
SENATE BILL 5097

State of Washington

67th Legislature

2021 Regular Session

By Senators Robinson and Keiser

Prefiled 01/06/21.

1 AN ACT Relating to expanding coverage of the paid family and
2 medical leave program; amending RCW 50A.05.010, 50A.35.010, and
3 50A.35.020.

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

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

7 Unless the context clearly requires otherwise, the definitions in
8 this section apply throughout this title.

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

10 (i) Is performed infrequently and irregularly; and

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

13 (b) For purposes of casual labor:

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

16 (ii) "Irregularly" means work performed not on a consistent
17 cadence.

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

1 (3) "Commissioner" means the commissioner of the department or
2 the commissioner's designee.

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

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

6 (b) "Employee" does not include employees of the United States of
7 America.

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

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

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

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

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

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

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

39 (B) The base of operations or place from which such service is
40 directed or controlled is not in any state in which some part of the

1 service is performed, but the individual's residence is in this
2 state.

3 (b) "Employment" does not include:

4 (i) Self-employed individuals;

5 (ii) Casual labor;

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

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

11 (II) Such service is either outside the usual course of business
12 for which such service is performed, or that such service is
13 performed outside of all the places of business of the enterprises
14 for which such service is performed; and

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

18 (B) As a separate alternative:

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

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

29 (III) Such 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 such
32 individual has a principal place of business for the work the
33 individual is conducting that is eligible for a business deduction
34 for federal income tax purposes; and

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

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

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

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

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

18 (B) The service is either outside the usual course of business
19 for which the service is performed, or the service is performed
20 outside of all the places of business of the enterprise for which the
21 service is performed, or the individual is responsible, both under
22 the contract and in fact, for the costs of the principal place of
23 business from which the service is performed;

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

31 (D) On the effective date of the contract of service, the
32 individual is responsible for filing at the next applicable filing
33 period, both under the contract of service and in fact, a schedule of
34 expenses with the internal revenue service for the type of business
35 the individual is conducting;

36 (E) On the effective date of the contract of service, or within a
37 reasonable period after the effective date of the contract, the
38 individual has an active and valid certificate of registration with
39 the department of revenue, and an active and valid account with any
40 other state agencies as required by the particular case, for the

1 business the individual is conducting for the payment of all state
2 taxes normally paid by employers and businesses and has registered
3 for and received a unified business identifier number from the state
4 of Washington;

5 (F) On the effective date of the contract of service, the
6 individual is maintaining a separate set of books or records that
7 reflect all items of income and expenses of the business that the
8 individual is conducting; and

9 (G) On the effective date of the contract of service, the
10 individual has a valid contractor registration pursuant to chapter
11 18.27 RCW or an electrical contractor license pursuant to chapter
12 19.28 RCW.

13 (9) "Employment benefits" means all benefits provided or made
14 available to employees by an employer, including group life
15 insurance, health insurance, disability insurance, sick leave, annual
16 leave, educational benefits, and pensions.

17 (10) "Family leave" means any leave taken by an employee from
18 work:

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

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

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

30 (11) "Family member" means any individual related by blood or
31 affinity whose close association with a covered individual is the
32 equivalent of a family member and includes a child, grandchild,
33 grandparent, parent, sibling, or spouse of an employee.

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

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

36 (14) "Health care provider" means: (a) A person licensed as a
37 physician under chapter 18.71 RCW or an osteopathic physician and
38 surgeon under chapter 18.57 RCW; (b) a person licensed as an advanced
39 registered nurse practitioner under chapter 18.79 RCW; or (c) any

1 other person determined by the commissioner to be capable of
2 providing health care services.

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

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

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

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

17 (19) "Premium" or "premiums" means the payments required by RCW
18 50A.10.030 and paid to the department for deposit in the family and
19 medical leave insurance account under RCW 50A.05.070.

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

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

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

36 (c) Remuneration also includes settlements or other proceeds
37 received by an individual as a result of a negotiated settlement for
38 termination of an individual written employment contract prior to its
39 expiration date. The proceeds are deemed assigned in the same

1 intervals and in the same amount for each interval as compensation
2 was allocated under the contract.

3 (d) Remuneration does not include:

4 (i) The payment of tips;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33 (e) Treatment for purposes of (a) of this subsection includes,
34 but is not limited to, examinations to determine if a serious health
35 condition exists and evaluations of the condition. Treatment does not
36 include routine physical examinations, eye examinations, or dental
37 examinations. Under (a)(ii)(A)(II) of this subsection, a regimen of
38 continuing treatment includes, but is not limited to, a course of
39 prescription medication, such as an antibiotic, or therapy requiring
40 special equipment to resolve or alleviate the health condition, such

1 as oxygen. A regimen of continuing treatment that includes taking
2 over-the-counter medications, such as aspirin, antihistamines, or
3 salves, or bed rest, drinking fluids, exercise, and other similar
4 activities that can be initiated without a visit to a health care
5 provider, is not, by itself, sufficient to constitute a regimen of
6 continuing treatment for purposes of this title.

