

## **Washington Paid Family and Medical Leave (WPFML) Webinar: Frequently Asked Questions**

Thank you for attending the webinar! The information below captures questions we received, with modifications where needed, and associated answers. Please remember these answers are not legal advice and are based on the best available information as of November 5, 2019. Be sure to work with your Vigilant employment attorney or other counsel as you apply these answers to your specific circumstances.

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## Enforcement

### 1. How will this new law be enforced and what are the penalties for violations?

The Employment Security Department (ESD) is the agency tasked with enforcing WPFML, including receiving and investigating complaints from employees. Penalties can be assessed by ESD for violations such as failing to meet the reporting requirements, pay premiums, post the ESD poster, or provide the ESD-required notice, and for interfering with an employee's rights under WPFML. The law also creates a private right of action, meaning employees can sue employers for WPFML violations, which can result in civil damages including back pay, economic damages, interest, liquidated damages, and attorneys' fees.

## Covered employees and employers

### 2. Does WPFML apply to our employees if our business is physically located outside of Washington but we have employees working in Washington?

It might. WPFML applies to any employer with one Washington employee, but the employee's work must be "localized" in Washington in order for the employee to be covered. An employee's work is considered localized in Washington when it meets the definition in Washington Administrative Code (WAC) 192-510-010. A fair summary of this rule would be that WPFML only applies to employees who, 1) Perform most of their services in Washington, 2) Perform most of their services outside of Washington, but are based in Washington or the place where their services are directed or controlled is in Washington, or 3) Perform most of their services outside of Washington, but where they perform their service is not where the base of operations or place where the services are directed or controlled from is, but the person happens to live in Washington (e.g., your company is based in Oregon, most of the services are performed in Idaho, but the person lives in Washington).

### 3. We're physically located in Washington but have employees in other states; because we're located in Washington does that mean these out-of-state employees are covered by WPFML?

No, as long as these out-of-state employees are not "localized" in Washington. WPFML applies to your employees if the employee's work is "localized" in Washington. An employee's work is considered localized in Washington when it meets the definition in WAC 192-510-010. See the explanation of this WAC above.

### 4. We have 50 plus employees, but only 4 in Washington. Does that matter?

Yes, the amount of employees you have who meet the localization standard impacts a number of different things under WPFML. In a nutshell, assuming only 4 of your employees meet the localization standard, you would be a small employer for purposes of WPFML, which removes the job restoration requirements under WPFML, as well as the obligation to pay the employer premiums.

**5. Is the employer definition for 50+ employees based on employer identification number (EIN), or is there a joint employer standard, e.g., commonly-owned businesses?**

The rules state that each entity with its own Unified Business Identifier (UBI) number will be treated independently regardless of common ownership or control.

**6. Are company owners and officers excluded from WPFML?**

WPFML applies to individuals who are employed by an employer. Generally, this will mean that owners who are not employees would be excluded, but corporate officers would be included if they are employees.

**Handbook and policy changes**

**7. What are the kinds of policies in our handbook we should be reviewing to make changes in light of WPFML?**

Policies that may require review and modification include those that deal with paid leave (e.g., vacation, sick, paid time off), unpaid leave (e.g., removing references to Washington Family Leave Act, employer-provided medical or personal leaves of absences), attendance (e.g., adding WPFML to references regarding protected leaves, attendance bonuses, no-fault point systems), and medical benefits (e.g., when they continue). Additionally, although employers are not legally obligated to have a specific policy addressing WPFML, we recommend doing so and will have a model policy for members.

**8. Should we add a policy to our handbook specifically addressing WPFML?**

Yes, although employers are not legally obligated to have a specific policy addressing WPFML, we recommend doing so and will have a model policy for members.

**9. How will Vigilant help us to update our policies?**

We are always happy to help review our members' policies. However, given time constraints and resources, we are asking members to first begin by reviewing existing policies and make necessary changes (including to the model policy we will provide), and then we will review these changes as we're able for compliance with WPFML.

**Job restoration (job protection)**

**10. When does an employee have a right to job restoration?**

WPFML provides job restoration if the employee, 1) works for an employer with 50 or more employees in Washington, 2) has been employed by the current employer for 12 months or more, and 3) has worked for the current employer at least 1,250 hours in the last 12 months.

