

Employee Benefit ■ Plan Review

Washington Offers Paid Family and Medical Leave for Employees – But First It Must Be Funded (Phase I)

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In January 2018, Washington employers rang in the New Year by navigating newly published regulations requiring all non-exempt employees the opportunity to accrue paid sick time. This past January, employers rang in the New Year by implementing the first phase of the newly enacted paid family and medical leave program (PFML) — the premium payment. The PFML program will be offered to most of Washington’s workforce, with benefits available to eligible employees as of January 1, 2020.

On January 1, 2020, Washington will be the fifth state to offer PFML benefits to workers. But, first the program needs to be funded. Washington’s Employment Security Department (ESD) will administer the program and beginning January 1, 2019, will be collecting premiums from employees and employers on a quarterly basis, and on January 1, 2020, employees can begin to apply for benefits. The program is being rolled out in four phases and the topics covered in each phase are as follows:

- Phase I – collective bargaining agreements, collection of premiums, and voluntary plans;
- Phase II – employer responsibilities, penalties, and small business assistance;
- Phase III – benefits; and
- Phase IV – appeals.

This article focuses on Phase I of the paid family and medical leave program.

SUMMARY OF PFML

PFML allows for all eligible employees to receive paid leave up to 12 weeks for their own serious health condition (medical leave), or for family care, including caring for a newborn or newly-adopted child, taking care of a family member with a serious health condition, or taking time to be with a family member injured in military service or to deal with exigencies of military deployment (family leave). PFML also provides for benefits up to 16 weeks for a combined family and medical leave (for example, medical leave related to the birth of a child, plus caring for the newborn), and up to two additional weeks for certain pregnancy complications. With the exception of child-birth or placement of a child, there is a seven-day waiting period for eligibility. An employee is eligible after working 820 hours in Washington in four out of the five past quarters. The hours worked do not need to be for the same employer, only that the hours occurred in Washington. PFML protects the employee’s job while on leave and must be returned to the same or comparable position. The employee will make the request for paid benefits to ESD who will then review and determine if the employee meets the eligibility criteria. If approved, ESD will pay the benefit amount directly

to the employee. The benefit amount will be a certain percentage of the employee's wages, up to \$1,000 per week.

PHASE I

Washington has initiated Phase I which involves the collection of premiums on a quarterly basis that will fund the program. Effective January 1, 2019, all employees and employers have to pay a share of the premium with the employee's portion deducted from her or his paycheck. For 2019, the state plan premium will be 0.4 percent. The employer may deduct up to 100 percent of the premiums for the family leave fund and up to 45 percent of the premiums for the medical leave fund. In total, the employer is responsible for 37 percent of the total premiums, and the employee is responsible for 63 percent of the premium.

While the majority of Washington employers will be required to participate in the program, there are some exemptions that employers may want to consider or are eligible for.

EXEMPTIONS

Small Business Support

Companies with fewer than 50 employees are exempt from paying the employer share of the premium. If the company elects to pay its share of the premiums it may be eligible for small business assistance funds. Companies with fewer than 150 employees have to pay its portion of the premiums, but may be eligible for the small business assistance funds.

Voluntary Plans

The other option for employers is to opt-out of the state program upon the submission and approval of a voluntary plan where the employer funds its own PFML program. At a minimum, the voluntary plan must provide all eligible current and former employees with the same amount of paid leave and for the same reasons. The voluntary plan eliminates the

employer's premium contribution, and the employer can deduct its employee's share of the premium and use that toward funding the plan. The employer cannot deduct more than what the state would under PFML. An employee is eligible for benefits under a voluntary plan when the employee has worked 820 hours in Washington, and at least 340 hours for the current employer, or if the employee was covered under a voluntary plan by its former employer during the qualifying period of the first four of the last five completed calendar quarters from the date leave begins. Employees who do not meet the eligibility requirement for the voluntary plan will receive benefits under the state plan so long as those eligibility requirements are met.

Employers who initiate a voluntary plan are still required to report quarterly all information required under the state plan (employee information, wages paid during the quarter, and total hours worked during the quarter), as well as providing to the employee weekly benefit and leave duration information, and amount of premiums being deducted from the employee's paycheck. These funds are not considered an employer's asset and must be held in a separate, specifically identifiable trust account in a financial institution. An employee cannot be required to use paid time off or other accrued leave as compensation while using the benefit of the plan. Employees are entitled to reinstatement if they have worked for the employer for at least nine months and at least 965 hours during the 12 months preceding the first day of leave. For the first three years the employer will submit its voluntary plan to the ESD for review. After the third year the voluntary plan will only have to be reviewed if there are any amendments that are not required under the law.

Conditional Premium Waiver

An employer can request a waiver for an out-of-state employee

who is temporarily working in Washington (i.e., out-of-state fire-fighter fighting Washington wild-fires; utility workers helping after a storm). If the employee exceeds 820 hours during the qualifying period, the conditional waiver expires, and both the employer and employee will be responsible for paying premiums.

"Localization" of Work

PFML covers all employers in Washington, including out-of-state employers with Washington employees when all of the employee's work is performed in Washington, or most of the employee's work or services are done in Washington, but some work is temporarily performed out-of-state. For those employers where work is *not* located in any state the "localization rules" provide that the worker must participate when: (1) the base of operations is in Washington; (2) if there is no base, but the place where services are directed is in Washington; or (3) where there is no base of operations, no place where services are directed, but the worker lives in Washington.¹ *Services* as defined in this regulation are deemed to be "localized" when

- (1) the service is performed entirely within the state; or
- (2) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions.²

Generally, the ESD will look to its localization rules and see if they are being applied to the employees in the unemployment context. If the localization rules are being applied than the employees would be covered under the PFML program.

Collective Bargaining Agreement

The final exemption from the PFML program is when a collective bargaining agreement (CBA) governs the employer-employees. CBAs that were in effect prior to October 19, 2017, are grandfathered in and no premiums have to be paid or reported until the CBA expires, is reopened, or is renegotiated. The ESD has defined “reopened, renegotiated, or expires” for purposes of implementing this program to be when the CBA is renegotiated in its entirety. This does not include narrow or specific sections of the CBA, memorandum of understanding (MOU), or negotiations of future contracts.

WHAT EMPLOYERS SHOULD DO IN 2019 IN PREPARATION FOR 2020 PFML BENEFITS:

- As of 2019 employers are required to collect the premiums and report on a quarterly basis to ESD. Employers are also required to provide their

employees with notice of the new law and the deduction of the premiums from their paychecks. The ESD has a sample paystub insert for employers to download and use as the notification to employees.³

- It is also recommended that employee handbooks be revised to update the company’s leave policies so the employees have notice of their rights when the PFML benefits become available on January 1, 2020.
- Decide whether to establish and/or apply for a voluntary plan. This option makes sense when the employer already has in place a generous leave plan that already meets, or would not be difficult to meet with some adjustments, the minimum requirements of PFML.
- Ensure the company’s payroll department began deducting employee premiums effective January 1, 2019. Employers with more than 50 employees will also need to be prepared

to pay the employer’s premium share.

- For those employers with a CBA, be aware of the events that will trigger the expiration of the exemption to PFML, and require prompt premium collection and reporting obligations. 🌟

NOTES

1. RCW 50.04.110.
2. RCW 50.04.120.
3. The paystub insert along with other employer-related information can be found at <https://www.paidleave.wa.gov/employers>.

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