

# PFMLA, Federal FMLA, & Your Sick Leave Benefits



**BARNARD  
IGLITZIN &  
LAVITT LLP**

**Danielle Franco-Malone**  
*franco@workerlaw.com*

**Jennifer Robbins**  
*robbins@workerlaw.com*



**Washington State**  
**Council of Fire Fighters**

# **Washington State Paid Family & Medical Leave**

# Background

- **RCW: Title 50A**
- **WAC: 192-500**
- **Paid Family Medical Leave Insurance System**
- **Paid MEDICAL leave**
- **Paid FAMILY leave**

# Who qualifies?

- **Employee qualifies if they have worked at least 820 hours in the first four of the last five completed calendar quarters**
  - **Includes single or multiple jobs**
- **If the employee worked less than five quarters, then use the last of the four quarters**



# Paid Medical Leave



**What makes someone eligible for Paid Medical Leave?**



**You have to have a “serious health condition”**



**RCW 50A.05.010(22) defines serious health condition as:**

# Serious Health Condition

- An illness, injury, impairment, or physical or mental condition that involves:
- Inpatient care – hospital, hospice, or residential medical care facility; OR
- Incapacity from continuing treatment:
  - 3 or more days where the person cannot work, attend school, or perform regular daily activities because of a condition, treatment, recovery, or subsequent treatment
  - Pregnancy – incapacity from pregnancy or prenatal care
- Chronic conditions that cause incapacity requiring continued treatment (examples: asthma, diabetes, epilepsy)



# Certification of Serious Health Condition Form

**Name of person applying for leave:** \_\_\_\_\_

**Instructions:** Answer all questions fully and completely. Limit your responses to the condition for which the person applying for Paid Leave is seeking leave. Please be sure to sign the form. **Return to patient or fax to 833-535-2273.**

## Section two: Description of the serious health condition

To be completed by a healthcare provider as defined in RCW 50A.05.010

**Patient's name:** \_\_\_\_\_

**Date of birth:** \_\_\_\_ / \_\_\_\_ / \_\_\_\_

**Does the patient have a serious health condition?** (as defined in RCW 50A.05.010)

No     Yes. If yes, provide a brief description of the diagnosis: \_\_\_\_\_

**Is the patient pregnant or recovering from giving birth?**

No     Yes. Expected due date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_ or Child's date of birth: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

**If yes, is the patient experiencing a pregnancy-related serious health condition?**

*This can include but is not limited to severe morning sickness, prenatal complications resulting in bedrest, preeclampsia, infections or recovery after a cesarean delivery or other postnatal complications.*

Yes     No

**What is the expected duration of the serious health condition?**

*Your answer should be your best estimate based upon your medical knowledge, experience and examination of the patient. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine Paid Leave eligibility.*

**Start date:** \_\_\_\_ / \_\_\_\_ / \_\_\_\_

**End date:** \_\_\_\_ / \_\_\_\_ / \_\_\_\_ or  **Condition is chronic or permanent**

# Paid Family Leave Qualification

- Family member in the military who is about to be deployed overseas or is returning home from overseas deployment
- Care for a family member with a serious health condition or injury – see previous section
- Bonding with a new child through birth, adoption, or foster placement
- Who is a family member? 2021 update:
  - Child
  - Grandchild
  - Grandparent
  - Parent
  - Sibling
  - Spouse
  - Person who resides in your home where the relationship creates an expectation that the employee will care for the person





# Exceptions

- Employer provides PFML through an approved voluntary plan
- Covered by a CBA that hasn't been opened or renegotiated since October 19, 2017 – expires 12/31/2023
- Federal employees
- Employment with a federally recognized tribe that hasn't opted into the state plan
- Employment with a business on tribal land owned by a member of a federally recognized tribe


# Benefits – Paid Leave

- Up to 12 weeks of family or medical leave
- Up to 16 weeks of combined medical and family leave if occurring in the same year
- Up to 18 weeks of combined medical and family leave for pregnancy resulting in incapacity followed by bonding leave

JANUARY 2022						
Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
31					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

---

# Paid Leave

- **You do not need to take it all at once – intermittent availability**
  - **Need at least eight consecutive hours per week for a weekly claim**
  - **Only one type of leave per week – family or medical**
- 

# Benefit Amount

- Up to 90% of an employee's average weekly salary
- Capped at \$1,427 in 2023
- ESD adjusts the cap every year
- Paid by direct deposit or prepaid debit card
- Your benefits start from your approved leave date
- Retroactive payments if application is after the start leave date