**11. If an employee is not eligible for job restoration (e.g., works for an employer with fewer than 50 employees in Washington, and/or the**

**employee doesn't meet the 12 months of service and 1,250 hours worked criteria with the employer), is the employer required to grant WPFML leave and continue employment during the leave?**

Although the statute and rules do not specifically answer this question, they seem to imply that there is a leave entitlement under WPFML for all employers. However, there is no job restoration required unless the employee meets these eligibility requirements: 1) works for an employer with 50 or more employees in Washington, 2) has been employed by the current employer for 12 months or more, and 3) has worked for the current employer at least 1,250 hours in the 12 months immediately before the date the leave will begin. Note, however, that even when WPFML doesn't require job restoration, there could be other leave laws that provide protection to the employee, such as the Americans with Disabilities Act (ADA), so we encourage employers to check with counsel before terminating employment in these circumstances.

**12. Are employees at remote company locations that have fewer than 50 employees still entitled to job-protected leave if the company as a whole has 50 employees or more in Washington?**

Yes, employees who are otherwise eligible for job protection under WPFML (i.e., have been employed by the current employer for 12 or more months and have worked for the current employer for at least 1,250 hours in the 12 months immediately preceding the date leave will begin), will be eligible as long as the employer employs at least 50 employees anywhere in Washington. Note, this is different than the federal Family and Medical Leave Act (FMLA) where the 50 or more employee threshold includes the requirement that the employee works at a worksite with 50 or more employees within 75 miles.

### Leave entitlement

**13. How much leave is available to eligible employees?**

Eligible employees are entitled to a maximum of 12 weeks of family leave or medical leave in a 12-month period, or a combined total of 16 weeks of family leave and medical leave. Employees who are incapacitated due to pregnancy or childbirth may be entitled to an additional 2 weeks of leave, up to a maximum of 18 weeks in a 12-month period.

**14. Are employees entitled to WPFML leave from the employer if they choose not to apply to ESD for partial-pay benefits?**

Unfortunately, the answer to that question isn't clear from the law. ESD is taking the position that employees are only covered by the law and entitled to the leave if they are approved for paid leave by ESD. Since ESD is charged with enforcing WPFML, its opinion is material, but its statements are unofficial and subject to change. We recommend checking with employment counsel before denying any requested leave.

**15. Leave appears to be available when an employee works 820 hours; how will the employer know if an employee has satisfied the hours requirement with another employer?**

ESD is responsible for determining eligibility for WPFML, and will have access to the employee's work hours for all employers to determine if the employee has worked 820 hours for any employer during the qualifying period. ESD intends to notify the employer whether the employee is approved for WPFML paid leave benefits, so the employee's eligibility will be clear at that time.

**16. If an employee has exhausted their WPFML entitlement with a previous employer, how will the employer know that, and when will the employer receive that information?**

ESD will deny the employee's application for WPFML benefits and will notify the employer of the denial. Currently, there's no timeframe in place as to when ESD will provide that notice. Employers are also free to ask their employees about prior use of WPFML when the employee provides notice of the need for leave.

**17. Will employees taking leave time in 2019 be entitled to extra weeks of leave in 2020 under WPFML for the same event?**

Yes, assuming they meet the requirements for WPFML in 2020. ESD has stated that any leave time taken in 2019 will not be considered in determining an employee's eligibility for paid leave benefits in 2020.

**18. How does WPFML work for an employee who has intermittent leave?**

There's nothing in the statute or rules that specifically speaks to intermittent leave use. Employees approved by ESD for WPFML may submit a claim for any week in which they take off at least eight consecutive work hours.

**19. Are employees allowed to break up their family leave entitlement for baby bonding into multiple chunks of time off of their choosing, or are they required to take all of their baby bonding leave at one time (as FMLA requires)?**

There's nothing in the statute or rules that speaks to this issue, so it's likely to depend somewhat on the specific circumstances of the leave. Generally, it appears employees are allowed to break up their family leave time. We recommend checking with employment counsel before denying an employee's request to take bonding leave in separate blocks of time.

