

SSB 5097 - S AMD 336

By Senator Robinson

ADOPTED 03/02/2021

1 Strike everything after the enacting clause and insert the
2 following:

3 "NEW SECTION. **Sec. 1.** The legislature intends to prevent
4 impacts, based on this act, to the family and medical leave insurance
5 account or the application of a solvency surcharge.

6 **Sec. 2.** RCW 50A.05.010 and 2020 c 125 s 1 are each amended to
7 read as follows:

8 Unless the context clearly requires otherwise, the definitions in
9 this section apply throughout this title.

10 (1) (a) "Casual labor" means work that:

11 (i) Is performed infrequently and irregularly; and

12 (ii) If performed for an employer, does not promote or advance
13 the employer's customary trade or business.

14 (b) For purposes of casual labor:

15 (i) "Infrequently" means work performed twelve or fewer times per
16 calendar quarter; and

17 (ii) "Irregularly" means work performed not on a consistent
18 cadence.

19 (2) "Child" includes a biological, adopted, or foster child, a
20 stepchild, a child's spouse, or a child to whom the employee stands
21 in loco parentis, is a legal guardian, or is a de facto parent,
22 regardless of age or dependency status.

23 (3) "Commissioner" means the commissioner of the department or
24 the commissioner's designee.

25 (4) "Department" means the employment security department.

26 (5) (a) "Employee" means an individual who is in the employment of
27 an employer.

28 (b) "Employee" does not include employees of the United States of
29 America.

30 (6) "Employee's average weekly wage" means the quotient derived
31 by dividing the employee's total wages during the two quarters of the
32 employee's qualifying period in which total wages were highest by

1 twenty-six. If the result is not a multiple of one dollar, the
2 department must round the result to the next lower multiple of one
3 dollar.

4 (7) (a) "Employer" means: (i) Any individual or type of
5 organization, including any partnership, association, trust, estate,
6 joint stock company, insurance company, limited liability company, or
7 corporation, whether domestic or foreign, or the receiver, trustee in
8 bankruptcy, trustee, or the legal representative of a deceased
9 person, having any person in employment or, having become an
10 employer, has not ceased to be an employer as provided in this title;
11 (ii) the state, state institutions, and state agencies; and (iii) any
12 unit of local government including, but not limited to, a county,
13 city, town, municipal corporation, quasi-municipal corporation, or
14 political subdivision.

15 (b) "Employer" does not include the United States of America.

16 (8) (a) "Employment" means personal service, of whatever nature,
17 unlimited by the relationship of master and servant as known to the
18 common law or any other legal relationship performed for wages or
19 under any contract calling for the performance of personal services,
20 written or oral, express or implied. The term "employment" includes
21 an individual's entire service performed within or without or both
22 within and without this state, if:

23 (i) The service is localized in this state; or

24 (ii) The service is not localized in any state, but some of the
25 service is performed in this state; and

26 (A) The base of operations of the employee is in the state, or if
27 there is no base of operations, then the place from which such
28 service is directed or controlled is in this state; or

29 (B) The base of operations or place from which such service is
30 directed or controlled is not in any state in which some part of the
31 service is performed, but the individual's residence is in this
32 state.

33 (b) "Employment" does not include:

34 (i) Self-employed individuals;

35 (ii) Casual labor;

36 (iii) Services for remuneration when it is shown to the
37 satisfaction of the commissioner that:

38 (A) (I) Such individual has been and will continue to be free from
39 control or direction over the performance of such service, both under
40 his or her contract of service and in fact; and

1 (II) Such service is either outside the usual course of business
2 for which such service is performed, or that such service is
3 performed outside of all the places of business of the enterprises
4 for which such service is performed; and

5 (III) Such individual is customarily engaged in an independently
6 established trade, occupation, profession, or business, of the same
7 nature as that involved in the contract of service; or

8 (B) As a separate alternative:

9 (I) Such individual has been and will continue to be free from
10 control or direction over the performance of such service, both under
11 his or her contract of service and in fact; and

12 (II) Such service is either outside the usual course of business
13 for which such service is performed, or that such service is
14 performed outside of all the places of business of the enterprises
15 for which such service is performed, or the individual is
16 responsible, both under the contract and in fact, for the costs of
17 the principal place of business from which the service is performed;
18 and

