

Paid Family and Medical Leave Rulemaking
Phase 2
Draft Version 2

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Chapter 192-01 WAC
Employment Security Rule Governance

NEW SECTION

WAC 192-01-001 Rule Governance Statement.

The employment security department administers several distinct programs in titles 50 RCW and 50A RCW through the Washington Administrative Code. The provisions in chapters 192-04 WAC through 192-499 WAC apply to the Employment Security Act in title 50 RCW. Chapter 192-500 WAC and thereafter apply to the Paid Family and Medical Leave program in title 50A RCW.

**Chapter 192-500 WAC
Definitions**

NEW SECTION

WAC 192-500-010 Employer.

(1) An "employer" is a person or entity that meets the criteria of RCW 50A.04.010(6). For the purposes of paid family and medical leave, the term employer is used for both employer and employer agent.

(2) This section does not apply to any self-employed person or federally recognized tribe that has not elected coverage under Title 50A RCW.

NEW SECTION

WAC 192-500-015 Employer agent.

(1) An "employer agent" is a designated representative that is authorized to conduct business on behalf of the employer.

(2) In order to represent an employer before the department, the employer or employer agent must submit a signed power of attorney form to the department.

(3) The employer is responsible for all acts taken or failures to act by the employer agent on the employer's behalf.

NEW SECTION

WAC 192-500-020 Calendar quarter.

"Calendar quarter" means the period of three consecutive calendar months ending on March 31st, June 30th, September 30th, or December 31st.

NEW SECTION

WAC 192-500-025 Terms meaning deliver.

(1) Unless otherwise specified, the terms "mail," "provide," "file," "submit," and "send" are interchangeable and mean to properly transmit, deliver, or distribute:

- (a) By email or other electronic services, or
- (b) In another format approved by the department.

(2) This section does not apply to appeals filed under Title 50A RCW.

NEW SECTION

WAC 192-500-030 Willful.

"Willful" and "willfully" means a knowing and intentional act or omission, unless otherwise defined in Title 50A RCW.

NEW SECTION

WAC 192-500-035 Interested parties.

(1) In all determinations, cases, and appeals adjudicated under Title 50A RCW the employment security department is an "interested party."

(2) Other interested parties in family or medical leave determinations related to the state plan and appeals include:

(a) The employee or former employee; and

(b) An employer or former employer of that employee that is required to provide information to the department related to the determination or appeal in question.

(3) Other interested parties in family or medical leave determinations related to a voluntary plan include:

(a) The employer or former employer; and

(b) An employee or former employee that is required to provide information to the department related to the determination or appeal in question.

(4) Other interested parties in a determination related to a small business assistance grant include the employer requesting the grant.

NEW SECTION

WAC 192-500-040 Aggrieved person.

An "aggrieved person" is any interested party who receives an adverse decision from:

(1) The department for which the department has provided notice of appeal;

(2) The office of administrative hearings; or

(3) The commissioner's review office.

Chapter 192-510 WAC
Assessing and Collecting Premiums

NEW SECTION

WAC 192-510-065 When can an employer deduct premiums from employees?

(1) An employer may not deduct more than the maximum allowable employee share of the premium during any pay period.

(2) If an employer fails to deduct the maximum allowable employee share of the premium from wages earned during a pay period, the employer is considered to have elected to pay that portion of the employee share under RCW 50A.04.115(3)(d) for that pay period. The employer cannot deduct this amount from a future paycheck of the employee.

NEW SECTION

WAC 192-510-066 How are premium payments applied?

(1) A payment received with a premium assessment will be applied to the quarter for which the premium assessment is filed. A payment exceeding the legal fees, penalties, interest and premiums due for that quarter will be applied to any other debt as provided in subsection (2). If no debt exists, a refund will be issued for any premium overpayments of fifty dollars or more. Premium overpayments of less than fifty dollars will be credited to future premium assessments.

(2) Payments received will be applied in the following order of priority:

- (a) Current quarter balance,
- (b) Any previous quarter premium balance starting with the oldest quarter,
- (c) Then beginning with the oldest quarter in which a balance is owed:
 - (i) Penalties;
 - (ii) Fees; and
 - (iii) Interest charges.