**20. How does the waiting period work?**

The waiting period is one week, defined as the Sunday through Saturday during which the employee takes at least 8 consecutive hours of leave that qualifies for WPFML. No WPFML partial-pay benefits are paid during the waiting period, but it does count toward the employee's maximum weeks of WPFML paid leave entitlement. Only one waiting period is required in a claim

year. The employee can choose to use any paid time off (vacation, paid sick leave, PTO, etc.) to cover time off during the waiting period without affecting WPFML partial-pay benefits. There is no waiting period for WPFML taken for the birth or placement of a child.

**21. If an employee calls in sick one day, would they qualify for WPFML?**

It's possible but unlikely. An employee who is out sick only one day would still have to meet the definition of a "serious health condition" to qualify for WPFML, and would still be subject to the one-week waiting period before receiving any partial-pay benefits.

**22. What happens to WPFML leave eligibility if the employee fails to give us the proper amount of notice? ESD states that benefits will be denied for the same amount of time that the employee failed to give proper notice, but does this mean that the employer can also deny, reduce, or delay the employee's time off?**

Nothing in the WPFML rules actually speaks to employers granting or denying leave time to employees. However, employers are prohibited from interfering with an employee's attempt to use WPFML, and large employers are required to restore an eligible employee to their same job upon return from approved paid leave. We recommend checking with employment counsel before denying time off to an employee under these circumstances.

**23. For purposes of family leave, what is the definition of "sibling"; are step, half, and/or in-law included?**

Although not defined in the law, ESD has defined "sibling" as any individual with whom the employee shares at least one parent, so step and half siblings would be "family members" for WPFML purposes. An employee's sibling-in-law is not included.

**24. Can employees take family leave to care for a grandparent-in-law (spouse's grandparent) with a serious health condition?**

Although not specifically defined in the law, ESD is taking the position that grandparents-in-law are included in the definition of "family member" for WPFML purposes.

**25. For purposes of family leave to bond with a new child, what qualifies as "placement" of the child for adoption or foster care?**

There isn't a specific definition under WPFML, but ESD is using a broad definition of "placement" when an employee applies for WPFML benefits. ESD has stated that completion of a formal legal process, or finalizing of an adoption, will not be required for approval of paid leave benefits. Remember, ESD will be deciding whether or not to approve the employee's request for paid leave benefits, not the employer.

## Interaction with other laws

### **26. Is Washington's Family Leave Act (WFLA) going away, and if so what are the implications of that change?**

Yes, it's going away as of December 31, 2019, and being replaced by WPFML. Employer policies referencing WFLA will need to be revised prior to January 1, 2020.

### **27. How does WPFML interface with FMLA?**

Employers should ensure compliance with both laws, and run them concurrently when the situation allows. We recommend tracking each type of leave separately. See other FAQs in this section for more details.

### **28. Will employees who are covered by WPFML also be covered by FMLA?**

Not always. If an employee is covered by FMLA, the employee is also covered by WPFML. However, WPFML covers more employees, covers them earlier in their employment, and covers care for a broader group of family members, so an employee may be covered by WPFML but not FMLA.

### **29. Is WPFML taken concurrently with FMLA, or does it add additional time to what employees can take?**

That will likely depend on the timing and circumstances of the leaves. The law states that employers can require WPFML and FMLA to be taken concurrently; however, ESD has stated that it will not take any prior FMLA leave (or other types of leave) into consideration when determining eligibility for WPFML. If an employee is eligible for both types of leave and takes approved WPFML, you can designate FMLA leave to run concurrently. However, based on ESD's stated position, if an employee chooses to take FMLA leave without applying for WPFML, the FMLA leave time will not be counted against the employee's entitlement to WPFML. In that case, the employee could take additional time. When employees request FMLA, you must provide them with the ESD-required notice, and you can encourage them to apply for WPFML immediately so they can receive those paid leave benefits while on FMLA (which would otherwise be unpaid). Also, we recommend having a written WPFML policy stating that FMLA and WPFML will run concurrently to the extent allowed by law.

### **30. Can employers require FMLA and WPFML to run concurrently?**

See the answer to question 29.

