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EMPLOYEE LEAVE IN WASHINGTON—2020

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Available
Employee Leave,
2020

Washington Paid Family Medical Leave

Paid Sick Leave

Employer Provided Sick and Vacation

Family and Medical Leave Act

Leave Related to Workplace Injuries

+ COVID-19
Additions

FFCRA Emergency Sick Leave

FFCRA Expanded Family Leave

Leave Based on Government Orders

Layoff/Unemployment
Considerations

Today's Focus...

- Washington Paid Family Medical Leave
- FFCRA Expanded Family Leave
- FFCRA Emergency Sick Leave
- Leave Based on Government Orders

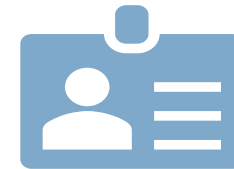
Washington Paid Family & Medical Leave (WPFML)



**Mandatory statewide
insurance program**



**Most employers must
participate**



Most employees are covered

- ✓ Full-time, part-time and temporary workers
- ✓ Who experience a “qualifying event”
- ✓ After working **820 hours** during qualifying period (approx. one year)

What's a "qualifying event?"

An employee...

- Welcomes a child into their family (through birth, adoption or foster placement)
- Experiences serious illness or injury
- Needs to care for a seriously ill or injured relative
- Needs time to prepare for a family member's pre- and post-military deployment activities, including childcare issues related to the family member's deployment

How much leave is available under WPFML? Can it be intermittent?

12
weeks

14
weeks

16
weeks

18
weeks

Can be used intermittently, but employee must...



- *Take 8 hours off in a row, whether they work full or part time*
- *Use in a one-year period (cannot be carried over)*

Notice Requirements

For the Employee:

- Employer can require 30-days notice if foreseeable
- If unforeseeable, as soon as practical
- Can be handwritten, typed or any “written electronic communications”

For the Employer:

- Workplace poster
- Notice if away from work for 7+ consecutive days for any covered reason (5 days to provide notice)
- Once leave approved, recommended that employers send confirmation letter
- Send ESD Form Notice Letter
<https://paidleave.wa.gov/app/uploads/2019/12/Employer-to-employee-notice-2019.pdf>

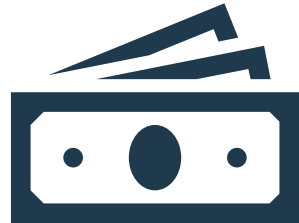
Options for Employers

Employers *may* provide “supplemental benefits,” such as:

- Additional time off
- Additional wages to provide Employees with their full salary while they are off
- Job protection for Employees whose jobs are not automatically protected though the new law



Health Insurance Continuation During Leave



Employee covers their portion of premiums



Regulations being developed for healthcare continuation where employee “stacks leave”

Job Restoration

Same or equivalent position if:

- Employer has 50+ employees
- Employee worked for company for at least 12 months
- Employee worked 1,250 hours in 12 months prior to leave

Questions About WPFML Basics?

Coming up:

Relationship between WPFML
and Federal FMLA

“Stacking” complications

Relationship between WPFML and FMLA leave

FMLA	WPFML
Unpaid	Paid
Administered by employer	Administered by ESD
Applies to employers with 50+ employees	Applies to all WA employers regardless of size (but job protection only applies for employers with 50+ employees)
Employer can require use of employer-provided (non-Washington sick leave) paid time off	Employer cannot require employees use of employer-provided paid leave benefits
“Family member” includes spouse, child, and parent	“Family member” includes spouse, child, parent, sibling, grandparent, and grandchild

Federal Family & Medical Leave Act

Coming up:
Eligibility | Highlights |
Qualifying reasons | Stacking
| Relationship to other laws
and policies

FMLA: Eligibility & Highlights

- Employee Eligibility Requirements:
 - Have worked for employer for at least 12 months;
 - Have at least 1,250 hours of service in the 12 months before taking leave;* **and**
 - Work at a location where the employer has 50+ employees within 75 miles of the employee's worksite.
- Employer may require certification and employee must provide sufficient information of need.
- Leave may be full-time, intermittent, or reduced schedule.
- Employee may choose/employer require use of accrued paid leave while taking FMLA.
- Employee has right to restoration to the same job or one nearly identical to it.
- Group health insurance must continue if employee pays any usual portion of premium.