# Supplemental Benefits

- Employer may offer supplemental benefits to cover the gap between wages and PFML compensation
- Example includes allowing the employee to use their accrued leave
- Supplemental benefits not reported as income to ESD, so it does not reduce benefit amount
- Employer cannot mandate an employee use supplemental benefits

# Benefits – Healthcare/Job Protection

- **Healthcare: Your employer must maintain your healthcare if PFML overlaps with FMLA**
  - **Employees are still required to pay their share of premiums**
- **Job Protection, if:**
  - **Your employers has more than 50 employees in Washington**
  - **You were employed there for at least a year**
  - **You worked at least 1,250 in the year preceding leave**
- **Employer must restore you to your position or a position with equivalent pay, benefits, and other terms of employment**
  - **Equivalent position: nearly identical – pay, benefits, working conditions, privileges, perks, location, and status**

# PFML Does Not Protect Everything



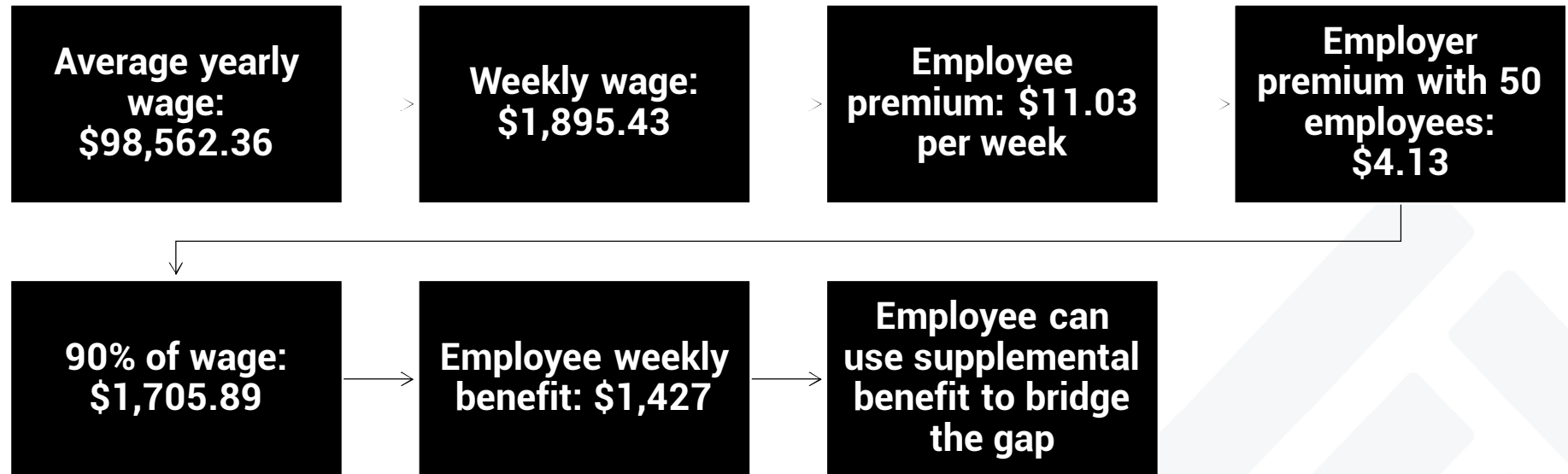
- Does not protect accrual of seniority or employment benefits during leave, except for healthcare benefits
- Does not protect any right, benefit, or position of employment other than that which the employee would have had if the employee did not take leave
- Employer may *uniformly* apply a practice or policy requiring employee to receive certification from employee's health care provider to return to work
- Employer may require employee to “periodically” report to the employer on the status and intention to return to work

# Premiums - 2023

- ESD sets premiums annually depending on account needs
- Total premium is currently 0.8% of salary capped at \$160,200
- Default Premium is split between the employer and employee
  - Employees pay 72.76% of total premium
  - Employers
    - 50 employees or more: 27.24% of total premium
    - Less than 50 employees: no employer premium
- NOTE: WA CARES Act (long term care) premiums begin 7/1/23 at .58% of gross wages



