



COMPLIANCE SERVICES Alert



Dec. 6, 2018

Employers prepare! Washington state family and medical leave rules require action beginning January 2019

Washington state's new paid leave law provides both family and medical leave benefits for employees beginning in January 2020, but employer withholding obligations come online far earlier, just a month from now.

To comply with the law, nearly all Washington employers must do the following:

- Begin collecting premiums from employee paychecks beginning Jan. 1, 2019, unless the employer will pay those premiums for its employees.
- Unless the employer is offering both the family leave and medical leave portions of the new law's benefits under an employer-maintained plan rather than relying on the state program, remit employer and employee premiums (used to fund benefits under the new law) to the Washington Employment Security Department (ESD) by the end of the month following each calendar quarter, beginning April 30, 2019, for the first quarter of 2019.
- Whether offering the leave benefit under an employer-maintained plan or paying employer and employee premiums over to the state, report employees' hours, wages and other information to the ESD by those same quarterly deadlines.
- Provide notice of the Washington State Paid Family and Medical Leave (WSPFML) program to employees, including employee premium payment withholding information.

Washington has issued an [Employer Toolkit](#) as an employer reference for purposes of complying with WSPFML requirements and is also offering [webinars](#).

Background

Washington's paid family and medical leave benefits

Beginning in 2020, Washington will require nearly all employers in the state to offer eligible employees paid family and medical leave for up to 12 weeks, or longer in some cases, for the following events:

Medical leave:

- The employee's own serious illness or injury.

Family leave:

- The employee's need to bond with a new child due to birth, adoption or foster placement.
- The employee's need to care for a seriously ill or injured relative.
- The employee's need to prepare for a family member's military deployment (pre- and post-deployment), as well as time for childcare issues related to a family member's military deployment.

If an employee faces multiple events in the same year, that employee may be eligible to receive up to 16 weeks of leave and up to 18 weeks if she experiences a serious health condition during pregnancy that results in incapacity.

Benefits are provided through a state-administered program, funded by employer and employee premium payments, but employers have the option to establish an employer-based "voluntary plan" that meets or exceeds the state-provided benefits. The rules for voluntary plans are discussed below and differ slightly from the state-administered program.

Employees eligible for benefits

To be eligible for benefits, an employee must have worked 820 hours during a "qualifying period," which is equivalent to an average of 16 hours a week for a year. Hours worked include hours while working in part-time, seasonal or temporary positions.

The "qualifying period" is defined under the statute as the first four of the last five completed calendar quarters or, if eligibility is not established, the last four completed calendar quarters immediately preceding the application for leave. Specific guidance in applying this definition to determine benefits has not yet been provided. Essentially, this means that to be eligible for benefits, employees must have worked for some Washington employer for at least 12 months and must have worked a minimum of 820 hours during that 12-month period.

An interesting aspect of the new paid leave law is its portability feature. Employees qualify for benefits if they have accumulated sufficient hours in a qualifying period, no matter how many Washington employers they've worked for during that qualifying period. That is, the employee doesn't have to work the minimum number of hours in a qualifying period *for the same employer*.

Lockton comment: If the employer is offering a voluntary plan in lieu of paying premiums to the state program, the employee must work at least 340 of those 820 or more hours *for that employer*

to trigger an obligation on *that employer* to provide the paid leave benefit. If an employee doesn't meet the 340-hour requirement for that employer, but meets the 820-hour requirement (i.e., by working for other employers during that qualifying period), the employee's benefit will be paid by the state, instead of through the current employer's voluntary plan.

The amount of the benefit payment, job restoration and continuation of fringe benefits

The benefit under the new paid family leave program can result in almost total wage replacement. The benefit is generally up to 90 percent of an employee's average weekly wage, with a minimum of \$100 per week and a maximum of \$1,000 per week.

Employers are prohibited from discriminating or retaliating against an employee for requesting or taking WSPFML. Employers with 50 or more employees must restore the employee returning from WSPFML to a same or equivalent job if the employee has met the Family and Medical Leave Act (FMLA) guidelines of having worked for at least 12 months and has worked 1,250 hours in the 12 months prior to the date leave began (about 24 hours per week, on average).

Lockton comment: The coordination between FMLA and WSPFML will potentially require employers to analyze the qualifying period to establish benefits eligibility and the 12 months preceding the leave to establish job restoration rights.

Employers must offer health insurance at the same employee contribution rate during WSPFML.

Lockton comment: Lockton will provide a more comprehensive summary of leave requirements as the state finalizes regulations relating to coverage issues. The state has focused first on premium contribution requirements and reporting and is expected to issue final rules on benefits issues following that.

Covered employers

Almost every Washington employer must participate in the WSPFML program, either by helping fund the program, by reporting information to the state, or both. Almost every Washington employee will be eligible to receive benefits, provided the employee meets the hours requirement in a given qualifying period.

Businesses, regardless of size and status (such as being a nonprofit, charity or faith organizations), are subject to the law. Thus, any public or private business that employs even one person in Washington state is subject to the law, with few exceptions. Those few exceptions include: federally recognized tribes, federal employees, self-employed individuals and some employees subject to collective bargaining agreements (discussed below). Federally recognized tribes and self-employed individuals may opt in to coverage under the law.

