
ENGROSSED SUBSTITUTE SENATE BILL 5097

State of Washington

67th Legislature

2021 Regular Session

By Senate Labor, Commerce & Tribal Affairs (originally sponsored by Senators Robinson, Conway, Darneille, Das, Hasegawa, Hunt, Keiser, Llias, Lovelett, Nguyen, Saldaña, Stanford, Van De Wege, and Wilson, C.)

READ FIRST TIME 02/11/21.

1 AN ACT Relating to expanding coverage of the paid family and
2 medical leave program; amending RCW 50A.050.010; and creating new
3 sections.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

5 NEW SECTION. **Sec. 1.** The legislature intends to prevent
6 impacts, based on this act, to the family and medical leave insurance
7 account or the application of a solvency surcharge.

8 **Sec. 2.** RCW 50A.05.010 and 2020 c 125 s 1 are each amended to
9 read as follows:

10 Unless the context clearly requires otherwise, the definitions in
11 this section apply throughout this title.

12 (1) (a) "Casual labor" means work that:

13 (i) Is performed infrequently and irregularly; and

14 (ii) If performed for an employer, does not promote or advance
15 the employer's customary trade or business.

16 (b) For purposes of casual labor:

17 (i) "Infrequently" means work performed twelve or fewer times per
18 calendar quarter; and

19 (ii) "Irregularly" means work performed not on a consistent
20 cadence.

1 (2) "Child" includes a biological, adopted, or foster child, a
2 stepchild, a child's spouse, or a child to whom the employee stands
3 in loco parentis, is a legal guardian, or is a de facto parent,
4 regardless of age or dependency status.

5 (3) "Commissioner" means the commissioner of the department or
6 the commissioner's designee.

7 (4) "Department" means the employment security department.

8 (5) (a) "Employee" means an individual who is in the employment of
9 an employer.

10 (b) "Employee" does not include employees of the United States of
11 America.

12 (6) "Employee's average weekly wage" means the quotient derived
13 by dividing the employee's total wages during the two quarters of the
14 employee's qualifying period in which total wages were highest by
15 twenty-six. If the result is not a multiple of one dollar, the
16 department must round the result to the next lower multiple of one
17 dollar.

18 (7) (a) "Employer" means: (i) Any individual or type of
19 organization, including any partnership, association, trust, estate,
20 joint stock company, insurance company, limited liability company, or
21 corporation, whether domestic or foreign, or the receiver, trustee in
22 bankruptcy, trustee, or the legal representative of a deceased
23 person, having any person in employment or, having become an
24 employer, has not ceased to be an employer as provided in this title;
25 (ii) the state, state institutions, and state agencies; and (iii) any
26 unit of local government including, but not limited to, a county,
27 city, town, municipal corporation, quasi-municipal corporation, or
28 political subdivision.

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

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

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

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

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

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

8 (b) "Employment" does not include:

9 (i) Self-employed individuals;

10 (ii) Casual labor;

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

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

16 (II) Such service is either outside the usual course of business
17 for which such service is performed, or that such service is
18 performed outside of all the places of business of the enterprises
19 for which such service is performed; and

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

23 (B) As a separate alternative:

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

27 (II) Such service is either outside the usual course of business
28 for which such service is performed, or that such service is
29 performed outside of all the places of business of the enterprises
30 for which such service is performed, or the individual is
31 responsible, both under the contract and in fact, for the costs of
32 the principal place of business from which the service is performed;
33 and

34 (III) Such individual is customarily engaged in an independently
35 established trade, occupation, profession, or business, of the same
36 nature as that involved in the contract of service, or such
37 individual has a principal place of business for the work the
38 individual is conducting that is eligible for a business deduction
39 for federal income tax purposes; and

1 (IV) On the effective date of the contract of service, such
2 individual is responsible for filing at the next applicable filing
3 period, both under the contract of service and in fact, a schedule of
4 expenses with the internal revenue service for the type of business
5 the individual is conducting; and

6 (V) On the effective date of the contract of service, or within a
7 reasonable period after the effective date of the contract, such
8 individual has established an account with the department of revenue,
9 and other state agencies as required by the particular case, for the
10 business the individual is conducting for the payment of all state
11 taxes normally paid by employers and businesses and has registered
12 for and received a unified business identifier number from the state
13 of Washington; and

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

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

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

23 (B) The service is either outside the usual course of business
24 for which the service is performed, or the service is performed
25 outside of all the places of business of the enterprise for which the
26 service is performed, or the individual is responsible, both under
27 the contract and in fact, for the costs of the principal place of
28 business from which the service is performed;