19 (III) Such individual is customarily engaged in an independently
20 established trade, occupation, profession, or business, of the same
21 nature as that involved in the contract of service, or such
22 individual has a principal place of business for the work the
23 individual is conducting that is eligible for a business deduction
24 for federal income tax purposes; and

25 (IV) On the effective date of the contract of service, such
26 individual is responsible for filing at the next applicable filing
27 period, both under the contract of service and in fact, a schedule of
28 expenses with the internal revenue service for the type of business
29 the individual is conducting; and

30 (V) On the effective date of the contract of service, or within a
31 reasonable period after the effective date of the contract, such
32 individual has established an account with the department of revenue,
33 and other state agencies as required by the particular case, for the
34 business the individual is conducting for the payment of all state
35 taxes normally paid by employers and businesses and has registered
36 for and received a unified business identifier number from the state
37 of Washington; and

38 (VI) On the effective date of the contract of service, such
39 individual is maintaining a separate set of books or records that

1 reflect all items of income and expenses of the business which the
2 individual is conducting; or

3 (iv) Services that require registration under chapter 18.27 RCW
4 or licensing under chapter 19.28 RCW rendered by an individual when:

5 (A) The individual has been and will continue to be free from
6 control or direction over the performance of the service, both under
7 the contract of service and in fact;

8 (B) The service is either outside the usual course of business
9 for which the service is performed, or the service is performed
10 outside of all the places of business of the enterprise for which the
11 service is performed, or the individual is responsible, both under
12 the contract and in fact, for the costs of the principal place of
13 business from which the service is performed;

14 (C) The individual is customarily engaged in an independently
15 established trade, occupation, profession, or business, of the same
16 nature as that involved in the contract of service, or the individual
17 has a principal place of business for the business the individual is
18 conducting that is eligible for a business deduction for federal
19 income tax purposes, other than that furnished by the employer for
20 which the business has contracted to furnish services;

21 (D) On the effective date of the contract of service, the
22 individual is responsible for filing at the next applicable filing
23 period, both under the contract of service and in fact, a schedule of
24 expenses with the internal revenue service for the type of business
25 the individual is conducting;

26 (E) On the effective date of the contract of service, or within a
27 reasonable period after the effective date of the contract, the
28 individual has an active and valid certificate of registration with
29 the department of revenue, and an active and valid account with any
30 other state agencies as required by the particular case, for the
31 business the individual is conducting for the payment of all state
32 taxes normally paid by employers and businesses and has registered
33 for and received a unified business identifier number from the state
34 of Washington;

35 (F) On the effective date of the contract of service, the
36 individual is maintaining a separate set of books or records that
37 reflect all items of income and expenses of the business that the
38 individual is conducting; and

39 (G) On the effective date of the contract of service, the
40 individual has a valid contractor registration pursuant to chapter

1 18.27 RCW or an electrical contractor license pursuant to chapter
2 19.28 RCW.

3 (9) "Employment benefits" means all benefits provided or made
4 available to employees by an employer, including group life
5 insurance, health insurance, disability insurance, sick leave, annual
6 leave, educational benefits, and pensions.

7 (10) "Family leave" means any leave taken by an employee from
8 work:

9 (a) To participate in providing care, including physical or
10 psychological care, for a family member of the employee made
11 necessary by a serious health condition of the family member;

12 (b) To bond with the employee's child during the first twelve
13 months after the child's birth, or the first twelve months after the
14 placement of a child under the age of eighteen with the employee; or

15 (c) Because of any qualifying exigency as permitted under the
16 federal family and medical leave act, 29 U.S.C. Sec. 2612(a)(1)(E)
17 and 29 C.F.R. Sec. 825.126(b)(1) through (9), as they existed on
18 October 19, 2017, for family members as defined in subsection
19 (~~((10))~~) (11) of this section.

20 (11) "Family member" means a child, grandchild, grandparent,
21 parent, sibling, or spouse of an employee, and also includes any
22 individual who regularly resides in the employee's home or where the
23 relationship creates an expectation that the employee care for the
24 person, and that individual depends on the employee for care.

25 (12) "Grandchild" means a child of the employee's child.

26 (13) "Grandparent" means a parent of the employee's parent.

