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Leave Options for Pregnancy Related Conditions

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- Where specific issues arise, attendees should **seek legal advice** from a licensed employment law practitioner regarding the particular facts and circumstances of the matter at issue.
- **The law changes rapidly and some rules (pertaining to Paid Family and Medical Leave) are still under development.** These materials contains general information only and may not reflect current legal developments or updates.

Agenda

- Focus on leave options for Washington employees with pregnancy-related conditions:
 - WLAD/PDA
 - Washington Paid Family and Medical Leave
 - Supplemental benefits
 - FMLA
 - FMLA updates



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Leave as an accommodation for
pregnancy and related conditions

Pregnancy as a protected status under state and federal law

- Discrimination on basis of pregnancy (or ability to become pregnant) is a violation of state and federal law
 - **Washington Law Against Discrimination (WLAD) RCW 49.60**
 - Applies to employers with 8 + employees
 - **Pregnancy Discrimination Act (PDA) 42 USC § 2000 (c)**
 - Applies to employers with 15+ employees
 - Enacted to close loophole that pregnancy discrimination was not “sex” discrimination under Title VII
- Pregnant women and/or women affected by pregnancy-related conditions must be treated the same as others in the workplace – in terms of benefits and all other aspects of employment

Protections afforded

- Employers who allow/accommodate leave for disabled employees must do so for pregnant employee
- Employer cannot force/require a pregnant employee to take leave or set a pre-determined date for the start of leave
- Pregnant employee must be permitted to work as long as she is willing and able (no unilateral action on the part of employer)
- Employer may not require pregnant employee to undergo tests or special procedures to assess their ability to work
 - If employer requires non-pregnant employee to provide medical documentation of disabling condition and need for leave, employer may require same for pregnant employee. Likewise employer may require fitness for duty certification to return if required for pregnant and non-pregnant employees

Pregnancy disability

- Pregnancy itself is not a disabling condition – but many conditions may flow from pregnancy that may be temporarily or permanently disabling, requiring accommodation.
- For example:
 - Pre-eclampsia
 - Pregnancy induced hypertension or diabetes
 - Hyperemesis
 - Incompetent cervix
- Some or all of these conditions may be disabling and require leave

Pregnancy leave options

- Several laws provide leave for pregnant employees. These include:
 - WLAD and PDA (leave as an accommodation) for employee who is disabled as a result of pregnancy (“pregnancy disability leave”);
 - Washington Paid Family and Medical Leave (WPFML) for disabling condition as a result of pregnancy as well as bonding leave;
 - FMLA leave for disabling “serious health condition” due to pregnancy and bonding leave;
 - Also: Washington Paid Sick Leave; employer-provided benefits (PTO, vacation)



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Leave as a accommodation under
WLAD and PDA

Reasonable accommodations for pregnancy related disabilities

- If pregnant employee is unable to perform her duties as a result of a disabling pregnancy-related condition, her disability is to be treated on the same basis as any other disability.
- Pregnant employee must be afforded same accommodation options as other disabled employees as appropriate. Options may include telework, modified work schedules, light duty or period of unpaid leave.
- Under state and federal law, employer engage in interactive process with employee, and provide reasonable accommodations where such can be provided without “undue hardship.”

Leave as a reasonable accommodation

- Under state and federal laws, pregnant employee may be entitled to unpaid leave as a reasonable accommodation for disabling condition
 - No minimum length of service requirements to be eligible for accommodations
- Leave is generally unpaid and employer is not required to continue health benefits (unless it would do so otherwise). Employer must hold job open and return employee to same or equivalent position when no longer disabled.
- Under WLAD, length of leave/amount of leave available is determined by the employee's health care provider for the length of time the employee is disabled. This is referred to as "pregnancy disability leave"
- <https://lni.wa.gov/workers-rights/leave/pregnancy-parental-leave>

Leave as a reasonable accommodation - scenarios

- Employee works without issue until delivery of baby. Period of time after to recover from delivery (typically 6-8 weeks as certified by the HCP) would be considered period of disability and covered by the WLAD/PDA.
- Employee becomes disabled as a result of a pregnancy related condition and needs to be off work until the delivery. All time leading up to delivery, plus recovery time from delivery (certified by HCP) is covered by WLAD/PDA.
- Employee has pregnancy related disability and needs modified work schedule and leave at other times. Absences and delivery + recovery period covered by WLAD/PDA.
- NOTE: other leaves may be in play too – WPFML and FMLA



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Leave under Washington Paid Family and Medical Leave (PFML)

