

WSR 23-08-075

PROPOSED RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed April 4, 2023, 2:41 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-21-096.

Title of Rule and Other Identifying Information: Amending WAC 192-500-195 Placement, 192-510-010 Election, withdrawal, and cancellation of coverage, 192-540-030 What are employers required to report to the department?, and 192-800-150 Can an employee designate a representative to act on their behalf?

Hearing Location(s): On May 9, 2023, at 9:00 a.m., Microsoft Teams. Join online, link available at paidleave.wa.gov/rulemaking; join by phone 564-999-2000, PIN 853 918 562#. Hearing will be held remotely.

Date of Intended Adoption: On or after May 16, 2023.

Submit Written Comments to: Janette Benham, Employment Security Department, P.O. Box 9046, Olympia, WA 98507-9046, email rules@esd.wa.gov, by May 9, 2023.

Assistance for Persons with Disabilities: Contact Teresa Eckstein, state EO officer, phone 360-480-5708, email teckstein@esd.wa.gov, by May 2, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The paid family and medical leave (PFML) program (Title 50A RCW) is proposing amendments to existing rules to provide additional clarity and improve program operations.

The proposed amendments add a new data field to employer quarterly reports to include employees' dates of birth and require a report of "no payroll" for up to a maximum of eight quarters when employers have no paid wages to report. The proposed amendments will affect both PFML and the long-term services and supports trust (WA Cares fund) since employers submit one report to the department for both programs.

Specific to PFML, the proposed amendments correct an RCW pointer reference, clarify the definition of "placement" for the purposes of family leave to bond with the employee's child, clarify that hours worked in self-employment prior to the effective date of the election of coverage for self-employed individuals do not count toward establishing benefit eligibility, and clarify that weekly claims may be filed by an estate executor or administrator if the employee dies after they've been approved for benefits.

Reasons Supporting Proposal: The proposed amendments to WAC 192-500-195 provide clear direction when determining eligibility for family leave to bond with the employee's child.

The proposed amendments to WAC 192-510-010 clarify eligibility requirements for self-employed individuals who elect PFML coverage.

The proposed amendments to WAC 192-540-030 are necessary in order to ensure that employers are reporting correct information to the department, including when no wages are paid during any given quarter. The report of "no payroll" will be required for up to a maximum of eight quarters unless the employer notifies the department before the end of eight consecutive quarters that they have no employees to report at that time and in the foreseeable future. In addition, since WA Cares fund premium assessment begins July 1, 2023, employers must submit quarterly reports that include information for both PFML and WA Cares fund. The department is utilizing one employer report for both programs. RCW 50B.04.020 (4)(c) requires the department to determine

the compliance of premium payments (employer audits) in coordination with the same activities conducted for PFML under Title 50A RCW. This requirement will assist the department because a report of "no payroll" will ensure the department does not flag a missing report for audit.

The proposed amendment adding employees' dates of birth will assist with ensuring employee work history and premium assessments are complete. RCW 50B.04.080 requires the department, to the extent feasible, to use the same premium assessment, collection, and reporting procedures for the WA Cares fund as it does for PFML. Requiring dates of birth for employees will assist with determining employee eligibility for prorated benefits for WA Cares fund under RCW 50B.04.050. The requirements will fulfill the department's obligation under RCW 50B.04.020 to assist the trust commission, council, and office of the state actuary in monitoring the solvency and financial status of the program because the information will assist with actuarial modeling and solvency projections. The requirements will also assist the department with projecting fund solvency for the PFML program, align with unemployment insurance practices of "no payroll" reports, and ensure the department has accurate data for annual PFML employer sizing determinations.

The proposed amendments to WAC 192-800-150 correct a pointer to a previously repealed RCW and clarify the requirements for executors or administrators of estates when filing weekly claims if an employee dies after being approved for paid family or medical leave.

Statutory Authority for Adoption: RCW 50A.05.060, 50A.10.010.

