

HR Update Regarding Sick Leave and PFML Regulations

July 2, 2020

Several recent developments affect Washington Paid Sick Leave (WPSL) and Paid Family Medical Leave (PFML) benefits. The Department of Labor & Industries issued an administrative policy explaining how the Department will interpret and enforce the WPSL statute. Additionally, the Employment Security Department (ESD) issued rules addressing PFML and new legislation amended the PFML statute. We were already aware of most of these, with one significant change. Below are the key points with some questions and answers as they currently relate to administration of County benefits and policies.

- **Sick Leave** - The biggest change is that an employer cannot require employees to use accrued sick leave, including during an FMLA absence. When an employee reports an absence, if they do not state they are taking sick leave, they should specifically be asked if they want to use sick leave accruals (but not the reason for the sick leave use). If the employee declines to use their sick leave, another accrued leave type must be used, unless they are on PFML.
- **Health Care Benefits** - The rule regarding maintenance of health care benefits is in line with current practices. Employers must maintain health insurance benefits during a PFML leave if the leave overlaps by at least one day with FMLA leave. If required to maintain health care benefits, they must be maintained for the entire duration of the PFML leave, even if employment is terminated for reasons unrelated to the leave (ie: layoff, disciplinary termination). Employees must continue to pay their premium shares during this time.
- **Waiting Period** - No waiting period is required for PFML leave taken due to a qualifying military exigency (there is already no waiting period required for leave taken for the birth or placement of a child; for other reasons there is a seven calendar day waiting period).
- **Added Family Members** - The PFML definition of “child” was amended to include “a child’s spouse” so now PFML may be taken to care for sons/daughters-in-law.

Sick Leave

Q. Can employers require an employee to use their accrued paid sick leave, or deduct paid sick leave from an employee’s balance, without the employee’s authorization?

A. No, it is the employee’s right to choose to use accrued, unused paid sick leave for authorized purposes. An employer may not require an employee to use accrued, unused paid sick leave, including during the time an employee is on FMLA leave. If an employee takes time off for what would otherwise be an authorized purpose under the paid sick leave law, but does not choose to use their accrued, unused paid sick leave for such time, the employer cannot require the use of the employee’s accrued, unused paid sick leave to cover this absence. In such a circumstance, the employee’s absence is not subject to the protections of the state law, and the employee could be subject to discipline for the absence. In addition, the County requires an employee to use vacation or other non-sick leave accruals before going into leave without pay status. See P.C.C. 3.80.020.C.

Q. How does this affect the current policy that requires an employee to exhaust all of their leave before going into unpaid leave, including when on FMLA?

- A. The Administrative Guidelines will be updated to reflect this change in law so that employees do not have to exhaust their sick leave while on FMLA or before going into an unpaid leave status.

Q. How does an employer know if an employee intends on using paid sick leave?

- A. Employees are expected to report when they intend to use paid sick leave, whether they have planned the leave in advance (such as for medical appointments) or when they call in to report an absence according to their Department's call in procedures. If there is any ambiguity as to whether an employee intends to use paid sick leave, the supervisor should specifically ask the employee if they want to use sick leave for the absence and include that confirmation in the time entry comment in Workday. For example, if an employee leaves a message that does not clearly request to use sick leave, a supervisor should ask the employee to confirm that they are requesting use of accrued sick leave with a clearer statement from the employee that the employee was requesting paid sick leave. If the employee declines to use sick leave, they must use other available leave accruals before going into leave without pay status.

Q. What if an employee does not provide reasonable notice of the need to use sick leave?

- A. As explained in the Administrative Guidelines, section 3.68.030, employees must provide reasonable notice of their absence as soon as possible before the scheduled start of their shift unless impracticable. If an employee fails to provide notice as required and the employee later requests use of paid sick leave for an authorized purpose to cover such absence, the employee may be subject to discipline for not providing reasonable notice. However, in this circumstance, the employer may not deny the use of the paid sick leave if it is for an authorized purpose. Please contact HR for guidance.