### **31. What happens when there's nonconcurrent use of WPFML and FMLA?**

Depending on the timing and circumstances of the leaves, the employee may be entitled to take more than 12 weeks of leave. If that's the case, some of the employee's leave time may be unpaid and/or without benefits continuation, depending on the specific circumstances.

**32. How does the WPFML “claim year” interact with the 12 month FMLA leave period, as we’ve defined it by policy (e.g., calendar year, rolling 12 month period, 12 months from the time FMLA is taken, etc.)?**

The WPFML claim year is defined as a 52-week period starting from the date of birth or placement, or the date the employee files a complete and timely application related to some other qualifying event. With this definition, the WPFML claim year will essentially function the same as the 12-month-look-forward FMLA period, starting from the first day of leave taken. We recommend determining the availability of leave under WPFML and FMLA separately, regardless of which definition you’re using for FMLA.

**33. What if an employee takes ADA leave, or some other type of leave that would qualify for WPFML but isn’t eligible for FMLA? How will the employer get “credit” for already having granted that leave time so that the employee is no longer eligible for the full WPFML entitlement?**

According to ESD, any leave time the employee has already taken under other leave laws or legal rights will not be considered when approving the employee’s application for WPFML, even if the previous leave was taken for the same reason. If that’s the case, the employee may be entitled to WPFML leave regardless of any previous leave taken.

**34. How does WPFML interact with WA pregnancy disability leave?**

Washington’s pregnancy disability leave entitlement is provided for under the Washington Law Against Discrimination (WLAD), which is not affected by WPFML. Therefore, an employee disabled due to pregnancy or childbirth is still entitled to leave under Washington’s pregnancy disability leave law for her entire period of disability. FMLA runs concurrently with the disability period to the extent it applies and the employee is qualified. The employee would also qualify for medical leave under WPFML during the disability period if she chooses to apply, and may still qualify for family leave to bond with her baby once she is no longer disabled, depending on the specific circumstances.

**Medical benefits**

**35. Does WPFML require continuation of an employee’s health insurance benefits while on leave?**

Sometimes. If the employee is also on FMLA, or if the employee meets the eligibility requirements of FMLA (i.e. 12 months and 1,250 hours), then health insurance benefits must be continued throughout the WPFML.

**36. If benefits continue, are we able to require the employee to pay us for their portion of the premiums?**

Yes, employees are still responsible to pay their share of any health insurance premiums while on WPFML.



### Supplemental benefit payments (SBP)

**37. Can an employer allow an employee to use supplemental benefit payments that result in the employee receiving more than 100% of their usual pay?**

Yes, if the employer chooses to do so.

**38. How are supplemental benefit payments designated by the employer? Can an employer designate supplemental benefit payments for certain groups of employees only, or only certain types of leave?**

There is no guidance or information yet on how these designations will be made by the employer. What is clear, though, is that it will be important for employees to correctly exclude any supplemental benefit payments in their weekly claim to ESD. This means employers will want to be clear as to what company-provided pay benefits are designated as supplemental benefit payments, and provide this information to employees.

### Paid leave (sick, vacation, PTO, holiday) and WPFML

**39. How does WPFML work in the context of Washington Paid Sick Leave (WPSL)?**

Employees have the right to use paid sick leave before, during, or after WPFML if the reason for the time off qualifies for use of paid sick leave. Employees cannot be *required* to use their paid sick leave, nor can the employer prevent them from using it; use of paid sick leave is purely the employee's choice. Employers have the right to decide whether to designate the use of paid sick leave during WPFML as a supplemental benefit payment. If the employer does so, the employee receives the paid sick leave on top of WPFML partial-pay benefits. If paid sick leave is not designated as a supplemental benefit payment, the employee can still take it but it will reduce the partial-pay benefits the employee receives from ESD.

**40. Can we require an employee to exhaust the paid leave our company provides (e.g., paid sick leave, vacation, PTO, etc.) prior to getting WPFML?**

No, you can't require employees to use any paid leave before, in place of, or concurrently with WPFML.