FMLA: Qualifying Reasons

- 12 weeks leave in a 12-month period for:
 - the birth of a child and to care for the newborn child within one year of birth;
 - the placement of a child for adoption or foster care and to care for the newly placed child within one year of placement;
 - to care for the employee's spouse, child, or parent who has a serious health condition;
 - a serious health condition that makes the employee unable to perform the essential functions of his or her job;
 - any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**
- 26 weeks military caregiver leave.

Concurrent Leave v. Consecutive Leave

According to **RCW 50A.15.110(2)**, FMLA and WPFML should be taken concurrently.

“Unless otherwise expressly permitted by the employer, leave taken under this title must be taken concurrently with any leave taken under the federal family and medical leave act of 1993.”

BUT Employer *cannot require* an employee to take WPFML.

If Employee takes WPFML first, Employer can designate the same absence as FMLA.

If Employee takes FMLA first, they could later take 12 weeks of WPFML.

Example: Stacking Leave

Reminder: *Employer cannot require employee to file claim for WPFML benefits, so leave may be consecutive.*

Example:

Jane qualifies for both FMLA and WPFML.

She takes 12 weeks of FMLA.

Reminder: Jane cannot be required to also use WPFML benefits concurrently.

Upon return, she applies for WPFML (12 additional weeks or more).

Jane is entitled to job protection under both laws.

Jane gets **24+ weeks** of protected leave and (potentially) healthcare benefits continuation.

Relationship to ADA and WLAD



In many cases, ADA and WLAD will also apply to employees who take Washington WPFML.

What does this mean?

- Additional leave of absence may be considered a “reasonable accommodation”
- May essentially create “job restoration” requirements, even for employers with under 50 employees
- Obtain legal counsel before denying additional leave or denying job protection

Relationship to Other Leave Policies



Employer cannot require use of WPFML or condition the use of employer-provided benefits on an employee filing for WPFML.

Example 1 (30 weeks of leave):

- ❑ Employer provides 12 weeks paid maternity leave
- ❑ Employee uses 12 weeks of employer-provided maternity leave
- ❑ Afterwards, employee can take 12 more weeks of WPFML leave
- ❑ Potentially 6 more weeks if complication during pregnancy

Relationship to Other Leave Policies

Example 2 (32 weeks of leave):

- ❑ Employer provides 8 weeks of PTO per year
- ❑ Employee takes 12 weeks of WPFML
- ❑ Afterwards, employee takes 8 weeks of PTO
- ❑ If employer fails to concurrently designate FMLA leave, the employee will be entitled to an additional 12 weeks of unpaid FMLA leave after returning from WPFML.





Important Points Regarding Leave Policies

Employer **can still require** use of non-statutory leave during FMLA leave.

- [Continue to require use of PTO during FMLA leave.](#)

Employer **cannot require** use of Washington paid sick leave.

- [Consider minimizing sick leave provided.](#)

Universal PTO programs are governed by Washington paid sick leave requirements.

- [Many employers are re-evaluating their paid leave policies.](#)

*Washington State Paid Sick Leave**

Coming up on WA Paid Sick Leave:
Accrual | Use of leave |
Verification | Misuse | Paying
leave | “Stacking”
complications

* Local municipal ordinances may differ or provide more benefits to employees.

Washington Paid Sick Leave: ACCRUAL

One hour of paid sick leave accrued for every **forty** hours worked (including OT hours)

Full time, part-time, temporary, or seasonal

Accrual begins first day of work

No cap on accrual *during* accrual year

Maximum year-to-year carryover of 40 hours

Washington Paid Sick Leave: USE OF LEAVE

Use must be permitted after 90 calendar days of employment

Then, use must be allowed no more than 30 days after earned

At least once a month, provide notice of accrual, use, and sick leave balance

Employer cannot require employee to use leave (but may have a rule that no unpaid time is permitted)

Employer must permit use in increments consistent with normal payroll practices

Employees may
use leave for
themselves or
family members
for these
reasons:

- A mental or physical illness, injury, or health condition.
- To diagnose, care for, or treat a mental or physical illness, injury, or health condition.
- To receive preventive medical care.
- For leave that qualifies under the state's [Domestic Violence Leave Act](#).
- If an employee's workplace, or their child's school or place of care, has been closed by order of a public official for a health-related reason.