Q. What happens if there is an erroneous paid sick leave payment?

- A. If there is an erroneous or accidental payment of paid sick leave hours, employers and employees may mutually agree to remedy the situation by deducting the erroneous paid sick leave hour from the employee's other leave accruals and restoring the corresponding number of hours to the employee's sick leave accruals. In accordance with County guidelines, the employee will need to select another accrued leave type to account for the absence. If there are insufficient leave accruals, the erroneous sick leave payment will be deducted from the employee's paycheck. Any paycheck deduction agreements must be in writing and comply with state regulations. Please contact Payroll for assistance if this situation should arise. An erroneous payment of paid sick leave includes situations where an employer misunderstands an employee's notification that they will be absent as a request to use sick leave hours and deducts sick leave hours from the employee's accruals based on that misunderstanding.

Example: An employee wakes up one morning and feels too ill to perform work. They call their supervisor and leave a message stating they are not feeling well and will be staying home that day. The supervisor interprets this message as a request to use sick leave hours. The supervisor enters sick time off in Workday to cover the missed shift which deducts sick leave from the employee's accruals and applies a payment on the employee's next paycheck. After noticing the payment,

the employee realizes that paid sick leave hours were deducted from their leave accruals. The employee asks their employer to restore the paid sick leave hours and decides which leave accruals they want to use instead. If there are no other accruals available, the employee and employer each sign an agreement to deduct the paid sick leave payment from the employee's next paycheck and restore the erroneously used paid sick leave hours to the employee's sick leave accruals.

As indicated, the employee will be required to use an alternative accrued leave to account for the absence before going into unpaid leave status.

Q. If an employee does not have enough accrued paid sick leave hours available to cover an absence, is the entire absence subject to the protections of the law?

- A. No, the entire absence would only be subject to the protections of the law if the employee has enough accrued paid sick leave to cover the whole absence. The state's paid sick leave protections only apply when an employee is using their accrued paid sick leave for an authorized purpose. If an employee does not have enough paid sick leave to cover the entire absence, the employer may apply their own rules to the period of the absence not covered by available paid sick leave.

Example: An employee is regularly scheduled for 8-hour shifts. The employee is sick and will not be able to perform work. The employee decides to use their paid sick leave hours to cover as much of the absence as they can. The employee only has four hours of paid sick leave accrued. The first four hours of the employee's absence are protected by law; the employee may not be disciplined for the first four hours of this absence. However, paid sick leave law does not protect the last four hours of the employee's absence. The employer may apply their attendance or disciplinary policies regarding unprotected absences to the four unprotected hours.

PFML (Administered by ESD)

Q. When does an employer need to provide a continuation of health insurance benefits to an employee who is on PFML?

- A. An employee taking state PFML is entitled to the continuation of health benefits when there is at least one day of concurrent PFML with leave taken under FMLA. When this happens, the employee's health insurance benefits must be maintained as if the employee had continued to work from the date PFML commenced until whichever of the following occurs first: (a) the employee's PFML ends; or (b) the employee returns from leave to any employment. The employee remains responsible for the employee's share of the premium costs.

Q. If an employee is terminated while on PFML, do their health insurance benefits continue?

- A. If health insurance benefits are maintained at the start of a PFML leave, they must be maintained for the entire duration of the PFML leave, even if employment is terminated for reasons unrelated to the leave (ie: layoff, disciplinary termination), subject to the employee paying their premium share.

Q. What are the exceptions to the seven-day waiting period for PFML?

- A. Previously, the statute provided that no waiting period is required for leave taken for the birth or placement of a child. With the new amendments, a waiting period is also not required for leave taken due to a qualifying military exigency. PFML for other reasons requires a seven calendar day waiting period.

Q. How did the PFML definition of “child” change?

- A. The PFML definition of “child” was amended to include a child’s spouse. Now the definition of “child includes a biological, adopted, or foster child, a stepchild, a child's spouse, 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.” This change allows an employee to take PFML to care for sons/daughters-in-law.