**41. Can an employee use the paid leave our company provides (e.g., paid sick leave, vacation, PTO, etc.) during the WPFML waiting period?**

Yes, employees must be allowed to use their paid leave during the WPFML waiting period if the reason for their leave is a qualified reason for use of the leave. For example, if an employee is taking medical leave, the employee must be allowed to use paid sick leave. The employer may not be required to allow the use of vacation time, however, if your policy normally wouldn't allow the employee to use vacation time for the employee's own illness or injury. Use of paid leave during the waiting period will not affect the employee's eligibility for WPFML paid leave benefits.

**42. Can an employer require an employee to use the paid leave our company provides (e.g., paid sick leave, vacation, PTO etc.) *during* WPFML?**

No, you can't require employees to use any paid leave before, in place of, or concurrently with WPFML.

**43. Is an employee allowed to use the paid leave our company provides (e.g., paid sick leave, vacation, PTO, etc.) *while on* WPFML? And if so, can we control how much they're using so they're not getting more pay than they would otherwise get if they worked?**

Yes, the employee can choose to use their paid leave during WPFML provided the reason for their leave is a qualifying reason for use of that form of paid leave under your policy. If you choose to designate the use of paid leave as a supplemental benefit payment, then you can control how much leave time the employee will be allowed to use to supplement ESD benefits (e.g., up to 3 hours of paid leave per day, no more than 2 days of paid leave per week). If you choose not to designate the use of paid leave as a supplemental benefit payment, or if the employee chooses not to take advantage of the supplemental benefit payment designation, the employee may still have a right to take the paid leave but then their WPFML partial-pay benefits from ESD will be reduced.

**44. Doesn't FMLA allow us to *mandate* use of paid leave (e.g., paid sick leave, vacation, PTO, etc.) while an employee is on FMLA leave? Since federal law trumps state law, are we still allowed to mandate use of paid leave when FMLA and WPFML run concurrently?**

FMLA regulations allow employers to mandate the use of paid leave only if the FMLA leave would otherwise be unpaid. If FMLA and WPFML are running concurrently, the employee will receive partial-pay benefits from ESD, the FMLA leave is no longer unpaid, and neither federal nor state law would allow the employer to mandate the use of paid leave.

**45. If we permit employees to use company-provided paid leave while on WPFML, does that mean they would be able to get this paid leave and whatever they're getting under WPFML from ESD?**

Yes, the paid leave you provide will be in addition to the WPFML partial-pay benefits from ESD if you designate that paid leave as a supplemental benefit payment. Otherwise, use of the paid leave will reduce the partial-pay benefits the employee receives from ESD.

**46. Cashout of PTO/PSL at the end of the leave year: if an employee is out and receiving WPFML benefits from the State, what impact, if any, will this have on the WPFML benefits? Would the employer have to code it as "supplemental"?**

Any cash out of employer-sponsored paid leave while an employee is receiving WPFML partial-pay benefits is treated the same as an employee's use of the paid leave. It will reduce the amount of partial-pay benefits the

employee receives from ESD unless you designate it as a supplemental benefit payment. (It's your choice as the employer whether to designate the paid leave cash out as a supplemental benefit payment.)

**47. Do we have to pay for a holiday that falls during an employee's use of WPFML?**

No, unless your company policy says you will. If the employee is paid for the holiday, the pay will reduce the employee's WPFML partial-pay benefits for that week unless you designate the holiday pay as a supplemental benefit payment. (It's your choice as the employer whether to designate the holiday pay as a supplemental benefit payment.)

**48. Does paid sick leave and vacation leave continue to accrue while an employee is out on WPFML? Right now when our employees are out on paid sick leave or vacation the leave continues to accrue, but not when employees are on unpaid leave.**

Whether or not paid leave continues to accrue during WPFML is a matter of company policy. Continued accrual is not required by either WPFML or WPSL. We recommend treating employees on WPFML consistently with how you would treat employees on FMLA or other similar leaves of absence.

**Paid leave (STD, pay continuation) and WPFML**

**49. How will this law integrate with company-sponsored short term disability (STD) benefits? What about fully-insured STD benefits?**

STD benefits will not affect the employee's entitlement to WPFML paid leave benefits, and will not affect the amount of benefits the employee receives. The impact of WPFML benefits on an employee's entitlement to the company-sponsored STD benefits depends on the terms of the specific plan.

