

ESSB 5097 - H COMM AMD
By Committee on Appropriations

ADOPTED 04/06/2021

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

1 employee's qualifying period in which total wages were highest by
2 twenty-six. If the result is not a multiple of one dollar, the
3 department must round the result to the next lower multiple of one
4 dollar.

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

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

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

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

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

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

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

34 (b) "Employment" does not include:

35 (i) Self-employed individuals;

36 (ii) Casual labor;

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

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

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

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

11 (B) As a separate alternative:

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

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

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

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

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

1 (VI) On the effective date of the contract of service, such
2 individual is maintaining a separate set of books or records that
3 reflect all items of income and expenses of the business which the
4 individual is conducting; or

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

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

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

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

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

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

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

1 (G) On the effective date of the contract of service, the
2 individual has a valid contractor registration pursuant to chapter
3 18.27 RCW or an electrical contractor license pursuant to chapter
4 19.28 RCW.

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

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

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

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

17 (c) Because of any qualifying exigency as permitted under the
18 federal family and medical leave act, 29 U.S.C. Sec. 2612(a)(1)(E)
19 and 29 C.F.R. Sec. 825.126(b)(1) through (9), as they existed on
20 October 19, 2017, for family members as defined in subsection
21 (~~((10))~~) (11) of this section.

22 (11) "Family member" means a child, grandchild, grandparent,
23 parent, sibling, or spouse of an employee, and also includes any
24 individual who regularly resides in the employee's home or where the
25 relationship creates an expectation that the employee care for the
26 person, and that individual depends on the employee for care. "Family
27 member" includes any individual who regularly resides in the
28 employee's home, except that it does not include an individual who
29 simply resides in the same home with no expectation that the employee
30 care for the individual.

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

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

33 (14) "Health care provider" means: (a) A person licensed as a
34 physician under chapter 18.71 RCW or an osteopathic physician and
35 surgeon under chapter 18.57 RCW; (b) a person licensed as an advanced
36 registered nurse practitioner under chapter 18.79 RCW; or (c) any
37 other person determined by the commissioner to be capable of
38 providing health care services.

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

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

4 (17) "Parent" means the biological, adoptive, de facto, or foster
5 parent, stepparent, or legal guardian of an employee or the
6 employee's spouse, or an individual who stood in loco parentis to an
7 employee when the employee was a child.

8 (18) "Period of incapacity" means an inability to work, attend
9 school, or perform other regular daily activities because of a
10 serious health condition, treatment of that condition or recovery
11 from it, or subsequent treatment in connection with such inpatient
12 care.

13 (19) "Premium" or "premiums" means the payments required by RCW
14 50A.10.030 and paid to the department for deposit in the family and
15 medical leave insurance account under RCW 50A.05.070.

16 (20) "Qualifying period" means the first four of the last five
17 completed calendar quarters or, if eligibility is not established,
18 the last four completed calendar quarters immediately preceding the
19 application for leave.

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

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

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

38 (d) Remuneration does not include:

39 (i) The payment of tips;

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

4 (iii) Payments to members of the armed forces of the United
5 States, including the organized militia of the state of Washington,
6 for the performance of duty for periods not exceeding seventy-two
7 hours at a time.

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

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

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

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

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

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

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

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

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

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

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

39 (D) A period of incapacity which is permanent or long term due to
40 a condition for which treatment may not be effective. The employee or

1 family member must be under the continuing supervision of, but need
2 not be receiving active treatment by, a health care provider,
3 including Alzheimer's, a severe stroke, or the terminal stages of a
4 disease; or

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

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

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

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

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

1 provider, is not, by itself, sufficient to constitute a regimen of
2 continuing treatment for purposes of this title.

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

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

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

36 (h) Absences attributable to incapacity under (a)(ii)(B) or (C)
37 of this subsection qualify for leave under this title even though the
38 employee or the family member does not receive treatment from a
39 health care provider during the absence, and even if the absence does
40 not last more than three consecutive, full calendar days. For

1 example, an employee with asthma may be unable to report for work due
2 to the onset of an asthma attack or because the employee's health
3 care provider has advised the employee to stay home when the pollen
4 count exceeds a certain level. An employee who is pregnant may be
5 unable to report to work because of severe morning sickness.

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

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

10 (25) "State average weekly wage" means the most recent average
11 weekly wage calculated under RCW 50.04.355 and available on January
12 1st of each year.

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

17 (27) "Typical workweek hours" means:

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

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

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

23 (a) For the purpose of premium assessment, the remuneration paid
24 by an employer to an employee. The maximum wages subject to a premium
25 assessment are those wages as set by the commissioner under RCW
26 50A.10.030;

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

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

37 NEW SECTION. **Sec. 3.** (1) The employment security department
38 must collect and analyze disaggregated data relating to employment
39 protections under Title 50A RCW. The employment security department

1 must develop the proposed plan for data collection and analysis in
2 consultation with the paid family and medical leave advisory
3 committee.

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

7 (a) Program utilization by employees covered under approved
8 voluntary plans compared to employees covered under the state plan;
9 and

10 (b) Program utilization by employees working for employers with
11 50 or more employees compared to employees working for employers with
12 fewer than 50 employees.

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

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

19 (b) The effects, if any, on the family and medical leave
20 insurance account as a result of the amended definition of family
21 member in this act.

22 (4) The employment security department must provide members of
23 the paid family and medical leave advisory committee opportunity for
24 comment on the reports under subsections (2) and (3) of this section.
25 Comments provided through this process must be included in a separate
26 section of each final report.

27 NEW SECTION. **Sec. 4.** If the number of individuals utilizing
28 leave under Title 50A RCW as a result of the amended definition of
29 family member in this act exceeds 500 individuals in any calendar
30 year before July 1, 2023, the expenses of the additional leave must
31 be paid by the general fund into the family and medical leave
32 insurance account created in RCW 50A.05.070."

33 Correct the title.

EFFECT: Specifies that the definition of "family member" for paid family and medical leave (PFML) does not include an individual who resides in the employee's home with no expectation of care. Modifies the requirement that the Employment Security Department (ESD) collaborate with the PFML Advisory Committee on the data collection requirements to a requirement that ESD develop the proposed plan for

data collection in consultation with the PFML Advisory Committee. Removes requirements that ESD include certain data on employee leave use and returns in the first required report to the Legislature. Requires ESD to provide opportunity for members of the PFML Advisory Committee to provide comment in each required report to the Legislature.

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