A family member is a: child, regardless of age or dependency status; parent or parent of employee's spouse or partner; spouse or partner; grandparent; grandchild; or sibling.
See RCW 49.46.210(2).

Washington Paid Sick Leave: VERIFICATION

May be required for absences exceeding 3+ work days

Requirements must be included in written leave policy

Cannot be required in less than 10 days

Cannot create an unreasonable burden or expense

Policy must include “appeal” rights if verification results in an unreasonable burden or expense

Employee may draft personal statement

Employer may pay for doctor’s note

Washington Paid Sick Leave: MISUSE

If Employer can show misuse, payment of paid sick leave may be denied

Employer cannot deduct unpaid sick leave hours from an employee's accrued paid sick leave balance

Employee must be notified if payment is denied for unlawful use

Employees who unlawfully use paid sick leave can be subject to disciplinary action

If employee claims that the use of paid sick leave was authorized, they can [file a complaint](#) with L&I

Washington
Paid Sick Leave:
PAYING LEAVE

Pay in same pay period as used

Cash out at termination is optional
(written agreement is required)

Balances not cashed out must be
reinstated if employee is rehired
within 12 months

Questions about this overview of
Washington Paid Sick Leave?

Employer Benefit Sick and Vacation

- **Employers may provide sick leave above statutory minimums and additional benefits such as vacation or PTO.**
- Employers should critically evaluate whether to have separate sick leave or a combined PTO benefit program.
- Remember and follow employer-provided benefit policies when assessing all leave available to staff members!

Leave Related to Workplace Injuries

When managing employees on leave as a result of workplace injury or illness, evaluate other state and/or federal laws which may apply, including:

- ✓ FMLA leave (designate concurrently)
- ✓ ADA/state disability law (leave as a reasonable accommodation and its limitations)
- ✓ Conversion to inactive status

*Families First Coronavirus Response Act
("Families First" or "FFCRA")*

Coming up:
COVID Emergency Paid Sick
Leave
Expanded Family Leave

Families First Coronavirus Response Act ("Families First" or "FFCRA")

Until Dec. 31, 2020, the **Families First Coronavirus Response Act (FFCRA or Act)** requires employers with less than 500 employees to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19. Two types:

- Emergency Paid Sick Leave

- Expanded Family Medical Leave

FFCRA Emergency Paid Sick Leave

- 80 hours of paid sick leave at the employee's **regular rate of pay** if employee is in public or private quarantine, and/or experiencing COVID-19 symptoms and is seeking or has a medical diagnosis; or
- 80 hours of paid sick leave at **two-thirds the employee's regular rate** of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine or to care for a child (under 18 years of age) whose school or childcare is closed or unavailable for reasons related to COVID-19.
- All employees are eligible for FFCRA paid sick leave regardless of date of hire.

FFCRA Expanded Family Leave

Expansion of the existing FMLA, except it applies to employers with less than 500 employees.

Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19.

FFCRA Q & A

Most valuable resource on FFCRA:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Questions about FFCRA

Coming up:
Definitions
Washington Proclamations

*High Risk Employees:
Washington Proclamations 20-46 and 20-46.1*

Coming up:
Definitions
Washington Proclamations

What is considered high risk?

“High-risk” as defined by CDC are individuals who:

(1) are 65 years and older

(2) live in a nursing home or long-term care facility;

(3) have underlying medical conditions, particularly if not well-controlled, including :

- (a) chronic lung disease or moderate to severe asthma,
- (b) serious heart conditions,
- (c) people who are immunocompromised,
- (d) severe obesity with 40+ BMI,
- (e) diabetes,
- (f) chronic kidney disease undergoing dialysis, and
- (g) liver disease.