**50. If we have a company-provided pay continuation policy, or offer paid parental leave, can an employee receive payment under the policy and WPFML at the same time?**

Yes, but you can't require the employee to take WPFML concurrently with the paid leave provided under your policy. This may incentivize employees to "stack" the paid leave time provided under your policy on top of the WPFML entitlement, resulting in the employee taking a longer leave of absence. You may want to consider reducing the amount of paid leave or pay continuation the company is offering once WPFML takes effect.

**51. If we offer STD/LTD how do we go about getting it state approved to be exempt from WPFML?**

ESD must approve your STD/LTD plan as a voluntary plan in order for you to use it in place of WPFML. This is an extremely detailed process and is something most organizations who were planning on using their STD/LTD in place of WPFML as a voluntary plan did in 2018 and through 2019. Assuming this hasn't happened in your case, reach out to your STD/LTD

provider to determine whether your plan is actually a “voluntary plan” under WPFML, and if not, what your options are to get it set up as such.

### Documentation and certifications

#### **52. What proof do employees need to provide to use WPFML?**

The statute and rules require employees to provide documentation and/or certification to ESD when applying for WPFML. What must be included in this documentation and/or certification is different depending on the type of leave requested. Importantly, however, whether or not the employee has provided sufficient documentation or certification is determined by ESD, not the employer. Before or during this process, if you’re covered by FMLA and the employee is eligible, be sure you’re complying with FMLA’s requirements and getting the documentation you’re permitted to collect.

#### **53. What proof do employees need to provide to use family leave benefits under WPFML if the family member lives outside of the United States?**

Ultimately, it will be up to ESD to decide if the documentation or certification provided by the employee is sufficient. There’s nothing in the statute or rules that specifically addresses WPFML for family members residing out of state or outside of the U.S. However, given ESD’s general approach with this program, it seems unlikely ESD would reject an application because a covered family member lives out of state or outside the country as long as the employee provides all the necessary information. Additionally, the definition of health care provider in the rules, like FMLA, includes out-of-country practitioners.

### Employment Security Department (ESD) process

#### **54. What will ESD’s WPFML process look like and what are the steps an employee needs to take in order to get WPFML?**

Beginning January 1, 2020, employees will be able to submit an initial application for WPFML online, over the phone, and in any other manner authorized by ESD. In the initial application, the employee must provide sufficient information for ESD to determine eligibility, including the type of WPFML requested (medical, family, birth or placement, or military), and certification and/or documentation to validate the event. The employer will be notified by ESD that the employee has made an initial application for benefits and given an opportunity to respond directly to ESD.

ESD will make a decision as to whether the employee receives WPFML. ESD has said it intends to notify employers of its decision, but this isn’t mandated in the statute or rules. If ESD approves the employee’s initial application for WPFML, the employee must file a weekly claim with ESD at the end of each week in order to receive pay benefits from ESD. The rules allow employees to submit claims up to four weeks later and up to four weeks of claims at a time. In the weekly claim, the employee must provide the hours the employee worked, the supplemental benefits provided by the employer,

the non-supplemental benefits provided by the employer, the other benefits the employee received such as unemployment insurance or workers' compensation, and whether any changes impacting eligibility took place.

ESD will make a decision as to whether the employee receives WPFML based on the weekly claim(s) the employee submitted.

**55. How are employers involved in the process of WPFML claims?**

Employers must provide employees with the ESD-required notice by the later of, 1) the fifth business day after the employee's seventh consecutive missed day of work due to family or medical leave, or 2) the fifth business day after the employer becomes aware the employee's absence is due to family or medical leave. Once an employee has submitted an initial application to ESD for WPFML, the employer will have the opportunity to respond to ESD regarding the employee's initial application.

ESD will make a decision as to whether the employee receives WPFML. ESD has said it intends to notify employers of its decision, but this isn't mandated in the statute or rules. After the decision about an employee's WPFML initial application is made by ESD, ESD may reach back out to the employer for additional information (e.g., as it makes a decision about an employee's weekly claim), but that would be at ESD's discretion, the statute and rules don't mandate any other information sharing with employers by ESD.