27 (14) "Health care provider" means: (a) A person licensed as a
28 physician under chapter 18.71 RCW or an osteopathic physician and
29 surgeon under chapter 18.57 RCW; (b) a person licensed as an advanced
30 registered nurse practitioner under chapter 18.79 RCW; or (c) any
31 other person determined by the commissioner to be capable of
32 providing health care services.

33 (15) "Medical leave" means any leave taken by an employee from
34 work made necessary by the employee's own serious health condition.

35 (16) "Paid time off" includes vacation leave, personal leave,
36 medical leave, sick leave, compensatory leave, or any other paid
37 leave offered by an employer under the employer's established policy.

38 (17) "Parent" means the biological, adoptive, de facto, or foster
39 parent, stepparent, or legal guardian of an employee or the

1 employee's spouse, or an individual who stood in loco parentis to an
2 employee when the employee was a child.

3 (18) "Period of incapacity" means an inability to work, attend
4 school, or perform other regular daily activities because of a
5 serious health condition, treatment of that condition or recovery
6 from it, or subsequent treatment in connection with such inpatient
7 care.

8 (19) "Premium" or "premiums" means the payments required by RCW
9 50A.10.030 and paid to the department for deposit in the family and
10 medical leave insurance account under RCW 50A.05.070.

11 (20) "Qualifying period" means the first four of the last five
12 completed calendar quarters or, if eligibility is not established,
13 the last four completed calendar quarters immediately preceding the
14 application for leave.

15 (21)(a) "Remuneration" means all compensation paid for personal
16 services including commissions and bonuses and the cash value of all
17 compensation paid in any medium other than cash.

18 (b) Previously accrued compensation, other than severance pay or
19 payments received pursuant to plant closure agreements, when assigned
20 to a specific period of time by virtue of a collective bargaining
21 agreement, individual employment contract, customary trade practice,
22 or request of the individual compensated, is considered remuneration
23 for the period to which it is assigned. Assignment clearly occurs
24 when the compensation serves to make the individual eligible for all
25 regular fringe benefits for the period to which the compensation is
26 assigned.

27 (c) Remuneration also includes settlements or other proceeds
28 received by an individual as a result of a negotiated settlement for
29 termination of an individual written employment contract prior to its
30 expiration date. The proceeds are deemed assigned in the same
31 intervals and in the same amount for each interval as compensation
32 was allocated under the contract.

33 (d) Remuneration does not include:

34 (i) The payment of tips;

35 (ii) Supplemental benefit payments made by an employer to an
36 employee in addition to any paid family or medical leave benefits
37 received by the employee; or

38 (iii) Payments to members of the armed forces of the United
39 States, including the organized militia of the state of Washington,

1 for the performance of duty for periods not exceeding seventy-two
2 hours at a time.

3 (22)(a) "Serious health condition" means an illness, injury,
4 impairment, or physical or mental condition that involves:

5 (i) Inpatient care in a hospital, hospice, or residential medical
6 care facility, including any period of incapacity; or

7 (ii) Continuing treatment by a health care provider. A serious
8 health condition involving continuing treatment by a health care
9 provider includes any one or more of the following:

10 (A) A period of incapacity of more than three consecutive, full
11 calendar days, and any subsequent treatment or period of incapacity
12 relating to the same condition, that also involves:

13 (I) Treatment two or more times, within thirty days of the first
14 day of incapacity, unless extenuating circumstances exist, by a
15 health care provider, by a nurse or physician's assistant under
16 direct supervision of a health care provider, or by a provider of
17 health care services, such as a physical therapist, under orders of,
18 or on referral by, a health care provider; or

19 (II) Treatment by a health care provider on at least one occasion
20 which results in a regimen of continuing treatment under the
21 supervision of the health care provider;

22 (B) Any period of incapacity due to pregnancy, or for prenatal
23 care;

24 (C) Any period of incapacity or treatment for such incapacity due
25 to a chronic serious health condition. A chronic serious health
26 condition is one which:

27 (I) Requires periodic visits, defined as at least twice a year,
28 for treatment by a health care provider, or by a nurse under direct
29 supervision of a health care provider;

30 (II) Continues over an extended period of time, including
31 recurring episodes of a single underlying condition; and

32 (III) May cause episodic rather than a continuing period of
33 incapacity, including asthma, diabetes, and epilepsy;

34 (D) A period of incapacity which is permanent or long term due to
35 a condition for which treatment may not be effective. The employee or
36 family member must be under the continuing supervision of, but need
37 not be receiving active treatment by, a health care provider,
38 including Alzheimer's, a severe stroke, or the terminal stages of a
39 disease; or

1 (E) Any period of absence to receive multiple treatments,
2 including any period of recovery from the treatments, by a health
3 care provider or by a provider of health care services under orders
4 of, or on referral by, a health care provider, either for: (I)
5 Restorative surgery after an accident or other injury; or (II) a
6 condition that would likely result in a period of incapacity of more
7 than three consecutive, full calendar days in the absence of medical
8 intervention or treatment, such as cancer, severe arthritis, or
9 kidney disease.