# Putting it in to practice



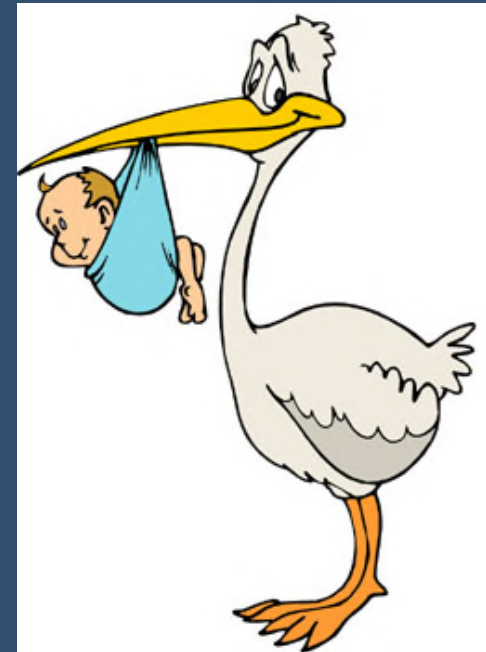
# Employer Notice

- **Written format**
  - Handwritten, typed, or any form of electronic notice is acceptable
    - e.g. text message
- **Notice contents**
  - Date of notice
  - Type of leave – family, medical, or both
  - Anticipated timing
  - Duration of leave
- If employee fails to give notice, ESD will deny benefits for an equal period of time that notice was insufficient
- Employer can waive any and all notice requirements



# Employer Notice - Foreseeable

- **Foreseeable PFML**
  - 30 days notice for expected birth, placement of a child, or planned medical treatment for a serious health condition
  - If 30 days is not possible, then as soon as practicable
  - Employee must make a reasonable effort to schedule the treatment so as to not unduly disrupt the operations of the employer
  - Military exigency: as soon as practicable



# Employer Notice - Unforeseeable

- Unforeseeable PFML
  - As soon as practicable under the circumstances
  - If employee is not able to provide notice, then another “responsible party” can provide notice
    - Spouse
    - Neighbor
    - Coworker



# Receiving Benefits

- **Waiting Week – not paid for the first week of leave**
  - **Not applicable to bonding leave or military family leave**
  - **You may use vacation or sick time during the Waiting Week**
- **Must claim a minimum of 8 hours a week**
  - **The claim week runs Sunday through Saturday**
- **Your Waiting Week counts regardless of determination status**



Buffering  
Please Wait..



# File your weekly claim

- Log into your account each week to file your claim, including your Waiting Week
- Payments take two weeks to process
- If you work during a week, you must include your wages in your weekly claim
  - These wages *will* reduce your payment
  - Includes second jobs
  - Supplemental benefits do not count
- You cannot collect unemployment during PFML

# Pension Credit?

- **DRS has not issued a rule addressing PFML as compensation**
- **DRS does not consider analogous plans as compensation**
  - **e.g. Workers Compensation and Disability payments**
- **Supplemental Benefits**
  - **Should be pensionable – must get paid at least 90 hours!!**
- **Option to purchase service credit**
  - **Member must pay employer, employee, and state portions of contribution within five years of resumption of status**
  - **Contact DRS**

# PFML is a Mandatory Subject of Bargaining

- *Whatcom County, Decision 13082-A* (PECB 2020)
  - PERC held that employers must bargain with unions before charging employee premiums
  - Employer must notify the union and provide for an opportunity to bargain
  - PERC compared PFML premiums to health care premiums





# Bargaining over PFML – Interest Arbitration Decisions

*Clark County v. Clark County Corrections Deputy Guild, 131479-I-19 (2019).*

- Arbitrator ordered 50/50 premium split. Employer had offered default contributions in 2019: 63% employee and 37% employer

*Clark County v. Clark County Deputy Sheriff's Guild, 132650-I-20 (2020).*

- The same arbitrator issued a 50/50 split a year later for a different bargaining group in Clark County.
- Employer proposed 63% employee and 37% employer split; Union proposed 100% employer contribution


# **Bargaining over PFML – Interest Arbitration Decisions**

## ***City of Richland***

- **Awarded Union right to supplementation**
- **“As argued by the Union, without Supplementation employees on PFML leave could not receive their full pay. With the Supplementation, employees could receive more income by utilizing some of their already-earned paid benefits, at no additional cost to the City.”**
- **Observed that almost 1/3 of fire agencies in WA have adopted supplemental benefits.**

---

# Interaction with FMLA

- PFML may be taken concurrently with FMLA
  - An employer may designate PFML as an FMLA leave without employee's choice
  - *But*, an employee can apply for a PFML leave after using FMLA leave, so they run consecutively, not concurrently.
  - Must have one day overlapping FMLA leave in order for employer to be required to maintain health insurance
- 

# Recap: PFML Bargaining Issues

- **Bargaining over premium allocation**
  - “Employer pays premium” versus paying a specific percentage
- **Future premium increases and employer-employee splits**
- **Ability to use supplemental leave**
  - **Cover the difference between normal wages and PFML benefits**
  - **More than normal wages?**
    - **Purchase LEOFF 2 service credit**
    - **Earn LEOFF 2 service credit – minimum 90 hours per month to earn credit**
    - **Ability to use full accrued leave until ESD issues PFML payments, and employee buys back used leave**