29 (C) The individual is customarily engaged in an independently
30 established trade, occupation, profession, or business, of the same
31 nature as that involved in the contract of service, or the individual
32 has a principal place of business for the business the individual is
33 conducting that is eligible for a business deduction for federal
34 income tax purposes, other than that furnished by the employer for
35 which the business has contracted to furnish services;

36 (D) On the effective date of the contract of service, the
37 individual is responsible for filing at the next applicable filing
38 period, both under the contract of service and in fact, a schedule of
39 expenses with the internal revenue service for the type of business
40 the individual is conducting;

1 (E) On the effective date of the contract of service, or within a
2 reasonable period after the effective date of the contract, the
3 individual has an active and valid certificate of registration with
4 the department of revenue, and an active and valid account with any
5 other state agencies as required by the particular case, for the
6 business the individual is conducting for the payment of all state
7 taxes normally paid by employers and businesses and has registered
8 for and received a unified business identifier number from the state
9 of Washington;

10 (F) On the effective date of the contract of service, the
11 individual is maintaining a separate set of books or records that
12 reflect all items of income and expenses of the business that the
13 individual is conducting; and

14 (G) On the effective date of the contract of service, the
15 individual has a valid contractor registration pursuant to chapter
16 18.27 RCW or an electrical contractor license pursuant to chapter
17 19.28 RCW.

18 (9) "Employment benefits" means all benefits provided or made
19 available to employees by an employer, including group life
20 insurance, health insurance, disability insurance, sick leave, annual
21 leave, educational benefits, and pensions.

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

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

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

30 (c) Because of any qualifying exigency as permitted under the
31 federal family and medical leave act, 29 U.S.C. Sec. 2612(a)(1)(E)
32 and 29 C.F.R. Sec. 825.126(b)(1) through (9), as they existed on
33 October 19, 2017, for family members as defined in subsection
34 (~~((10))~~) (11) of this section.

35 (11) "Family member" means a child, grandchild, grandparent,
36 parent, sibling, or spouse of an employee, and also includes any
37 individual who regularly resides in the employee's home or where the
38 relationship creates an expectation that the employee care for the
39 person, and that individual depends on the employee for care.

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

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

2 (14) "Health care provider" means: (a) A person licensed as a
3 physician under chapter 18.71 RCW or an osteopathic physician and
4 surgeon under chapter 18.57 RCW; (b) a person licensed as an advanced
5 registered nurse practitioner under chapter 18.79 RCW; or (c) any
6 other person determined by the commissioner to be capable of
7 providing health care services.

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

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

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

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

22 (19) "Premium" or "premiums" means the payments required by RCW
23 50A.10.030 and paid to the department for deposit in the family and
24 medical leave insurance account under RCW 50A.05.070.

25 (20) "Qualifying period" means the first four of the last five
26 completed calendar quarters or, if eligibility is not established,
27 the last four completed calendar quarters immediately preceding the
28 application for leave.

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

32 (b) Previously accrued compensation, other than severance pay or
33 payments received pursuant to plant closure agreements, when assigned
34 to a specific period of time by virtue of a collective bargaining
35 agreement, individual employment contract, customary trade practice,
36 or request of the individual compensated, is considered remuneration
37 for the period to which it is assigned. Assignment clearly occurs
38 when the compensation serves to make the individual eligible for all
39 regular fringe benefits for the period to which the compensation is
40 assigned.

1 (c) Remuneration also includes settlements or other proceeds
2 received by an individual as a result of a negotiated settlement for
3 termination of an individual written employment contract prior to its
4 expiration date. The proceeds are deemed assigned in the same
5 intervals and in the same amount for each interval as compensation
6 was allocated under the contract.

7 (d) Remuneration does not include:

8 (i) The payment of tips;

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

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

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

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

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

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

26 (I) Treatment two or more times, within thirty days of the first
27 day of incapacity, unless extenuating circumstances exist, by a
28 health care provider, by a nurse or physician's assistant under
29 direct supervision of a health care provider, or by a provider of
30 health care services, such as a physical therapist, under orders of,
31 or on referral by, a health care provider; or

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

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

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

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

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

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

8 (D) A period of incapacity which is permanent or long term due to
9 a condition for which treatment may not be effective. The employee or
10 family member must be under the continuing supervision of, but need
11 not be receiving active treatment by, a health care provider,
12 including Alzheimer's, a severe stroke, or the terminal stages of a
13 disease; or

14 (E) Any period of absence to receive multiple treatments,
15 including any period of recovery from the treatments, by a health
16 care provider or by a provider of health care services under orders
17 of, or on referral by, a health care provider, either for: (I)
18 Restorative surgery after an accident or other injury; or (II) a
19 condition that would likely result in a period of incapacity of more
20 than three consecutive, full calendar days in the absence of medical
21 intervention or treatment, such as cancer, severe arthritis, or
22 kidney disease.