Statute Being Implemented: RCW 50B.04.020 (4) (c), 50B.04.080 (4) (b), 50A.05.010, 50A.10.010, 50A.10.030.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: Employment security department, leave and care division, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: April Amundson, Olympia, Washington, 360-485-2816.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Janette Benham, Employment Security Department, P.O. Box 9046, Olympia, WA 98507-9046, phone 360-790-6583, email rules@esd.wa.gov. Also posted online at paidleave.wa.gov/rulemaking. WAC 192-540-030 What are employers required to report to the department? This rule requires a cost-benefit analysis.

WAC 192-500-195 Placement. This rule is exempt under RCW 34.05.328 (5) (c) (ii) because it is an interpretive rule that sets forth the agency's interpretation of statutory provisions. Interpretive rules are not significant legislative rules under RCW 34.05.328 (5) (c) (iii).

WAC 192-510-010 Election, withdrawal, and cancellation of coverage. This rule is exempt under RCW 34.05.328 (5) (c) (ii) because it is an interpretive rule that sets forth the agency's interpretation of statutory provisions. Interpretive rules are not significant legislative rules under RCW 34.05.328 (5) (c) (iii).

WAC 192-800-150 Can an employee designate a representative to act on their behalf? A portion of this rule is exempt under RCW 34.05.328 (5) (c) (ii) because it is an interpretive rule that sets forth the

agency's interpretation of statutory provisions. Interpretive rules are not significant legislative rules under RCW 34.05.328 (5)(c)(iii). A portion of this rule is exempt under RCW 34.05.328 (5)(b)(iv) because it corrects a reference to a repealed RCW pointer without changing the rule's effect.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Is exempt under RCW 19.85.025(4).

Scope of exemption for rule proposal:

Is partially exempt:

Explanation of partial exemptions:

	Proposed WAC Sections and Title	This proposed rule section is <u>not exempt</u> - Analysis is required.	This proposed rule section is <u>exempt</u> . Provide RCW to support this exemption.
1.	WAC 192-500-195 Placement.	<input type="checkbox"/>	RCW 19.85.025(4), the rule does not affect businesses and pertains only to individuals applying for PFML benefits.
2.	WAC 192-510-010 Election, withdrawal, and cancellation of coverage.	<input type="checkbox"/>	RCW 19.85.025(4), the rule does not affect businesses and pertains only to individuals applying for PFML benefits.
3.	WAC 192-540-030 What are employers required to report to the department?	X	
4.	WAC 192-800-150 Can an employee designate a representative to act on their behalf?	<input type="checkbox"/>	RCW 19.85.025(4), the rule does not affect businesses and pertains only to applicants and representatives acting on their behalf in order to claim PFML benefits. RCW 34.05.310 (4)(d), a portion of the rule corrects a reference to a previously repealed statute without changing the effect.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. Proposed amendments to WAC 192-540-030 will affect all businesses required to submit quarterly reports for PFML and WA Cares fund. The department estimates the maximum annual cost of compliance for employers to report employees' dates of birth and submit a report of "no payroll" is a maximum of \$91 for the first year and a maximum of \$73 for each subsequent year. The cost will likely diminish year after year as employers become familiar with the requirements.

The administrative burden of reporting "no payroll" is low and requires employers to log into the system and check a box that indicates they have no payroll to report. Some employers will not have to report "no payroll" if they notify the department that they no longer have employees and don't intend to in the foreseeable future. Other employers will only be required to report "no payroll" for eight consecutive quarters. Employers impacted the most by the report of "no payroll" are those that have fluctuating employment throughout the year. The department determined the cost of compliance based on employers that are most impacted by this requirement. The administrative cost may be less than the department's estimate because this report is already a requirement of other programs, such as unemployment insurance. Adding employees' dates of birth to quarterly reports will require employers to add all employees' dates of birth during the first

quarter of reporting and then add only new employees for each subsequent quarter of reporting.