---

# **Washington State Paid Sick Leave Update**

**RCW 49.46.200, RCW 49.46.210, WAC 296-128**



**What Does Your  
CBA Say?**

# Nuts and Bolts – Background

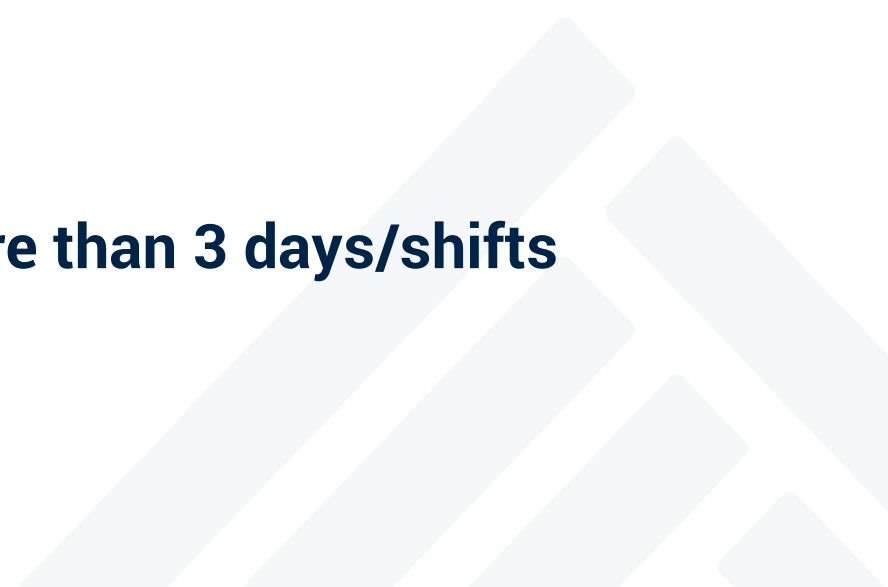
- Effective January 1, 2018
- Mandatory paid sick leave state-wide
- The law sets the *floor*, not the *ceiling*
- The law applies to all employers who are subject to the Minimum Wage Act (we'll come back to this)



---

# Nuts and Bolts – How It Works

<b>Accrual:</b>	<b>1 hour for every 40 hours <u>worked</u></b>
<b>Rate:</b>	<b>employee's "normal hourly compensation"</b>
<b>Carry-over:</b>	<b>40 hours or less</b>
<b>Doctor's Note:</b>	<b>absences lasting more than 3 days/shifts</b>
<b>Cap:</b>	<b>none</b>
<b>Cash out:</b>	<b>allowed, not required</b>





# Nuts and Bolts – When Can You Use It?

- Your own or a family member's:
  - Mental or physical illness, injury, or health condition
    - Includes COVID-19 illness or symptoms
    - Includes isolating due to COVID-19 exposure
  - Need for medical diagnosis, care or treatment
  - Need for preventive medical care
- Workplace or child's school closed for health-related reason
  - Includes COVID-19-related school/child care closures
- Domestic violence leave



# Who is a “family member” under the law?

	Washington State Sick Leave
Child	Yes. Includes biological, adopted, foster, step, in loco parentis, legal guardian, de facto parent – regardless of age or dependency status.
Spouse	Yes, <i>also</i> includes registered domestic partners.
Parent	Yes. Includes biological, adopted, foster, step, in-laws.
Grandparent	Yes
Grandchild	Yes
Sibling	Yes

# Does the paid sick leave law apply?

- **WA Dep't of Labor & Industries – Administrative Policy still in the works**
- **WSCFF public comment: 24-hour shift fire fighters are covered by the MWA paid sick leave provisions**
  - *<https://lni.us.engagementhq.com/PaidSickLeaveFAQs?preview=true>*
- **Courts may provide an answer**
  - *Aponte v. Mason Cty. Fire Prot. Dist. No 16, 3:21-CV-05459-DGE, 2022 WL 17092670, at \*10 (W.D. Wash. Nov. 21, 2022)*

# Does the paid sick leave law apply?

- **Employer may argue the MWA (including paid sick leave) does not apply to 24-hour shift fire fighters**
  - *1976 AG Opinion*
- **BUT - MWA text/history and L&I Guidance → coverage**
  - **MWA follows FLSA re: OT**
  - **L&I Guidance ES.A.1 on “required” to sleep at work**
  - **On duty v. on call**

# Does the paid sick leave law apply?

- L&I says: merely sleeping at work does not exempt you from the MWA
  - *Duties must require that you sleep at work*
  - *E.g., apartment or hotel managers, shepherders*



OR



?

