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Employment Law Note

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Five Key Changes that Paid Family and Medical Leave Will Bring

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On January 1, 2020, Washington will become the fifth state to implement a mandatory paid family and medical leave program, joining California, New Jersey, New York, and Rhode Island. (Connecticut, Massachusetts, and Oregon have enacted similar laws, but they do not take effect until 2021 or later.) In Washington, the program will be administered by the Employment Security Department (ESD), the same agency that presently administers the state's unemployment insurance program.

Washington employers should already be familiar with the Paid Family and Medical Leave law, as earlier in 2019 employers were required to begin reporting employee wages and submitting premium contributions to ESD. But on January 1, the landscape will become far more complicated. On that day, ESD will begin accepting applications from employees to take Paid Family and Medical Leave, and employers will be faced with notifications from employees announcing their intention to take that leave.

Organizations who are unprepared for this--or who expect Paid Family and Medical Leave to function seamlessly in parallel with the federal FMLA--will be in for a surprise. Below are five key changes that Paid Family and Medical Leave may bring to your organization, even if it is accustomed to complying with the federal FMLA:

Nearly Every Washington Employer Must Comply

Any individual or organization "having any person in employment" in Washington must provide leave under this new law. Only the federal government, and self-employed individuals, are excluded from coverage. If your business has fewer than 50 employees then you may not be used to handling employee requests for family or medical leave. That will change beginning in January.

Eligibility Decisions Are Made by ESD, Not the Employer

If an employee wants to take Paid Family or Medical Leave, they must notify their employer, and then file an application with the state Employment Security Department. Employees must still provide documentation or certification of their eligibility--but that documentation and certification is submitted to ESD, and ESD will make the determination about whether the employee is eligible for benefits. Employers who wish to contest the initial application for benefits will have only 18 days from receiving notification of the claim from ESD to do so, or else they will waive their objections to it. The only exception to this process is for employers who have implemented a voluntary Paid Family and Medical Leave plan that ESD has approved.

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The Interplay Between Paid Family and Medical Leave and the Federal FMLA is Complicated and Fraught with Pitfalls

Employers who are subject to the federal FMLA must still comply with that law and must still handle incoming requests for federal FMLA as that law requires. But employers who are expecting a seamless overlap between federal FMLA and Washington Paid Family and Medical Leave will be in for a surprise. The two banks of leave are separate and, for practical purposes, must be administered independently of each other. While their eligibility criteria are very similar, the two banks of leave have different maximums, different tracking criteria, different approval processes, and different reinstatement rules. In light of the overlapping eligibility criteria, employers may want to consider whether to modify their federal FMLA approval workflow to account for ESD's role as arbiter of state Paid Family and Medical Leave eligibility. There are also several scenarios where employees will remain eligible for one type of leave despite having exhausted the other.

Employers Cannot Require Employees to Use Their Vacation or Paid Time Off

The federal FMLA permits employers to require employees to draw down vacation or paid time off concurrently, to avoid employees banking that time for later use. The Paid Family and Medical Leave regulations forbid this: "Employers may not require employees to take paid vacation leave, paid sick leave, or other forms of paid time off provided by the employer before, in place of, or concurrently with paid family or medical leave benefits" (WAC 192-610-075).

Employees Need to Pay Attention to "Supplemental Benefits"

Employees may wish to use things like accumulated paid time off to supplement or "top off" the benefits that they receive from ESD while taking leave. While employers are not required to allow this, many may want to do so. But employers who wish to offer this type of supplemental benefit must **affirmatively** do so. If employees draw down things like PTO while also taking Paid Family or Medical Leave, and ESD determines that this PTO "was not considered a supplemental benefit payment" by the employer, the employee's ESD benefit will be subject to reduction. To avoid this problem, employers should be careful to clarify, in their policies, which of their benefits employees may use as "supplemental benefits" while taking Paid Family or Medical Leave.

There is still time to get compliant. ESD's regulations are mostly final. ESD formally adopted the sixth and final phase of its Paid Family and Medical Leave regulations on November 19, 2019. Those regulations take effect on Thursday, December 19, 2019, and with that, ESD's complement of Paid Family and Medical Leave regulations will be complete, at least for now. Since the target is no longer moving, the time is ripe for your organization to ensure that your processes and policies are compliant with what ESD will expect beginning on January 1.

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