Washington PFML Basics

- State funded insurance program that provides partial wage replacement for eligible employees who need to be out of the workplace for a qualifying medical or family need
- Generally, all Washington employees are covered and are required to pay into the system. Employers with fewer than 50 employees are not required to pay into the system, but all employers are required to make premium deductions from employee wages and make certain reports to the state.
- Application for PFML is **EMPLOYEE INITIATED**. The employer cannot require an employee to apply for PFML benefits, and cannot require an employee to use one type of benefit before another
 - i.e., cannot require employee to use all state benefits before using employer-provided benefits, or vice versa

Eligible employee; qualifying reasons

- **Eligible employee** is any employee who has worked at least 820 hours for any employer (or combination of Washington employers) in the “qualifying period”
 - “Qualifying period “ is the first four of the last five completed calendar quarters OR the last four quarters from the date leave is to begin
- **Eligible employee may take PFML leave for a “qualifying reason”**
 - Bonding leave (birth, adoption, foster) (must be used in the 12 months following birth or placement) (**family leave benefit**)
 - To care for family member’s serious health condition (**family leave benefit**)
 - For a qualifying exigency arising out of family member being on active duty (or having been notified of an impending call or order to active duty) (**family leave benefit**)
 - To care for employee’s own serious health condition (**medical leave benefit**)

How much leave? How much money?

- **Employee may be eligible to take between 12-18 weeks of PFML leave:**
 - 12 weeks of leave to care for the serious health condition of a family member
 - 12 weeks of leave for military exigency needs
 - 12 weeks for bonding leave
 - 12 weeks for employee's own serious health condition, plus an additional 2 weeks (for a total of 14 weeks) if the employee is disabled as a result of pregnancy
 - **TOTAL of 16 weeks for combination of any of the above with an additional 2 weeks (for a total of 18 weeks) if the employee is disabled as a result of pregnancy**
- **Amount of benefits** the employee receives will be calculated based on the employee's wages
 - minimum weekly benefit is \$100; the maximum weekly benefit is \$1,000.
 - <https://paidleave.wa.gov/estimate-your-weekly-pay/>

Job restoration and Health Benefits

- Employee is entitled to job restoration (same or equivalent position) at the conclusion of PFML leave if:
 - Employee works for an employer with 50+ employees;
 - Has worked for the current employer for twelve months; and
 - Has worked for the current employer for at least 1250 hours in the 12 months immediately preceding the date leave is taken.
- Employee is entitled to continued health benefits during the entire period of PFML leave ONLY if the leave overlaps with FMLA leave by at least one day
 - Employer can require continued payment of the employee's portion of premium while on PFML
- RCA 50A.35.010 (employment protection/job restoration); RCW 50A.35.020 and WAC 192-700-020 (health benefits)

WPFML and Pregnancy Disability Leave

- An employee who is disabled as a result of pregnancy may be eligible for protected leave under pregnancy disability laws (WLAD/PDA), and Washington Paid Family and Medical Leave.
 - RCW 50A. 15.110(1) “Leave under this title...is in addition to any leave for sickness or temporary disability because o pregnancy or childbirth.”
- Employee who is disabled as a result of pregnancy and requires leave prior to her delivery may choose to wait until after her delivery to apply for WPFML and use those paid benefits for her bonding leave. This would extend her absence from work:
 - Prior to delivery, her disabling condition and absence would be protected under WLAD/PDA; after she is recovered and no longer disabled, she could apply for PFML leave to take another 12 weeks of leave for bonding).

• FMLA may also come into play (RCW 50A.15.110)



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Detour: Supplemental Benefits under PFML

Supplemental benefits

- “Supplemental benefits” are defined as “payment offered by an employer to an employee who is taking leave under Title 50A RCW” (WAC 192-500-180)
- Employer may choose to designate certain employer-provided benefits (such as salary continuation, PTO, vacation, sick leave, parental leave) as “supplemental benefits” that an employee may use to supplement PFML benefits from the state
 - Employer can designate WHICH benefits they will allow to be used as supplemental benefits
 - Employer can designate HOW MUCH of a supplemental benefit an employee may use
 - Employers are not required to offer/allow supplemental benefits at all
- There is no magic requirement to designating “supplemental benefits” – it is a best practice for employer to identify in policy/handbook which benefits, if any, may be used to supplement PFML benefits

Supplemental benefits, cont.