**56. Do employers have to provide employees notice of their rights under WPFML, and if so, where do we get this and when does the notice have to be given?**

Yes, employers are required to, 1) post the ESD poster in the place the employer displays other similar notices (e.g., in the break room with other employment posters), and 2) provide the ESD-required notice by the later of, a) the fifth business day after the employee's seventh consecutive missed day of work due to family or medical leave, or b) the fifth business day after the employer becomes aware the employee's absence is due to family or medical leave.

**57. Do employees have to provide employers notice of their intent to take WPFML, and if so, what are the consequences if they don't do so?**

Yes, there are employee notice requirements and consequences for non-compliance. If the need for leave is foreseeable, the employee must provide the employer at least 30 days' written notice before WPFML is to begin. When the need for leave is not foreseeable, the employee must provide the employer written notice as soon as is practicable. For military exigency leave, employees must provide employers written notice as soon as practicable. If the employee is not able to provide written notice personally, ESD rules

permit another responsible party (e.g., the employee's spouse, neighbor, or coworker) to provide written notice on the employee's behalf.

The written notice itself, 1) need only be given once by the employee, regardless of whether WPFML is being taken continuously or intermittently; although the rules do say employees must inform employers as soon as is practicable if dates of scheduled leave change or were initially unknown, 2) can be given in hard-copy or electronically, and 3) must include the anticipated timing and duration of the leave.

If ESD determines the employee has failed to provide proper notice to the employer, the employee's benefits will be denied for a period of time equal to the number of days the notice was not provided.

**58. How will we know if an employee is eligible for WPFML if they've had a past employer or currently have multiple employers?**

The statute and rules require ESD, not the employer, to determine whether the employee is eligible for WPFML. There's nothing in the statute or rules that indicates employers will have access to information about the employee's prior or concurrent employment, so there's no reason to believe employers would be able to know whether or not employees are eligible. Employers can, however, get information about other employment, and whether or not initial applications or weekly claims have been approved by ESD and for what amounts, directly from their employees.

**59. How is ESD going to get the information from the employer about prior FMLA use?**

Nothing in the statute or rules requires ESD to collect information about prior FMLA leave. ESD doesn't intend to consider any type of prior leave use in determining eligibility for WPFML, except for prior WPFML.

**60. Will ESD tell employers when an employee's claim for WPFML benefits has been approved?**

There's nothing in the statute or rules that says when or if ESD will notify the employer of its decision regarding an initial application or weekly claim for WPFML, although ESD has indicated a number of times it intends to notify employers about its decision regarding the initial application. In the absence of information sharing from ESD, employers can require employees to provide additional information directly about their weekly claims and paid benefits.

**61. How and when will the employer be notified of the amount of the employees' WPFML pay benefits?**

There's nothing in the statute or rules that says when or if ESD will notify the employer of its decision regarding WPFML pay benefits or the amount of an employee's WPFML pay benefits. ESD has indicated a number of times that it intends to notify employers in some form of its decision regarding an

employee's initial application, but it's not clear what information this notice will contain. In the absence of information sharing from ESD, employers can require employees to provide additional information directly about their weekly claims and paid benefits.

**62. Can employees start the application process before January 1<sup>st</sup>?**

No. The statute and ESD's statements all indicate employees will be able to apply for WPFML starting January 1, 2020.

**63. Are there resources available that I can direct employees to so they can understand what's available to them and how to make use of WPFML?**

Yes, ESD is required by rule to post on its website (<https://paidleave.wa.gov/>) information to assist and guide employees. ESD will provide a copy of this information at no charge when requested, send an electronic link and ESD's phone number (833-717-2273) to employees who file an initial application for WPFML, and are available to assist employees and employers via email ([paidleave@esd.wa.gov](mailto:paidleave@esd.wa.gov)) and phone (833-717-2273).

**64. If our company uses a third party to handle our quarterly WPFML reporting and premium remission, and/or the internal person who handles this (e.g., payroll) isn't part of the Human Resources (HR) team that will handle day-to-day WPFML issues, should we have a process in place to make sure any notice indicating an employee has filed an initial application or weekly claim for WPFML received by the third-party administrator or the internal person makes its way to HR?**

Yes, employers should make sure any entity or individual who could receive notice from ESD about an employee's initial application for WPFML sends that notice to the group who will be responding to these notices. Additionally, if an employer wants someone to represent it and conduct business with ESD on its behalf, it can designate such a representative with ESD as the employer's agent.

