

SENATE BILL REPORT

SHB 2614

As Reported by Senate Committee On:
Labor & Commerce, February 25, 2020

Title: An act relating to paid family and medical leave.

Brief Description: Concerning paid family and medical leave.

Sponsors: House Committee on Labor & Workplace Standards (originally sponsored by Representatives Robinson, Doglio, Sells, Lekanoff, Tharinger and Ormsby; by request of Employment Security Department).

Brief History: Passed House: 2/13/20, 60-37.

Committee Activity: Labor & Commerce: 2/20/20, 2/25/20 [DPA, DNP, w/oRec].

Brief Summary of Amended Bill

- Makes numerous revisions to the Paid Family and Medical Leave (PFML) program to provide clarity and improve the program's administration, including waiting periods, conditional waivers, and supplementation of benefits.
- Exempts several classes of individuals from the definition of employment the purposes of the PFML program.
- Exempts casual labor from the types of covered employment.
- Grants the Employment Security Department (ESD) statutory authority to administer oaths, take depositions, issue subpoenas, or compel a witness' attendance in an administrative proceeding.
- Allows ESD to apply for and obtain a superior court order authorizing a subpoena in advance of its issuance.
- Authorizes employees to bring a private right of action to recover damages for an employer's unlawful acts, under specified conditions.
- Provides elective coverage for employees under certain collective bargaining agreements.

SENATE COMMITTEE ON LABOR & COMMERCE

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Majority Report: Do pass as amended.

Signed by Senators Keiser, Chair; Conway, Vice Chair; Saldaña, Stanford and Wellman.

Minority Report: Do not pass.

Signed by Senators Braun and Schoesler.

Minority Report: That it be referred without recommendation.

Signed by Senators King, Ranking Member; Walsh.

Staff: Richard Rodger (786-7461)

Background: Paid Family and Medical Leave Program. In 2017, a Paid Family Medical Leave (PFML) program was enacted to provide partial wage replacement to employees on leave for specified family and medical reasons. Employees are eligible for benefits after working at least 820 hours in a qualifying period. Premium collection began January 1, 2019, and benefits became payable beginning January 1, 2020. The program is administered by ESD.

Definitions. "Child" includes a biological, adopted, or foster child, a stepchild, or a child to whom the employee stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status. "Typical workweek hours" means:

- for an hourly employee, the average number of hours worked per week by an employee since the beginning of the qualifying period; and
- 40 hours for a salaried employee, regardless of the number of hours the salaried employee typically works.

Conditional Waivers. Employees who primarily work outside of Washington but come into the state for a minimal amount of work may be eligible to have their premium requirements waived if the employee is:

- physically based outside of the state;
- employed in the state on a limited or temporary work schedule; and
- not expected to be employed in the state for 820 hours or more in a qualifying period.

The waiver expires if the employee exceeds 820 hours in four consecutive quarters.

Benefit Waiting Period. PFML benefits can be paid after the seventh calendar day of leave. There is no waiting period for placement of a child.

Successive Periods of Leave. Successive periods of family and medical leave caused by the same or related injury or sickness are considered a single period of family and medical leave only if separated by less than four months.

Supplemental Benefits. An employer may offer supplemental benefit payments to an employee on family or medical leave, in addition to any paid family or medical leave benefits the employee is receiving. Supplemental benefit payments include vacation, sick, or other paid time off.

Child Support. If an employee owes child support obligations, ESD notifies the state and local child support enforcement agency and withholds monies as specified in statute.

Unemployment and Industrial Insurance. Individuals are prohibited from receiving PFML benefits when they are eligible for payments for unemployment insurance or industrial insurance benefits.

Voluntary Plans. An employer may opt-out of either the state program for family leave or medical leave, or both, by having a voluntary plan meeting specified standards.

Investigations and Damages. Employers are prohibited from denying the employee's rights or discriminating against an employee for exercising the rights under the PFML program. It is unlawful for any person to discharge or discriminate against an employee for filing a complaint or for taking other specified actions. ESD must investigate complaints and determine the amount of damages owed to the employee.

Private Right of Action. The PFML statute does not specify a private right of action by employees to recover damages for an employer's unlawful acts.

Administrative Authority. Agencies must have statutory authority to, among other items, administer oaths, take depositions, issue subpoenas, or compel a witness' attendance in an administrative proceeding. The PFML statute does not specify these authorities.

Appeals. Any aggrieved person may file an appeal from any determination or redetermination.

Summary of Amended Bill: Revised Definitions. A child's spouse is added to the definition of "child," allowing a mother-in-law or father-in-law to be eligible for benefits when caring for their son-in-law or daughter-in-law. "Typical workweek hours" refers to the average number of hours worked per week by an employee "within" the qualifying period, instead of "since the beginning" of the period.

The following classes of individuals are exempt from the definition of employment for the purposes of the PFML statutes:

- individuals when serving as a member of a statutory board, commission, council, committee, or other similar group classified as a class two, three, four, or five group;
- individuals when serving as an elected member, on one of the specified special purpose districts, who receive a per diem of \$250 per day, or less;
- individuals when serving as an appointed director, with a compensation limit of no more than \$1,000 per year, of an air pollution control authority; and
- volunteer firefighters compensated on per diem or nominal sum basis consistent with the definition of volunteer contained in the Code of Federal Regulations.

New Definitions. "Casual labor" is defined as work performed infrequently and irregularly and is not included in the definition of employment for the purposes of the PFML program. Premiums are not collected for workers performing these services and the hours do not count towards PFML eligibility. "Paid time off" is defined to include vacation leave, personal leave, medical leave, sick leave, compensatory leave, or any other paid leave offered by an

employer under the employer's established policy. "Supplemental benefit payments" is defined to mean payments made by an employer to an employee as salary continuation or as paid time off. Such payments must be in addition to any paid family or medical leave benefits the employee is receiving.