10 (b) The requirement in (a)(i) and (ii) of this subsection for
11 treatment by a health care provider means an in-person visit to a
12 health care provider. The first, or only, in-person treatment visit
13 must take place within seven days of the first day of incapacity.

14 (c) Whether additional treatment visits or a regimen of
15 continuing treatment is necessary within the thirty-day period shall
16 be determined by the health care provider.

17 (d) The term extenuating circumstances in (a)(ii)(A)(I) of this
18 subsection means circumstances beyond the employee's control that
19 prevent the follow-up visit from occurring as planned by the health
20 care provider. Whether a given set of circumstances are extenuating
21 depends on the facts. For example, extenuating circumstances exist if
22 a health care provider determines that a second in-person visit is
23 needed within the thirty-day period, but the health care provider
24 does not have any available appointments during that time period.

25 (e) Treatment for purposes of (a) of this subsection includes,
26 but is not limited to, examinations to determine if a serious health
27 condition exists and evaluations of the condition. Treatment does not
28 include routine physical examinations, eye examinations, or dental
29 examinations. Under (a)(ii)(A)(II) of this subsection, a regimen of
30 continuing treatment includes, but is not limited to, a course of
31 prescription medication, such as an antibiotic, or therapy requiring
32 special equipment to resolve or alleviate the health condition, such
33 as oxygen. A regimen of continuing treatment that includes taking
34 over-the-counter medications, such as aspirin, antihistamines, or
35 salves, or bed rest, drinking fluids, exercise, and other similar
36 activities that can be initiated without a visit to a health care
37 provider, is not, by itself, sufficient to constitute a regimen of
38 continuing treatment for purposes of this title.

39 (f) Conditions for which cosmetic treatments are administered,
40 such as most treatments for acne or plastic surgery, are not serious

1 health conditions unless inpatient hospital care is required or
2 unless complications develop. Ordinarily, unless complications arise,
3 the common cold, the flu, ear aches, upset stomach, minor ulcers,
4 headaches other than migraines, routine dental or orthodontia
5 problems, and periodontal disease are examples of conditions that are
6 not serious health conditions and do not qualify for leave under this
7 title. Restorative dental or plastic surgery after an injury or
8 removal of cancerous growths are serious health conditions provided
9 all the other conditions of this section are met. Mental illness
10 resulting from stress or allergies may be serious health conditions,
11 but only if all the conditions of this section are met.

12 (g)(i) Substance abuse may be a serious health condition if the
13 conditions of this section are met. However, leave may only be taken
14 for treatment for substance abuse by a health care provider or by a
15 licensed substance abuse treatment provider. Absence because of the
16 employee's use of the substance, rather than for treatment, does not
17 qualify for leave under this title.

18 (ii) Treatment for substance abuse does not prevent an employer
19 from taking employment action against an employee. The employer may
20 not take action against the employee because the employee has
21 exercised his or her right to take medical leave for treatment.
22 However, if the employer has an established policy, applied in a
23 nondiscriminatory manner that has been communicated to all employees,
24 that provides under certain circumstances an employee may be
25 terminated for substance abuse, pursuant to that policy the employee
26 may be terminated whether or not the employee is presently taking
27 medical leave. An employee may also take family leave to care for a
28 covered family member who is receiving treatment for substance abuse.
29 The employer may not take action against an employee who is providing
30 care for a covered family member receiving treatment for substance
31 abuse.

32 (h) Absences attributable to incapacity under (a)(ii)(B) or (C)
33 of this subsection qualify for leave under this title even though the
34 employee or the family member does not receive treatment from a
35 health care provider during the absence, and even if the absence does
36 not last more than three consecutive, full calendar days. For
37 example, an employee with asthma may be unable to report for work due
38 to the onset of an asthma attack or because the employee's health
39 care provider has advised the employee to stay home when the pollen

1 count exceeds a certain level. An employee who is pregnant may be
2 unable to report to work because of severe morning sickness.