Chapter 192-530 WAC
Voluntary Plans

NEW SECTION

WAC 192-530-035 When must an employer with a voluntary plan provide benefit payments?

An employer with an approved voluntary plan must send the first benefit payment to the employee within fourteen calendar days of the first day of leave, or the receipt of a properly completed application for benefits, whichever is later. Subsequent payments must be sent at least every 14 calendar days thereafter. Failure to adhere to these requirements may result in the termination of the voluntary plan by the department.

WAC 192-530-060 What happens at the end of a voluntary plan?

(1) If the employer chooses to withdraw from a voluntary plan due to a legally required change to the calculation of either an increasing the benefit amounts or the date of any change in the rate of employee premiums, the employer must provide notice to the department at least 30 days prior to the date that the change goes into effect. The plan will be considered withdrawn on the date of the change.

(2) If the employer chooses to withdraw from a voluntary plan for any other reason, the employer must provide notice to the department at least 30 days prior to the end of a calendar quarter. The plan will be considered withdrawn on the first day of the following calendar quarter. If notice is provided less than 30 days prior to the end of a quarter, the plan will be considered withdrawn on the first day of the second calendar quarter following notice of the withdrawal.

(3) If the department terminates an employer's voluntary plan, the department will notify the employer of the effective date and the reason for termination. The department will calculate the amount owed by the employer and send an invoice for payment. The amount due will consist of all moneys in the plan, including premiums paid by the employer, premiums paid by the employees, moneys owed to the voluntary plan by the employer but not yet paid to the plan, and any interest accrued on all these moneys. The amount will be due immediately. Any balance owed will not start collecting interest until thirty calendar days after the date of the invoice.

WAC 192-530-070 What is good cause for terminating an approved voluntary plan?

The department may terminate a voluntary plan if there is a risk that benefits will not be paid or for other good cause shown. Good cause for terminating a voluntary plan includes, but is not limited to, an employer's failure to:

- (1) Pay timely and accurate paid family or medical leave benefits;
- (2) Provide leave for a qualified event;
- (3) Protect the employment and employment benefits of an employee when required;
- (4) Provide complete quarterly reports;
- (5) Report to the department any amendments made to the voluntary plan;
- (6) Adhere to the approved voluntary plan; or
- (7) Adhere to the requirements of Title 50A RCW or Chapter 192-500 WAC and thereafter.

**Chapter 192-540 WAC
Employer Responsibilities**

NEW SECTION

WAC 192-540-010 When must an employer send notice to employees who may need paid family and medical leave?

(1) Employers must provide a written notice of employee rights to any employee when an employer becomes aware that the employee is taking family leave, medical leave, or a combination of both for a duration of at least seven consecutive days of work. The employer must use a notice provided by the department.

(2) The notice must be sent to the employee by the fifth business day after the employee's seventh consecutive missed day of work due to family or medical leave, or by the fifth business day after the employer becomes aware that the employee's absence is due to family or medical leave, whichever is later.

NEW SECTION

WAC 192-540-020 What are the employer requirements for posting notice in a work place?

(1) Employers must post and keep posted a notice regarding pertinent provisions of Title 50A RCW and filing of complaints in a common area, such as a break room or other area where such notices are customarily posted.

(2) Employers must use a standard notice that the department makes available or a notice developed by the employer, which must be approved by the department. The notice developed by the employer must be submitted to the department and contain the following:

- (a) Information on how an employee may file a claim;
- (b) Information about filing a complaint against an employer;
- (c) Responsibilities for premium payments;
- (d) Information including rights to the paid family and medical leave program as provided by the state or the employer's voluntary plan; and
- (e) The minimum and maximum provisions available for paid family or medical leave, including:
 - (i) Weekly benefit amount;
 - (ii) Maximum weeks available under paid family or medical leave; and
 - (iii) How long the benefit is available after the employee applies.

(3) Employers can be audited to determine if a proper notice with pertinent information is displayed.