**65. How can we make sure an employee who's receiving paid leave (sick, vacation, holiday, PTO, etc.) or pay continuation (company-provided short-term disability payments, fully-insured short-term disability payments, etc.) benefits from the company doesn't get overpaid under WPFML?**

It will be almost impossible to ensure every employee who's eligible for a company-provided pay benefit and accesses WPFML receives only what they would have earned had they worked. Employers can attempt to control the amount of pay an employee receives under a company-provided pay benefit by designating the pay benefit as a SBP. See the section above for more information on SBPs.

**Collective bargaining agreements and unions**

**66. Does this law have a carve-out for employee's covered by a collective bargaining agreement?**

Yes, employees who are parties to a collective bargaining agreement (CBA) that was in effect on October 19, 2017, are not covered by WPFML until the CBA is reopened, renegotiated, or expires.

**67. If we have a CBA that existed prior to October 19, 2017, what happens when it's reopened, renegotiated, or expired?**

Employers must immediately inform ESD when the CBA that was in effect on October 19, 2017, is reopened, renegotiated, or expires. Once this has taken place, it's unclear exactly when reporting and remitting premiums to ESD will need to happen, and when these employees will be eligible for WPFML. ESD has taken the position at this moment that only CBAs that have been renegotiated in their *entirety* meet the definition of reopened, renegotiated, or expired, which presumably means it would not be until the contract has been completely renegotiated that reporting and remitting premiums to ESD would take place, and when these employees will be eligible for WPFML. Nevertheless, we encourage everyone in this situation to speak with legal counsel and ESD for guidance.

**Other federal or state provided benefits**

**68. Can an employee get unemployment insurance, workers' compensation insurance, or some other government provided benefit in addition to WPFML?**

No, the law says any week an employee is eligible to receive state or federal unemployment insurance, industrial insurance (workers' compensation), or disability insurance, the employee is disqualified from receiving WPFML benefits.

**Employer preparation**

**69. What are the topics our organization needs to discuss in order to be ready for WPFML and who are the stakeholders that should be involved in those discussions?**

Here are four broad topics for discussion and possible stakeholders who could be involved:

- i. Topic: Making sure the employer continues to properly report the required information and remit premiums to ESD. Stakeholders: Accounting, tax, and payroll team – anyone that ensures compliance with tax related reporting and remitting.
- ii. Topic: Deciding whether to designate each employer-provided pay benefit as supplemental benefit payments or not (e.g., paid sick leave, paid vacation, PTO, short-term disability benefits, long-term disability benefits, pay continuation policies, etc.). Stakeholders: Accounting, senior managers, and HR. Designating an employer-provided pay benefit as supplemental or not supplemental will impact company finances and reporting to ESD, and employee leave and paid leave benefits.



- iii. Topic: Reviewing existing policies for needed changes. Stakeholders: Senior managers and HR.
- iv. Topic: Adding processes to address WPFML. Stakeholders: Senior managers and HR.

**70. Should we track WPFML use, and if so, how should we attempt to do this?**

Yes, employers have potential liability for interfering with an employee's use of WPFML, so tracking all aspects of this leave would be in the employer's best interest. Here's one way to do this. First, ensure you're providing proper notice to employees and retaining any notice they provide you. Second, have a form, policy, or process in place for you to make it clear to the employee how you've classified each employer-provided pay benefit (i.e., supplemental or not), so when they file initial applications or weekly claims they correctly input this information. Third, require employees to tell you that they've made an initial application or weekly claim for WPFML and the contents of those applications or claims. Fourth, use a tracking chart, spreadsheet, or other method to track the employee's time off from work/leave of absence as WPFML.

**71. How does this affect an employer's disciplinary processes?**

Like any other form of legally-protected leave, employers cannot discipline employees for proper use of WPFML, and may not interfere with employees' use of leave or retaliate against them in any way.