- If employer offers supplemental benefits, **employee has the option whether to use them**
 - Employer cannot require employee to use supplemental benefits when receiving PFML
- The use of supplemental benefits will NOT reduce the employee's PFML benefits from the state
- **NOTE:**
 - Under the PFML definitions, "supplemental benefit payments" are specifically excluded from the definition of "wages" – so, when used in this "supplemental" fashion, these benefits are NOT considered reportable wages! (They are still taxable income to the employee, though)
 - It is essential that the employee **does NOT report these supplemental benefits** as "wages" received from the employer when completing and submitting the weekly claims forms
 - If the employee reports these employer-provided benefit payments, ESD views them as "wages" and will reduce the employee's PFML benefit payments!
 - Likewise, the employer **does NOT report supplemental benefits** as "wages earned" or "hours worked" on the quarterly reports to ESD and does not deduct premiums from the supplemental benefit payments

Best practice

- Employer should designate in policy/handbook which employer-provided benefits may be used as supplemental benefits and at what level or percentage (only to “top off” or full benefit which may take employee above usual earnings)
- Before employee takes leave, confirm whether/which supplemental benefits are offered by the employer, confirm whether employee wants to use supplemental benefits, and clarify that the employee should not report supplemental benefits on their weekly claims or it will reduce their PFML benefit



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FMLA Leave

FMLA Basics

- FMLA provides up to 12 weeks unpaid, job protected leave, with continued health benefits for certain qualifying events
- Applies to employers with **50 or more employees**
- Employee with a qualifying event may be eligible for FMLA if he/she:
 - has worked for the employer for at least 12 months (not necessarily consecutive months),
 - has worked at least 1250 hours during the 12 month period immediately preceding leave, and
 - is employed within 75 miles of worksite with 50 other employees
- Qualifying events:
 - Birth of a child or adoption/placement via foster care
 - Employee's own serious health condition
 - Care for serious health condition of immediate family member
 - Qualifying activities related to a family member's impending military service/deployment
 - Care for a service member with serious injury or illness (up to 26 weeks)

FMLA leave for pregnancy or birth

- FMLA provides eligible employee leave for pregnancy or birth – 29 CFR § 825.120 (a)(4):

The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of a child for prenatal care if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

Intersection of FMLA and PFML

- Employee may be eligible for protected leave for pregnancy related reasons under both FMLA and PFML. Both provide leave for:
 - Employee's own "serious health condition" (which may be a pregnancy related disability); and/or
 - Bonding leave taken within 12 months of the delivery/placement of child
- Some employees may seek to extend their pregnancy related leave by running these two leaves CONSECUTIVELY:
 - FMLA followed by Washington PFML = which may result in employee being out of the workplace for 12 weeks of FMLA leave; followed by up to 18 weeks of PFML
 - Employer cannot force the employee to apply for PFML leave, so it is within the power of the employee to arrange their leaves in this order.

Intersection of FMLA and PFML

- However, if employee applies for/seeks to take PFML first, for a reason that would also qualify for FMLA leave, the leaves run concurrently:
 - **RCW 50A.15.110: “Unless otherwise expressly permitted by the employer, leave taken under this title must be taken concurrently with any leave taken under the [FMLA].”**
- This would limit the employee’s ability to stack leaves end to end – and probably limit the total duration to the maximum allowed under PFML (18 weeks total)



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Detour: DOL issues guidance on two
FMLA requirements

DOL approves telemedicine visits to establish serious health condition

- Under FMLA, one method for an employee to substantiate their serious health condition and support a request for leave is to attend an in-person visit with a health care provider within 7 days of the first day of incapacity.
- On 12/29 the DOL issued guidance, confirming that for purposes of establishing a serious health condition under the FMLA, a telemedicine visit is considered an in-person visit for purposes of FMLA leave so long as the visit is:
 - an examination, evaluation, or treatment by a health care provider;
 - permitted and accepted by state licensing authorities; and,
 - performed by video conference.
- Videoconference element is critical to meet the requirement - telephone call, letter, email or text message are not sufficient means of communication to meet the requirement.

DOL approves electronic notices

- FMLA regulations require employers to post in *conspicuous places* on their premises, the general FMLA notice explaining the FMLA provisions and providing information for filing complaints of FMLA violations with the DOL.
- On 12/29/20, the DOL issued guidance confirming that electronic posting of the general notice will satisfy FMLA requirements where all hiring and work is done remotely and the employer posts the notice on internal and external websites that are accessible to employees and applicants.
- Where employers have both on-site and remote workers, the employer can supplement the hard-copy notice posting requirement with electronic posting – but hard-copy posting is still required. (So best to do both!)

Questions?



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