(4) Failure to post this notice may result in a penalty of one hundred dollars for each instance in which the department determines the employer has willfully failed to comply with this requirement. The department will deposit any penalties collected in accordance with this section into the paid family and medical leave enforcement account.

NEW SECTION

WAC 192-540-030 What are employers required to report to the department?

(1) Each calendar quarter, every employer must file a complete report with the department. The report must include each employee's:

- (a) Full name;
- (b) Social Security number;
- (c) ZIP code of primary work location;
- (d) Job title;
- (e) Start date;
- (f) Wages paid during that quarter; and
- (g) Total hours worked during that quarter.

(2) The report must include the total amount of premiums deducted from all employees' wages during the calendar quarter.

(3) If an employee does not have a Social Security number but does have an individual taxpayer identification number (ITIN), the ITIN qualifies as a Social Security number. If the employee later obtains a Social Security number, the employer should use the Social Security number when filing the report of the employee's wages.

NEW SECTION

WAC 192-540-040 How should employers report hours worked for each calendar quarter?

Each calendar quarter, employers must report to the department the number of hours worked by each employee. Employers must include the following hours in the report.

(1) **Hourly employees.** Report the total number of hours worked by each employee.

(2) **Employees on salary.** Report forty hours for each week in which a full-time, salaried employee worked.

(3) **Vacation pay, sick leave pay, paid time off.** Report the number of hours an employee is on paid leave. Do not report hours for a cash out of leave.

(4) **Overtime.** Report the number of hours actually worked for which overtime pay or compensatory time is provided, without regard to the amount of wages or compensation paid.

(5) **Commissioned or piecework employees.** Report the actual number of hours worked by employees paid by commission or by piecework. If there are no reliable time keeping records, report a full-time commissioned or piecework employee at forty hours worked for each week in which any of their duties were performed.

(6) **Wages in lieu of notice.** Report the actual number of hours for which an employee was paid.

(7) **Faculty employees.** (1) To be considered full-time, faculty members of community and technical colleges must meet the definition of "full-time" as defined in RCW 28B.50.489.

(a) For full-time faculty members, report thirty-five hours per week.

(b) For part-time faculty members, multiply thirty-five hours by the percentage that is equal to the percentage of hours worked in relation to a full-time faculty member consistent with RCW 28B.50.4891.

Example: A technical college deems a teaching workload of fifteen hours per week to be full-time. An instructor teaches a workload of twelve hours per week. Twelve divided by fifteen is eighty percent. Eighty percent of thirty-five is twenty-eight. Report twenty-eight hours per week.

(2) Part-time faculty members may overcome the presumption of hours established by this formula by providing the department with sufficient evidence of hours worked that exceeds the hours reported by employer.

(8) **Severance pay.** Do not report hours for severance pay.

(9) **Payment in kind.** Report the actual hours worked for performing services which are compensated only by payment in kind.

(10) **Fractions of hours.** If the employee's total number of hours for the quarter results in a fraction amount, round the total to the next higher whole number.

(11) **Practice, preparation, and rehearsal time.** If an employee who is part of a performing group is paid for a performance but is also required by the employer to attend practice, preparation, and rehearsal on an organized group basis, report the hours spent in the required practice, preparation, and rehearsal as well as the performance.

(12) **On-call and standby hours.** Report the number of actual hours for which an employee receives wages for being on-call or on standby with the employer.

NEW SECTION

WAC 192-540-050 When are employers required to submit quarterly reports to the department?

The quarterly reports referenced in WAC 192-540-030 must be submitted by the last day of the month following the end of the calendar quarter being reported. If a reporting date falls on a Saturday, Sunday, or a legal holiday, the reports will be due on the next business day.

**Chapter 192-550 WAC
Penalties and Audits**

NEW SECTION

WAC 192-550-010 What happens if an employer fails to submit required reports?

(1) An employer that willfully fails to file a complete and timely report under WAC 192-540-030 and 192-540-040 is subject to penalties under RCW 50A.04.090.