Businesses with fewer than 50 employees are exempt from the obligation to fund the state-paid family and medical leave benefit. Special rules applicable to small businesses are described in additional detail below.

If an employee is covered under a collective bargaining agreement (CBA) that was in existence on or before Oct. 19, 2017, no WSPFML requirements, including withholding and reporting, apply until the CBA is reopened, renegotiated or expires. Employers with employees covered under a CBA negotiated, reopened,

renegotiated or which has expired after Oct. 19, 2017, are subject to the program's requirements, including withholding and reporting.

Under proposed rules, business size for early 2019 will be calculated using the headcount from the employer's 2019 first quarter report (January through March). The count is not based on classification of a position as full or part time but is limited to employees considered to work in the state of Washington. As of the third quarter 2019, business size will be determined by averaging the count on an annual basis using quarterly counts.

Lockton comment: Counts are established in a manner consistent with Washington state unemployment compensation rules. It appears that each employer filing unemployment compensation reports will be treated as a separate employer for purposes of WSPFML. However, regulatory guidance has not yet been provided under all provisions of the law.

Out-of-state employers and coverage of their Washington employees

If an employee generally works outside of the state of Washington but works in Washington on a temporary schedule (expected to be less than 820 hours during any 12-month period), an employer may apply for a premium waiver for that employee. The waiver must be signed by both the employer and employee. If the employee actually works 820 hours in the state of Washington, the conditional waiver will be revoked and the full premium will be due both retroactively and prospectively.

Lockton comment: Given employers are not permitted to deduct the premium for prior pay periods, it is not clear yet who will have ultimate liability for paying the employee's premium share if a conditional waiver is revoked.

Employees who perform all work in the state of Washington or only perform some work out of state on a temporary basis are eligible for WSPFML benefits. When an employer cannot establish that work is primarily performed in a specific state, the employee is eligible for WSPFML if:

- The employee's base of operations is in the state of Washington, or
- If there is no base of operations, the place where services are directed is in the state of Washington, or
- The employee lives in the state of Washington.

Lockton comment: Regardless of an employer's overall size, the determination of size for compliance with the WSPFML program appears to be based only on the count of employees deemed to be working in Washington. Thus, many large employers with a small presence in Washington state can take advantage of the small employer rules, including the exemption from paying the employer premium if they have fewer 50 Washington employees.

Premium payment to support the paid family and medical leave benefits

WSPFML is funded through a shared contribution paid by the employer and employee equal to 0.4 percent of the employee's gross wages (pretax wages, minus tips) capped at the Social Security wage base, as updated annually (\$132,900 for 2019).

Except for certain small employers (discussed later), employers must pay approximately 37 percent of the required premium, while employees fund the remaining approximately 63 percent. Employers may either withhold the employee's premium or elect to pay some or all the employee's portion of the premium.

Employers can estimate premiums using the Washington state premium calculator online or can use the calculation as shown in the example below using 0.4 percent as the applicable rate for 2019 (conventional rounding may be used when necessary).

Example:

An employee earns \$2,500 gross pay in a single pay period. First, calculate the employee's total premium due (i.e., $\$2,500 * .004 = \10). Second, calculate the minimum employer and maximum employee shares:

$$\text{Maximum employee share} = \$10 * .6333 = \$6.33$$

$$\text{Minimum employer share} = \$10 * .3667 = \$3.67$$

The employer may withhold from employees' wages the full employee-payable portion or may reduce that amount by increasing employer payments.

Beginning with the first paycheck issued on or after Jan. 1, 2019, employers must deduct the employee's share from each paycheck based on the appropriate premium calculation. Note that this deduction is made for all Washington state employees beginning next month even though they will not be entitled to benefits prior to 2020.

Lockton comment: It's important to emphasize that if any employee premiums are to be withheld, they must be withheld from each paycheck issued on or after Jan. 1. The work period related to the first paycheck issued in 2019 is irrelevant for purposes of withholding the first premium but is important for later periods. An employer may not later withhold premium that should have been withheld during any prior pay period. The liability for that withholding amount will then fall on the employer. This requirement dramatically underscores the need for the employer to ensure its payroll and other administrative systems are on top of the withholding aspect of the new law.

Remitting premiums

Beginning in 2019, employers are responsible for reporting and remitting premiums to fund the state plan to ESD on a quarterly basis, as of the last day of the month following each calendar quarter. An employer

offering a voluntary plan covering all required benefits need not remit premium to ESD. The first report and remittance are due April 30, 2019.

Lockton comment: An employer with a voluntary plan covering only family leave or only medical leave, but not both, will have a premium remitting obligation for the relevant portion of the benefit (family or medical) accessible through the state plan. The benefit being covered by the state plan will require an employer to remit a portion of the employee premium to ESD quarterly.

Quarterly reporting begins April 30, 2019, for first quarter 2019

Whether offering a voluntary plan or relying on the state program to provide benefits, employers are required to report employee information to ESD quarterly, also beginning April 30, for the first quarter of 2019.