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

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

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

38 (e) Treatment for purposes of (a) of this subsection includes,
39 but is not limited to, examinations to determine if a serious health
40 condition exists and evaluations of the condition. Treatment does not

1 include routine physical examinations, eye examinations, or dental
2 examinations. Under (a)(ii)(A)(II) of this subsection, a regimen of
3 continuing treatment includes, but is not limited to, a course of
4 prescription medication, such as an antibiotic, or therapy requiring
5 special equipment to resolve or alleviate the health condition, such
6 as oxygen. A regimen of continuing treatment that includes taking
7 over-the-counter medications, such as aspirin, antihistamines, or
8 salves, or bed rest, drinking fluids, exercise, and other similar
9 activities that can be initiated without a visit to a health care
10 provider, is not, by itself, sufficient to constitute a regimen of
11 continuing treatment for purposes of this title.

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

25 (g)(i) Substance abuse may be a serious health condition if the
26 conditions of this section are met. However, leave may only be taken
27 for treatment for substance abuse by a health care provider or by a
28 licensed substance abuse treatment provider. Absence because of the
29 employee's use of the substance, rather than for treatment, does not
30 qualify for leave under this title.

31 (ii) Treatment for substance abuse does not prevent an employer
32 from taking employment action against an employee. The employer may
33 not take action against the employee because the employee has
34 exercised his or her right to take medical leave for treatment.
35 However, if the employer has an established policy, applied in a
36 nondiscriminatory manner that has been communicated to all employees,
37 that provides under certain circumstances an employee may be
38 terminated for substance abuse, pursuant to that policy the employee
39 may be terminated whether or not the employee is presently taking
40 medical leave. An employee may also take family leave to care for a

1 covered family member who is receiving treatment for substance abuse.
2 The employer may not take action against an employee who is providing
3 care for a covered family member receiving treatment for substance
4 abuse.

5 (h) Absences attributable to incapacity under (a)(ii)(B) or (C)
6 of this subsection qualify for leave under this title even though the
7 employee or the family member does not receive treatment from a
8 health care provider during the absence, and even if the absence does
9 not last more than three consecutive, full calendar days. For
10 example, an employee with asthma may be unable to report for work due
11 to the onset of an asthma attack or because the employee's health
12 care provider has advised the employee to stay home when the pollen
13 count exceeds a certain level. An employee who is pregnant may be
14 unable to report to work because of severe morning sickness.

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

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

19 (25) "State average weekly wage" means the most recent average
20 weekly wage calculated under RCW 50.04.355 and available on January
21 1st of each year.

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

26 (27) "Typical workweek hours" means:

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

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

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

32 (a) For the purpose of premium assessment, the remuneration paid
33 by an employer to an employee. The maximum wages subject to a premium
34 assessment are those wages as set by the commissioner under RCW
35 50A.10.030;

36 (b) For the purpose of payment of benefits, the remuneration paid
37 by one or more employers to an employee for employment during the
38 employee's qualifying period. At the request of an employee, wages
39 may be calculated on the basis of remuneration payable. The
40 department shall notify each employee that wages are calculated on

1 the basis of remuneration paid, but at the employee's request a
2 redetermination may be performed and based on remuneration payable;
3 and

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

6 NEW SECTION. **Sec. 3.** (1) The employment security department
7 must collaborate with the paid family and medical leave advisory
8 committee to collect and analyze disaggregated data relating to
9 employment protections under Title 50A RCW.

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

13 (a) Program utilization by employees covered under approved
14 voluntary plans compared to employees covered under the state plan;

15 (b) Program utilization by employees working for employers with
16 50 or more employees compared to employees working for employers with
17 fewer than 50 employees;

18 (c) The number of employees who took leave from an employer and
19 did not appear on that employer's subsequent quarterly premium
20 reports after leave had been completed. This data will be broken out
21 between employers with 50 or more employees, by employment sector,
22 and by employee earnings level. It will also include available
23 employee demographic information, including data broken out by race
24 and gender; and

25 (d) The lengths of leave employees took for different purposes,
26 broken out between employers with 50 or more employees and employers
27 with fewer than 50 employees, whether the employee appeared on
28 subsequent quarterly premium reports after leave had been completed,
29 by employment sector, and by employee earnings level. It will also
30 include available employee demographic information, including data
31 broken out by race and gender.

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

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

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

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

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