(2) The department will send a warning letter for an employer's first incomplete or untimely report. For a second or subsequent occurrence within five years of the date of the last occurrence, the department will assess penalties under the following schedule:

- (a) 2nd occurrence \$75.00
- (b) 3rd occurrence \$150.00
- (c) 4th and subsequent \$250.00
occurrences

(3) After five years without a warning letter or occurrence, prior occurrences will not count and the employer shall receive a warning letter instead of a penalty on the next occurrence.

NEW SECTION

WAC 192-550-020 What happens if an employer willfully fails to remit required payments?

(1) An employer that willfully fails to remit payment for premiums in full when due is subject to penalties under RCW 50A.04.090 in addition to accruing interest under WAC 192-550-030.

(2) The total amount of the penalty will be equal to the entire balance of premiums not remitted and any interest accrued on those delinquent premiums.

Example: If an employer owes \$300 in premium payments and \$20 in interest, the penalty for willfully failing to remit payment will equal \$320, for a sum total due and owing of \$640.

NEW SECTION

WAC 192-550-030 How will the department calculate interest on delinquent payments?

(1) When an employer fails to remit payment by the due date, the remaining unpaid balance shall accrue interest at a rate of one percent, compounded monthly, until payment is received in full.

(2) The department will issue a notice to employers whose payments are delinquent. The notice will include the total amount due for all applicable premiums, penalties, and interest under Title 50A RCW.

NEW SECTION

WAC 192-550-040 Can employer interest be waived?

(1) An employer may submit to the department an interest waiver request that includes all relevant facts, including all available proof, as to why it is requesting a waiver under RCW 50A.04.140.

(2) At its discretion, the department may waive interest if it finds that the interest was caused by the department's own error or the department's inability to decide the issue.

NEW SECTION

WAC 192-550-050 Audit Procedures.

(1) The department may inspect and audit employer files and records as needed to ensure compliance with Title 50A RCW. Audits may take place at the discretion of the department.

(2) Employers must provide all requested information to the department within ten business days or a time frame agreed to by the department.

(3) If the department discovers violations for the time frame being audited, the department may expand the audit to include prior and subsequent quarters, up to the most recently completed calendar quarter.

NEW SECTION

WAC 192-550-080 What happens if an employer fails to provide requested information to department for an audit?

Employers must provide all requested documentation as it pertains to the paid family and medical leave program. If an employer fails or refuses to provide necessary payroll or other wage information during an audit, the department may determine payroll and wage information for the purposes of premium assessment based on information otherwise available to the department. This may include information from the same employer,

similar employers, labor market information, information provided to other state or local agencies, or the best information otherwise available to the department.

**Chapter 192-560 WAC
Small Business Assistance**

NEW SECTION

WAC 192-560-010 Which businesses are eligible for small business assistance grants?

(1) Employers determined to have one hundred fifty or fewer employees in the state that are assessed the employer share of the premium are eligible to apply for small business assistance grants.

(2) Employers determined to have fewer than fifty employees are only eligible to apply for a small business assistance grant if they opt to pay the employer share of the premiums. The employer will be assessed the employer share of the premium for a minimum of three years after any grant is received. An employer may provide notice for opting out after the three-year period.

(3) An employer may request only one grant for each employee on paid family or medical leave. Submissions under (a) and (b) of this subsection do not qualify as grant applications and therefore do not count against the employer's limit of ten applications per year.

(a) An employer that qualifies for a grant under RCW 50A.04.230(3)(b) for an amount that is less than \$1,000 may submit documentation of significant additional wage-related costs incurred after filing the initial grant application in an attempt to qualify for additional grant funds.

(b) An employer may submit a revised application for a grant under RCW 50A.04.230(3)(c) in an attempt to qualify for additional grant funds. (4) An employer must apply for the grant no later than four months following the last day of the employee's paid family or medical leave.

NEW SECTION

WAC 192-560-020 What is the application process for a small business assistance grant?