Lockton comment: Even employers offering voluntary plans for both types of leave (medical and family) must submit reports to ESD. The state needs to know wage and hour information related to the employee because the employee's eligibility for benefits is cumulative based on hours worked for any employer and not contingent on service for any single employer.

Data regarding employees' hours and wages must be reported for each quarter beginning on or after Jan. 1, 2019. Employers must report employee-level information including:

- SSN or ITIN.
- Last name.
- First name.
- Middle initial.
- Hours worked in the reporting quarter.
- Wages paid in the reporting quarter.

The quarterly report will also include employer information fields such as:

- UBI number.
- Business name.
- Total premiums collected from employees.
- Name of the report preparer.

Lockton comment: Washington is developing a reporting process that is like the current reporting process for unemployment insurance, and reporting periods are aligned. However, filing a separate report will be required for WSPFML. Employers will generally be required to submit reports online through the Washington employer account management system; however, bulk filing and paper reporting options are also expected to be available.

Employers with voluntary plans will also be required to perform quarterly reporting, but the reporting requirements may differ slightly.

Voluntary plans

Rather than participate in (i.e., make contributions to) the state plan, an employer may elect to offer WSPFML benefits through a voluntary plan that pays benefits equal to or greater than state benefits.

Voluntary plans may be used to provide benefits for either family leave, medical leave or for both. Plan benefits must be offered to all Washington employees. In other words, a voluntary plan may not exclude from coverage any employee eligible for WSPFML, including part-time, temporary or seasonal employees.

Lockton comment: It appears likely to be administratively burdensome to offer a voluntary plan limited to either paid family leave or paid medical leave rather than both, as this would require multiple steps in establishing premium, withholding employee contributions, and complying with reporting and funding obligations for each of the voluntary and state plans.

Employee contributions to a voluntary plan must be held in a trust account and must accumulate interest. These trust assets are not considered part of an employer's assets and are required to be held in a separate, specifically identifiable account in a financial institution. If an employer terminates its voluntary plan, funds held in trust must be remitted to the ESD, less plan costs.

Employers must obtain state approval before operating a voluntary plan. Applications can be submitted through an online tool as of September 2018. Employers who have applications approved by Dec. 31, 2018, will not be required to collect state plan premiums with the first paycheck in January 2019.

Employers can access a [voluntary plan guide](#) and may apply for approval using the [online application process](#).

For the first three years of a voluntary plan's existence, reapproval is required every year. After three years, reapproval is required only if the employer makes changes to the plan. All voluntary plan applications will be subject to a \$250 fee, except for mandated renewals.

If a voluntary plan is denied, contributions must be withheld and remitted to the ESD and employees are covered under the state plan.

Lockton comment: Unless an employer already has a voluntary plan in place or establishing one would result in significant savings in benefits costs, the cost to establish a new plan may not be attractive. To establish a new plan an employer would need to draft the plan, engage a third-party administrator, obtain approval from the state, establish a trust, comply with funding requirements and comply with reporting requirements. Potential administrative costs and employee time required to implement such a program may be less attractive than participating in the state program, particularly before the state issues final regulatory guidance.

Employer notice requirements

Employers must post a notice to employees describing the WSPFML program prior to the date benefits are available (Jan. 1, 2020). A model poster is expected to be issued by the state of Washington in late 2019. The state recommends employers notify employees of the withholding that will begin in 2019. A [model paystub insert](#) is available in multiple languages for employers to distribute or post. This notification is optional.

Employers must provide each employee with a statement of an employee's rights under WSPFML within five business days after the employee's seventh consecutive day of absence due to family or medical leave, or within five business days after the employer has received notice that the employee's absence is due to family or medical leave, whichever is later. This notice is required as of January 2020.

Sample notices that have been created thus far may be accessed online in the state's [Employer Toolkit](#).

Small businesses and the new paid family and medical leave law

Businesses with fewer than 50 employees must comply with most aspects of the new law but are not required to pay premiums in support of the program. However, like larger employers, small employers must timely remit the employee portion of the premium and make the required reports to the state.

Lockton comment: The employer's 37 percent share of premiums is not required to be paid at all. Employee premium payments are still required and are capped at approximately 63 percent of .4 percent of covered wages, and the state funds the remainder. Employees are still eligible for the full WSPFML benefit. To obtain grants, however, an employer must make that contribution on a voluntary basis.

State grants to defray leave-related costs

Employers with up to 150 employees can apply for grants from the state to defray some of the costs associated with employees on leave. The employer can apply for a grant when an employee takes leave authorized by the WSPFML. The employer can apply for up to 10 such grants per year, and the grants provide up to \$3,000 for each employee on leave. An employer with fewer than 50 employees, and that is otherwise exempt from making employer contributions, is eligible to receive grants only if the employer elects to voluntarily pay the employer share of premiums to the program.

If you have questions about this new paid leave requirement, please contact your Lockton account team. As additional information is issued by the state of Washington, we will provide updated guidance on administering Washington state's required paid leave benefits.

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