Conditional Waivers. Employees who primarily work outside of Washington, but come into the state for a minimal amount of work, may be eligible to have their premium requirements waived if the employee is:

- physically based outside of the state;
- employed in the state on a limited or temporary work schedule; and
- not expected to be employed in the state for 820 hours or more in a qualifying period.

Benefit Waiting Period. Eligible employees may satisfy the seven-day waiting period requirement while simultaneously receiving paid time off for any part of the waiting period. Military exigency leave is exempted from the one week waiting requirement for the payment of benefits.

Successive Periods of Leave. The language dealing with successive periods of leave is eliminated.

Supplemental Benefits. Supplemental benefit payments are not considered remuneration, and they will not be used to prorate or reduce an employee's weekly benefit.

Child Support. The phrase "child support obligation" is defined to only include obligations being enforced pursuant to the provisions of federal law.

Unemployment and Industrial Insurance. An employee must apply for benefits under the unemployment and industrial insurance programs, and those programs determine their eligibility. An employee is disqualified from PFML benefits when they are receiving, has received, or will receive compensation from the other programs.

Voluntary Plans. Employers who operate a voluntary program, for just family leave or medical leave, must transmit all premiums collected for the other program to ESD. If an employer terminates or withdraws from a voluntary plan, all premiums for that plan remaining in its possession must be remitted to ESD.

Investigations and Damages. The process for an employee to file a complaint, concerning unlawful acts by the employer, is clarified and limited to alleged violations occurring within three years. ESD must investigate complaints and determine the amount of liquidated damages owed to the employee, unless the employee terminates the complaint. Liquidated damages for willful violations must be paid directly to the employee, and penalties are paid to ESD. Liquidated damages must be paid within 30 days, unless the employer files an appeal.

Parties seeking the collection of unpaid damages can file a warrant with any county clerk and may include claims for reasonable attorneys' fees for the collection action, reasonable expert witness fees, and costs. ESD's administrative actions are terminated if an employee withdraws their complaint or if all the parties agree to resolve the complaint. If the

administrative action is terminated, after an ESD determination has been issued, any findings, payments, or offers of payment as part of ESD's action are inadmissible in any other proceeding.

Private Right of Action. A private right of action to recover damages for an employer's unlawful acts may be brought by one or more employees and must commence within three years of the alleged violation. The private right of action is available to an employee who:

- has not filed a complaint with ESD or has withdrawn their ESD complaint; or
- resolved the complaint filed with ESD by agreement of all parties.

Appeals. Any aggrieved party may file an appeal from any determination or redetermination, instead of person, clarifying that entities have the same appeal rights.

Administrative Authority. ESD is granted statutory authority to, among other items, administer oaths, take depositions, issue subpoenas, or compel a witness' attendance in an administrative proceeding.

An authorized representative of ESD may apply for and obtain a superior court order authorizing a subpoena in advance of its issuance. The application must state that an order is sought pursuant to the authority granted; specify the records, documents, or testimony; and declare under oath that an investigation is being conducted for a lawfully authorized purpose, and the documents or testimony are reasonably related to an investigation within the department's authority. Where the application is made to the satisfaction of the court, the court must issue an order approving the subpoena. Prior notice of the request for a subpoena or issuance of court order is not required.

Elective Coverage for Employees Under Certain Collective Bargaining Agreements. Employees who were not eligible for the PFML program because they were under an existing collective bargaining agreement, may to elect coverage under the program. The employees must elect coverage for both the family leave and medical leave and are responsible for 100 percent of the premiums assessed to an employee. An employer may elect to pay all or part of the premiums. The employees must have worked at least 820 hours in the qualifying period to be eligible for benefits. If an employee elects coverage, the employer must collect the premiums and any surcharges through payroll deductions and remit the amounts collected to the department.

Miscellaneous. Technical corrections are made.

EFFECT OF LABOR & COMMERCE COMMITTEE AMENDMENT(S): Exempts several classes of individuals from the definition of employment the purposes of the PFML program. Provides elective coverage for employees under certain collective bargaining agreements

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: Our state's new paid family and medical leave program is up and running and has been a great success, with over 25,000 individuals signing up for benefits so far this year. We need this bill to ensure the program is working properly and effectively. It includes technical corrections to ensure clarity and includes an exemption casual labor, such as lawnmowing and babysitting. The civil enforcement provisions are extremely important, that is how rights are enforced in many other statutes in our state. We would be concerned about exempting others from the bill if they are functionally working as employees, such a voluntary firefighters. There is a line where exempting board and commission members makes sense.

OTHER: We are not allowed to join the paid family and medical leave program until our collective bargaining agreement expires in 2024. That is unfair and all employees should be eligible to use the program.

We have concerns with the provisions regarding private right of actions. The legislation should follow the provisions of the Wage Payment Act. The bill should limit who can file the complaints to only an employee and not allow others to file on the employee's behalf. The complaints should also be filed with the department first, instead of allowing the direct filing in court against an employer.

Persons Testifying: PRO: Representative June Robinson, Prime Sponsor; Nick Streuli, Legislative Director, Employment Security Department; Joe Kendo, Washington State Labor Council; Sam Grad, UFCW 21; Maggie Humphreys, MomsRising; Robert Battles, Association of Washington Business.

OTHER: Carolyn Logue, Washington Food Industry Association; Bruce Beckett, Washington Retail Association; Jon Holden, President and Directing Business Representative, IAM District 751.

Persons Signed In To Testify But Not Testifying: No one.