# Bargaining Sick Leave – Overview

- The law sets the floor, not the ceiling.
- The CBA cannot provide for less than the law requires.
- Issue-spotting:
  - Scope of Use – *COVID-19 pandemic showed how this matters*
  - Doctor's Note
  - Employee choice about when to use sick leave v. other leave
  - Accrual, carryover, cashout provisions
  - Incentives

# Update: L&I Guidance\*

- **The Two-Bucket Problem**

- *One bucket only: protections apply to all accrued leave*
- *Two buckets: protections apply only to PSL leave*

- **L&I Guidance Examples**

- **Key Take-Away**

- *Don't give up your above-state-law benefits; these are the comparables*



\*L&I Admin. Policy development is ongoing. Current draft:  
<https://lni.us.engagementhq.com/learn-about-paid-sick-leave>

# Update: L&I Guidance\*

- **Incentive Programs**

- *Generally unlawful retaliation*
- *BUT – cash out or conversion beyond 40-hour carryover OK at year end or separation*



- **Verification**


- *Only on fourth consecutive day employee was required to work*
- *Does not include scheduled days off*

\*L&I Admin. Policy development is ongoing. Current draft:  
<https://lni.us.engagementhq.com/learn-about-paid-sick-leave>



---

# What Must Be In the CBA (If Offered/Required)

- ✓ **“Reasonable notice” to employer before taking sick leave**
  - ✓ **Documentation/verification (doctors' notes, etc.) for 3+ day absences**
  - ✓ **Shared leave/ability to donate sick leave**
  - ✓ **Frontloading**
  - ✓ **Accrual year other than Jan 1-Dec 31**
- 

---

***Bonus Topic!***  
**Common Wage and Hour  
FAQs**



# Overtime Thresholds Under the Fair Labor Standards Act (FLSA)

- For fire protection employees, ratio of 212 hours per 28 days
- Work period must be between 7-28 days
- FLSA OT threshold is 40 hours for all other personnel
- These are *floors* set by federal law – your contract may require OT even if the law does not

## “Regular Rate of Pay”

- FLSA OT must be paid 1.5x the “regular rate of pay.”
- Includes ALL remuneration, except for a few exceptions outlined in section 7(e) of the FLSA.
- If a type of pay is not encompassed in one of the exceptions in section 7(e), it must be included in the regular rate.
- Must be calculated for each pay period.

# “Regular Rate of Pay”



## What's excluded?

1. Gifts (e.g. Christmas bonus)
2. Payment for time not worked due to vacation/holiday/illness
3. Discretionary bonuses or profit sharing
4. Contributions to benefit plans
5. Non-FLSA OT (e.g. daily OT, weekend premium, other contractual OT)

# “Regular Rate of Pay”

- What's included?
  - Everything else.
- Examples:
  - Longevity
  - Certification pay, e.g. EMT/Paramedic
  - Specialty Pay
  - Education
  - Acting Pay



# Training Time

- Pay is not required for attending specialized or follow-up training that is required by law.
- Pay is required unless all four of the following are met:
  1. attendance is outside the employee's regular work hours;
  2. attendance is in fact voluntary;
  3. not directly related to employee's job; and
  4. employee does not perform any productive work during the training.

# Pop Quiz!



## Question 1:

**A firefighter wants to take a Blue Card Incident Command class to make them a more attractive candidate for promotion. The class requires 40 hours of online training and a 3-day in-person simulation lab. Blue Card is not required by the Employer.**

**Must the employer pay for time spent on the training while off-duty?**

**What about while on-duty?**



# Pop Quiz!

## Question 2:

**A firefighter attends ongoing training to maintain their EMT certification.**

**Is time spent while off-duty compensable?**



# Travel Time under the FLSA

Compensable/paid	Non-compensable/unpaid
	"Ordinary" home to work commute, even if in an employer-provided vehicle
Travel that is "all in a day's work:" Travel to different worksites during the work day, e.g., travel between stations, or between station and HQ	
Home to work commute to special 1-day assignments, e.g., off-site training	
Travel requiring overnight stay if during normal work hours**	

**\*\*different under state law. *Port of Tacoma v. Sachs*, 19 Wn. App.2d 295 (2021) (state law entitles employees to compensation for passenger time spent traveling for work outside of normal work hours)**

---

# Contact Information

**Danielle Franco-Malone**

- [franco@workerlaw.com](mailto:franco@workerlaw.com)
- 206.257.6011

**Jennifer Robbins**

- [robbins@workerlaw.com](mailto:robbins@workerlaw.com)
- 206.257.6008