3 (23) "Service is localized in this state" has the same meaning as
4 described in RCW 50.04.120.

5 (24) "Spouse" means a husband or wife, as the case may be, or
6 state registered domestic partner.

7 (25) "State average weekly wage" means the most recent average
8 weekly wage calculated under RCW 50.04.355 and available on January
9 1st of each year.

10 (26) "Supplemental benefit payments" means payments made by an
11 employer to an employee as salary continuation or as paid time off.
12 Such payments must be in addition to any paid family or medical leave
13 benefits the employee is receiving.

14 (27) "Typical workweek hours" means:

15 (a) For an hourly employee, the average number of hours worked
16 per week by an employee within the qualifying period; and

17 (b) Forty hours for a salaried employee, regardless of the number
18 of hours the salaried employee typically works.

19 (28) "Wage" or "wages" means:

20 (a) For the purpose of premium assessment, the remuneration paid
21 by an employer to an employee. The maximum wages subject to a premium
22 assessment are those wages as set by the commissioner under RCW
23 50A.10.030;

24 (b) For the purpose of payment of benefits, the remuneration paid
25 by one or more employers to an employee for employment during the
26 employee's qualifying period. At the request of an employee, wages
27 may be calculated on the basis of remuneration payable. The
28 department shall notify each employee that wages are calculated on
29 the basis of remuneration paid, but at the employee's request a
30 redetermination may be performed and based on remuneration payable;
31 and

32 (c) For the purpose of a self-employed person electing coverage
33 under RCW 50A.10.010, the meaning is defined by rule.

34 NEW SECTION. **Sec. 3.** (1) The employment security department
35 must collaborate with the paid family and medical leave advisory
36 committee to collect and analyze disaggregated data relating to
37 employment protections under Title 50A RCW.

1 (2) By December 1, 2021, the employment security department must
2 submit a report to the appropriate committees of the legislature with
3 the following information:

4 (a) Program utilization by employees covered under approved
5 voluntary plans compared to employees covered under the state plan;

6 (b) Program utilization by employees working for employers with
7 50 or more employees compared to employees working for employers with
8 fewer than 50 employees;

9 (c) The number of employees who took leave from an employer and
10 did not appear on that employer's subsequent quarterly premium
11 reports after leave had been completed. This data will be broken out
12 between employers with 50 or more employees, by employment sector,
13 and by employee earnings level. It will also include available
14 employee demographic information, including data broken out by race
15 and gender; and

16 (d) The lengths of leave employees took for different purposes,
17 broken out between employers with 50 or more employees and employers
18 with fewer than 50 employees, whether the employee appeared on
19 subsequent quarterly premium reports after leave had been completed,
20 by employment sector, and by employee earnings level. It will also
21 include available employee demographic information, including data
22 broken out by race and gender.

23 (3) By June 30, 2022, and June 30, 2023, the employment security
24 department must submit a report to the appropriate committees of the
25 legislature with the following information:

26 (a) The number of individuals who used leave under Title 50A RCW
27 in the preceding 12 months as a result of the amended definition of
28 family member in this act; and

29 (b) The effects, if any, on the family and medical leave
30 insurance account as a result of the amended definition of family
31 member in this act."

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32 On page 1, line 2 of the title, after "program;" strike the
33 remainder of the title and insert "amending RCW 50A.050.010; and
34 creating new sections."

EFFECT: Provides that ESD must collaborate with the Paid Family and Medical Leave Advisory Committee and report to the Legislature, at specified times, with the following information: (1) Program utilization by employees under voluntary plans compared to state plans; (2) program utilization by employees working for employers with 50 or more employees compared to employees working for employers with fewer than 50 employees; (3) the number of employees who took leave from an employer and did not appear on that employer's subsequent quarterly premium reports after leave had been completed; (4) the lengths of leave taken for different purposes; (5) the number of individuals who used leave under Title 50A RCW in the preceding 12 months as a result of the bill's amended definition of family member; and (6) the effects, if any, on the family and medical leave insurance account as a result of the amended definition of family member. Adds an intent section. Removes sections on employment and health insurance protection for employees on leave.

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