To calculate the administrative cost of compliance, the department used the average hourly wage of \$36.50 for payroll services taken from the North American Industry Classification System (NAICS) code 541214. The time estimated to comply with these requirements is 2.5 hours or less of administrative work in the first year, and then two hours or less in each subsequent year. Using NAICS code 541214 at the average of \$36.50 per hour x 2.5 hours = \$91 for the first year and \$36.50 per hour x 2 hours = \$73 for each subsequent year. This cost does not exceed the minor cost threshold estimates for businesses affected (using all NAICS codes for Washington employers required to submit quarterly reports); therefore, a small business economic impact statement is not required under RCW 19.85.030.

April 4, 2023
April Amundson
Policy and Rules Manager
Leave and Care Programs

OTS-4460.1

AMENDATORY SECTION (Amending WSR 20-20-073, filed 10/2/20, effective 11/2/20)

WAC 192-500-195 Placement. (1) For the purposes of qualifying for paid family leave to bond with a child under RCW 50A.05.010, "placement" means the adoptive, guardianship, foster care, or nonparental custody placement of a child under the age of ((eighteen)) 18 with the employee. A placement is considered:

(a) An adoptive placement when the employee is legally and permanently assuming the responsibility of raising the child as their own, and the placement of the child into the employee's home is made through a private arrangement, a child placement agency, or a government agency.

(b) A guardianship placement when the employee is granted guardianship of a child by court order, and the child is placed in the home under:

(i) Title 11 RCW;

(ii) Title 13 RCW; or

(iii) Any other applicable guardianship that reflects the purpose, permanency, and legal authority of guardianships under Titles 11 and 13 RCW, including guardianships granted out of this state or country.

(c) A foster care placement when the employee is providing care for a child placed in the employee's home. Such placements must involve voluntary or involuntary removal of the child from the child's parents or guardian, and an agreement between a government agency and the foster family that the foster family will take care of the child. Although foster care placement may be with a relative of the child or another individual who may not have a foster care license, government agency action must be involved in the removal of the child.

(d) A nonparental custody placement when the child is placed into the home of the employee by court order granting the employee nonparental custody.

(2) For the purposes of this section, a "government agency" may include an agency of any branch of government at the county, state, or federal level, or a foreign jurisdiction.

(3) The entitlement to paid family leave benefits for placement of a child expires at the end of the (~~twelve~~) 12-month period beginning on the date the child was first placed in the home.

(4) When applying for paid family leave to bond with a child, the employee must provide documentation referenced in WAC 192-610-025 to verify placement of the child.

(5) Qualifying paid family leave to bond with a child placed for adoption, guardianship, foster care, or nonparental custody does not include:

(a) (~~Placement with a birth parent; and~~) Any arrangement where the child is already in the care and custody of a parent and remains in that same parent's care and custody;

(b) Any arrangement where a child is returned to the care and custody of a parent or is placed with a parent whose entitlement to family leave to bond with that child has already expired; and

(c) Any adoptive, guardianship, foster care, or nonparental custody placement of a child with an employee that occurs more than (~~twelve~~) 12 months after that child is first placed in the employee's home.

[Statutory Authority: RCW 50A.05.060. WSR 20-20-073, § 192-500-195, filed 10/2/20, effective 11/2/20.]

OTS-4461.1

AMENDATORY SECTION (Amending WSR 21-04-067, filed 1/29/21, effective 3/1/21)

WAC 192-510-010 Election, withdrawal, and cancellation of coverage. (1) Self-employed persons as defined in RCW 50A.10.010 and federally recognized tribes as defined in RCW 50A.10.020 may elect coverage under Title 50A RCW.

(2) Notice of election of coverage must be submitted to the department online or in another format approved by the department.

(3) Elective coverage begins on the first day of the quarter immediately following the notice of election.

(4) Hours worked in self-employment prior to the effective date of the election of coverage cannot be used to establish benefit eligibility.

(5) A period of coverage is defined as:

(a) Three years following the first day of elective coverage or any gap in coverage; and

(b) Each subsequent year.