Requirements under WA proclamations

Under **Washington Proclamations 20-46 and 20-46.1:**

1. Employers must accommodate “high-risk” employees requesting protection from risk of job-related exposure to COVID-19 until August 1, 2020 (unless Proclamation is extended beyond August 1).
 - Accommodation options: telework, alternative or remote work locations, reassignment, social distancing
 - If employer determines the accommodations are not feasible, employee may use all available accrued leave options free from risk of adverse employment action.
2. Employee may use any available employer-granted accrued leave or unemployment insurance in any sequence at their own discretion.
3. If employee’s paid time off exhausts during the period of leave, employers are prohibited from failing to fully maintain all employer-related health insurance benefits until the employee is deemed eligible to return to work.

Available Employee Leave, 2020

Absent employees must be in 1+ categories at all times.

CATEGORY	FOR EMPLOYERS WITH # OF EMPLOYEES	APPLIES TO EMPLOYEES WHO:	AMOUNT OF LEAVE	PAID	CAN YOU REQUIRE EMPLOYEE TO USE?	JOB PROTECTED
Washington Paid Family Medical Leave (WPFML)	1+	Sick Family care Military exigency	12, 14, 16, or 18 weeks	Yes.	No.	Yes, if ... No, if...
WA Paid Sick Leave	1+	Sick Family care Closure of school or business Domestic violence	1 hour for each 40 worked	Yes, but only accrued, unused hours.	No.	Yes, but not if they decline to take it.
FMLA	50+	Sick Family care military Exigency	12 weeks, but combines with FFCRA Family Leave. Possible extension to 24 weeks (military exigency and stacking with WPFML).	No.	May designate after 3 days' absence and terminate if process is not properly completed.	Yes.
Employee Benefit Sick Leave or PTO	Policy driven	Sick	Varies		Yes, per policy.	Yes.
Employee Vacation or PTO	Policy driven	Accrued, unused	Varies, but if PTO, use must be consistent with WA Paid Sick Leave		Yes, per policy.	Yes.
Workplace Injury	1+	Injured on job	Varies	Time loss through LNI.	In accordance with medical/IME assessment.	Per doctor or IME assessment.

+ COVID-19 Additions

Absent employees must be in 1+ categories at all times.

CATEGORY	FOR EMPLOYERS WITH # OF EMPLOYEES	APPLIES TO EMPLOYEES WHO:	AMOUNT OF LEAVE	PAID	CAN YOU REQUIRE EMPLOYEE TO USE?	JOB PROTECTED
FFCRA Emergency Sick Leave	Less than 500 employees	Sick with COVID symptoms Comply with isolation order (government or healthcare provider) Caring for family member's isolation order	80 hours	Yes, full up to \$511 per day	Maybe.	Yes.
FFCRA Emergency Sick Leave	Less than 500 employees	Family care related to COVID, including childcare for closures	80 hours	Yes, partial (up to \$200 per day).		
FFCRA Expanded Family Leave	Less than 500 employees	Child without school or care	12 weeks, but combines with FFCRA sick	Yes, 10 weeks at partial pay (up to \$200 per day).	No.	Yes.
High Risk per CDC and Government Order.	1+	High risk	Unspecified; until end of order (currently August 1, 2020)	No (unemployment may be available).	No.	Yes.
ADA Leave as reasonable accommodation	Effectively 1+	Temporary or long-term disability	Unspecified but time must be definite to be reasonable	No.	No.	Yes, if leave is a "reasonable accommodation."
All leave benefits exhausted?	All	Various	None specified. Indefinite leave is not reasonable accommodation	No.	No.	Maybe. Consider leave as reasonable accommodation.

The information provided during this seminar is a current overview of state and federal employment-related leave laws. Employment laws and practices will continue to evolve, and the laws discussed today may be amended in response to changing circumstances. The information discussed during this seminar and PowerPoint presentation does not constitute legal advice, nor should it be relied upon to address specific legal issues. For legal advice and assistance, please contact your company's attorney or an employment law practitioner.

Thank you for joining us today for this seminar.

Please contact us if you have any questions or if your company is in need of legal representation regarding employment law matters.

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Recertification Credit

Sorting Washington Paid Family and Medical Leave and COVID-Related Leave Requirements



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HRCI Program ID: 525116
Start Date: 6/18/2020
End Date: 6/18/2020
Recertification Credit Hours: 1.0
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