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

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

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

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

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

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

15 (25) "State average weekly wage" means the most recent average
16 weekly wage calculated under RCW 50.04.355 and available on January
17 1st of each year.

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

22 (27) "Typical workweek hours" means:

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

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

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

28 (a) For the purpose of premium assessment, the remuneration paid
29 by an employer to an employee. The maximum wages subject to a premium
30 assessment are those wages as set by the commissioner under RCW
31 50A.10.030;

32 (b) For the purpose of payment of benefits, the remuneration paid
33 by one or more employers to an employee for employment during the
34 employee's qualifying period. At the request of an employee, wages
35 may be calculated on the basis of remuneration payable. The
36 department shall notify each employee that wages are calculated on
37 the basis of remuneration paid, but at the employee's request a
38 redetermination may be performed and based on remuneration payable;
39 and

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

3 **Sec. 2.** RCW 50A.35.010 and 2019 c 13 s 4 are each amended to
4 read as follows:

5 (1) Except as provided in RCW 50A.30.010(5) and subsection (6) of
6 this section, any employee who takes family or medical leave under
7 this title is entitled, on return from the leave:

8 (a) To be restored by the employer to the position of employment
9 held by the employee when the leave commenced; or

10 (b) To be restored by the employer to an equivalent position with
11 equivalent employment benefits, pay, and other terms and conditions
12 of employment.

13 (2) The taking of leave under this title may not result in the
14 loss of any employment benefits accrued before the date on which the
15 leave commenced.

16 (3) Nothing in this section shall be construed to entitle any
17 restored employee to:

18 (a) The accrual of any seniority or employment benefits during
19 any period of leave; or

20 (b) Any right, benefit, or position of employment other than any
21 right, benefit, or position to which the employee would have been
22 entitled had the employee not taken the leave.

23 (4) As a condition of restoration under subsection (1) of this
24 section for an employee who has taken medical leave, the employer may
25 have a uniformly applied practice or policy that requires each such
26 employee to receive certification from the employee's health care
27 provider that the employee is able to resume work.

28 (5) Nothing in this section shall be construed to prohibit an
29 employer from requiring an employee on leave to report periodically
30 to the employer on the status and intention of the employee to return
31 to work.

32 (6) (a) This section does not apply unless the employee(~~(i)~~)
33 ~~Works for an employer with fifty or more employees;~~ (~~ii~~)) has been
34 employed by the current employer for (~~twelve months~~) ninety days or
35 more(~~;~~ and (~~iii~~) has worked for the current employer for at least
36 ~~one thousand two hundred fifty hours during the twelve months~~
37 ~~immediately preceding the date on which leave will commence. For the~~
38 ~~purposes of this subsection, an employer shall be considered to~~
39 ~~employ fifty or more employees if the employer employs fifty or more~~

1 ~~employees for each working day during each of twenty or more calendar~~
2 ~~workweeks in the current or preceding calendar year))~~ .

3 (b) An employer may deny restoration under this section to any
4 salaried employee who is among the highest paid ten percent of the
5 employees employed by the employer within seventy-five miles of the
6 facility at which the employee is employed if:

7 (i) Denial is necessary to prevent substantial and grievous
8 economic injury to the operations of the employer;

9 (ii) The employer notifies the employee of the intent of the
10 employer to deny restoration on such basis at the time the employer
11 determines that the injury would occur; and

12 (iii) The leave has commenced and the employee elects not to
13 return to employment after receiving the notice.

14 **Sec. 3.** RCW 50A.35.020 and 2019 c 13 s 39 are each amended to
15 read as follows:

16 (~~If required by the federal family and medical leave act, as it~~
17 ~~existed on October 19, 2017)) For any employee covered by RCW
18 50A.35.010(6)(a), during any period of family or medical leave taken
19 under this title, the employer shall maintain any existing health
20 benefits of the employee in force for the duration of such leave as
21 if the employee had continued to work from the date the employee
22 commenced family or medical leave until the date the employee returns
23 to employment. If the employer and employee share the cost of the
24 existing health benefits, the employee remains responsible for the
25 employee's share of the cost. This section does not apply to an
26 employee who is not in employment for an employer at the time of
27 filing an application for benefits.~~

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