(~~5~~) (6) Any self-employed person or federally recognized tribe may file a notice of withdrawal within (~~thirty~~) 30 calendar days after the end of each period of coverage.

~~((6))~~ (7) A notice of withdrawal from coverage must be submitted to the department online or in another format approved by the department.

~~((7))~~ (8) Any levy resulting from the department's cancellation of coverage is in addition to the due and unpaid premiums and interest for the remainder of the period of coverage.

[Statutory Authority: RCW 50A.05.060. WSR 21-04-067, § 192-510-010, filed 1/29/21, effective 3/1/21. Statutory Authority: RCW 50A.05.60 [50A.05.060] and 50A.25.030. WSR 20-01-087, § 192-510-010, filed 12/12/19, effective 1/12/20. Statutory Authority: RCW 50A.04.215. WSR 19-08-016, § 192-510-010, filed 3/22/19, effective 4/22/19; WSR 18-12-032, § 192-510-010, filed 5/29/18, effective 6/29/18.]

OTS-4462.1

AMENDATORY SECTION (Amending WSR 18-22-080, filed 11/2/18, effective 12/3/18)

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, including employers that have no payroll for the quarter as outlined in subsection (4) of this section.

(2) The report must include each employee's:

- (a) Full name;
- (b) Social Security number; ~~((and))~~
- (c) Date of birth; and
- (d) Wages paid during that quarter and the associated hours.

~~((2))~~ (3) The report must include the total amount of premiums deducted from all employees' wages, if any, during the calendar quarter.

~~((3))~~ (4) (a) If no wages were paid to employees during a calendar quarter, a report of no payroll must be filed for that quarter.

(b) The requirement to report no payroll shall continue for eight consecutive calendar quarters unless the employer notifies the department before the end of eight consecutive quarters that they have no employees to report at that time and in the foreseeable future.

(5) 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.

[Statutory Authority: RCW 50A.04.215. WSR 18-22-080, § 192-540-030, filed 11/2/18, effective 12/3/18.]

OTS-4463.1

AMENDATORY SECTION (Amending WSR 20-11-036, filed 5/14/20, effective 6/14/20)

WAC 192-800-150 Can an employee designate a representative to act on their behalf? (1) The department may authorize another individual to act on the employee's behalf for the purposes of paid family and medical leave benefits if:

(a) An employee designates an authorized representative by submitting written documentation as required by the department;

(b) A court-appointed legal guardian with authority to make decisions on a person's behalf submits documentation as required by the department;

(c) An individual designated as an attorney-in-fact under a power of attorney submits documentation satisfactory to the department to act on the employee's behalf; or

(d) If an employee is unable to designate an authorized representative due to a serious health condition, an individual may represent the employee by submitting a complete and signed authorized representative designation form made available by the department, which must include:

(i) Documentation from the employee's health care provider certifying that the employee is incapable of completing the administrative requirements necessary for receiving paid family and medical leave benefits and is unable to designate an authorized representative to act on the employee's behalf; and

(ii) An affidavit or declaration authorized by (~~RCW 9A.72.085~~) chapter 5.50 RCW attesting to the responsibility to act in the employee's best interest.

(2) A person meeting the requirements under subsection (1) of this section may file an initial application and weekly claims up to and including the week in which the employee died subject to WAC 192-620-010.

(3) If an employee has been approved for benefit payments and the employee dies, an estate executor or administrator may file ((a)) weekly claims for ((the)) any weeks in which the employee ((died)) was unable to file a weekly claim up to and including the week in which they died, subject to WAC 192-620-010.

(4) The department will terminate the authority given to the authorized representative:

(a) When the employee or authorized representative notifies the department verbally or in writing; or

(b) At the department's discretion.

(5) For the purposes of paid family and medical leave the term employee is used for both employee and authorized representative.

[Statutory Authority: RCW 50A.05.060. WSR 20-11-036, § 192-800-150, filed 5/14/20, effective 6/14/20. Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-800-150, filed 11/19/19, effective 12/20/19.]