(1) Applications for small business assistance grants must be submitted online or in another format approved by the department. To be approved, an application must contain:

- (a) The name and social security number or individual taxpayer identification number of the employee taking leave;
- (b) The amount and type of grant being requested;
- (c) An explanation summarizing any personnel or significant additional wage-related costs that were taken because of an employee taking leave; and

- (d) Written documentation, including, but not limited to, personnel records related to the hiring of a new temporary employee, wage reports, and signed statements, showing the temporary worker hired or significant additional wage-related costs incurred are due to an employee's use of leave.
- (2) Incomplete applications will not be reviewed and will not count against an employer's limit of ten applications per year under RCW 50A.04.230(4).
- (3) The department will deny the application for reasons including, but not limited to, the employer's failure to demonstrate that:
- (a) It hired a temporary worker or incurred any significant additional wage-related costs; or
 - (b) The temporary worker hired or significant additional wage-related cost incurred was not due to an employee's use of family or medical leave.
- (4) If a grant application is denied, the application will count against an employer's limit of ten applications per year.
- (5) The denial of a grant application is appealable.

NEW SECTION

WAC 192-560-030 What are significant additional wage-related costs for the purposes of small business assistance grants?

Significant additional wage-related costs are added expenses incurred by the small business due to an employee's use of leave and include:

- (1) Paying additional wages to an existing employee;
- (2) Outsourcing costs;
- (3) Certification;
- (4) Equipment purchases; or
- (5) Other costs that the department, in its discretion, determines are appropriate.

Chapter 192-570 WAC
Dispute Resolution

NEW SECTION

WAC 192-570-010 Conference and conciliation.

- (1) (a) The department will engage employers in conference and conciliation when the employer fails to make all required:
- (i) Premium payments;
 - (ii) Payments on penalties assessed by the department for the failure to submit required reports; or
 - (iii) Payments on penalties assessed by the department for violations related to voluntary plans.
- (b) "Conference and conciliation" for the purpose of this chapter means to encourage an amicable resolution of disputes between the employer and the department prior to the issuance of a warning letter.
- (2) The department will promptly attempt to contact the employer to engage in conference and conciliation when appropriate under subsection (1) of this section. If the department does not receive a response from the employer by the deadline given, the department will attempt the contact again, for a total of two attempts. A warning letter will be sent to the employer if no contact can be made.
- (3) (a) Through conference and conciliation employers will be given an opportunity to provide information and to explain their reasons for failing to meet the department's requirements in subsection (1) of this section. The department will not issue a warning letter if:
- (i) The employer provides good cause;
 - (ii) The department determines that the good cause provided prevented compliance; and
 - (iii) The parties agree to an approved repayment schedule.
- (b) "Good cause" for the purpose of this section means:
- (i) Death or serious illness of one or more persons directly responsible for discharging the employer's duties under Title 50A RCW;
 - (ii) Destruction of the employer's place of business or business records not caused by, or at the direction of, the employer; or
 - (iii) Fraud or theft against the employer.
- (4) The burden of proof is on the employer to provide all pertinent facts and evidence or documentation for the department to determine good cause.
- (5) Conference and conciliation is only available to employers that meet the requirements of RCW 50A.04.080, 50A.04.090, and

50A.04.655. Those employers that do not meet these requirements will be issued a warning letter without entering conference and conciliation. Penalties and interest will be assessed thereafter under Title 50A RCW and the rules adopted pursuant thereto.

(6) The department will issue a warning letter when:

(a) The employer does not comply with the approved repayment schedule; or

(b) A resolution is not reached through conference and conciliation.

NEW SECTION

WAC 192-570-020 Discrimination complaints.

(1) It is unlawful for an employer to discriminate against any employee for a reason specified in RCW 50A.04.085. When the department receives notification from an employee that discrimination may have occurred the department will investigate the allegation and issue a determination.

(2) Nothing in the chapter shall be construed to prohibit a private right of action under all applicable laws.

Chapter 192-800 WAC
Practice and Procedure

NEW SECTION

WAC 192-800-002 Untimely appeals.

Late appeals will be sent to the office of administrative hearings to determine if the appellant had good cause to file a late appeal.