STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

EMPLOYMENT STANDARDS

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WAC 296-130

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In 1988, the Legislature established minimum standards for family leave, which led to the original Family Care rules, Chapter 296-130 WAC. The Legislature recognized the changing nature of the work force and the competing demands on families brought about by increasing numbers of working mothers, single-parent households, and dual-career families. In addition, the Legislature recognized that it was in the public interest for employers to accommodate employees by providing reasonable leave from work for family reasons.

In January 2003, changes to RCW 49.12.265 through 49.12.295 took effect, allowing employees with available sick leave or other paid time off to care for sick family members in addition to children under age 18. New rules were adopted and became effective January 6, 2003. In July 2005, a further legislative change to the definition of "sick leave or other paid time off" provided that certain disability plans are also included. The updated Family Care Rules became effective June 1, 2006.

Questions and answers about elements of the law

1. What is the Family Care Act?

Under the law, employees in Washington State are entitled to use their choice of sick leave or other paid time off, including certain disability plans (see question 18 below):

- to care for a child with a health condition that requires treatment or supervision;
- to care for a spouse, parent, parent-in-law, or grandparent, who has a serious health condition or an emergency health condition; and,
- to care for children 18 years and older with disabilities that make them incapable of self-care.

Grandparents-in-law, grandchildren, and siblings are not covered by the Family Care Act.

2. What kind of leave and what family members are included in the Family Care Act?

The law allows employees to use earned sick leave to care for a sick child under the age of 18 years. Employees may use available sick leave or other paid time off, including vacation time and certain disability plans, to care for a sick child or other family members covered by the law (spouses, registered domestic partners, parents – biological or adoptive parents, parents-in-law, grandparents). An employer is prohibited from discharging, demoting, or disciplining employees for exercising their rights under the law. Violations of the Family Care Act provisions may result in a civil penalty.

3. Which employees are entitled to the provisions under this law?

All employees who have paid-leave benefits in Washington State are covered by this law, regardless of the size of the employer.

4. When must an employer allow an employee access to their "sick leave or other paid time off" to care for a sick family member?

If an employee is entitled to paid leave (i.e., sick leave, vacation, holiday leave or other paid time off), the employee must also be allowed to use that paid leave to care for a sick family member.

5. Does the law require businesses to offer sick leave or provide longer periods of leave?

No. The state law simply assures that employees who do have sick leave or other paid time off are able to use this leave to care for sick family members.

6. What is meant by "other paid time off?"

"Other paid time off" is any paid leave other than sick leave, such as vacation or personal holidays. Employees must be allowed to use any and all of their sick leave or other paid time off to care for sick family members. Many employers combine paid leave categories such as sick leave and vacation leave, often described as "paid time off" or "PTO". Employers may require employees to use this combined leave as a prerequisite to using leave designated for a specific purpose, such as extended illness bank leave.

7. When must an employer allow an employee access to extended illness bank (EIB) leave to care for a sick family member?

For those employers who use an extended illness leave bank (EIB), if the EIB is part of a sick leave policy, the leave must also be available for the care of a qualifying family member under the same terms as it would be available for the employee's own use.

8. What is meant by the term "earned" in RCW 49.12.270 (as in "[a]n employee may not take leave until it has been earned")?

There are a variety of ways for any employee to "earn" leave. It could be earned all at once, such as an allotment that is provided at the beginning of a calendar year. Some employees earn leave on a scheduled basis, such as weekly, per pay period, or per month. The law does not require an employer to give an advance on leave for family care purposes before it is earned by the employee.

9. What is meant by the term "entitled" in RCW 49.12.270 (as in "if, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off")?

It means that employer policies and collective bargaining agreements (CBAs) may define or limit when employees are allowed to take the leave that they have earned as long as the restriction does not affect an employee's choice to use the leave for Family Care Act purposes. Employees may not be "entitled" to use leave until they meet certain restrictions. For example, an employee may have sick leave that the employee has earned, but is not be entitled to use for any purpose because the employee is on probation for six months after the initial hire. Such a restriction is permissible because the employee is not "entitled" to the leave until the end of the six-month probationary period.

However, if a restriction on the use of leave prevents an employee's choice to use that leave for family care purposes, the restriction is invalid and the employee can use his or her leave for family care. For example, if an employer policy requires advanced scheduling for vacation leave, the policy would be inapplicable to an employee who chooses to use vacation leave to take care of a sick family member. While the employer is permitted to establish an advanced

scheduling policy generally, the policy cannot bar the employee from using vacation leave for Family Care Act purposes without violating the choice of leave provision.

10. What is meant by the provision in RCW 49.12.270 that says the employer must allow an employee to use "any or all of the employee's choice of sick leave or other paid time off" to care for a sick family member?

Employees must have access to any earned sick leave or other paid time off to care for a sick family member. If employees have access to paid leave for any purpose, then they must have full access to any and all of this paid leave to care for a sick family member. The law directs employers to allow employees their choice of earned paid leave to care for a sick family member, even if the use of that leave is not normally allowed for the employees' own illnesses.

11. Can an employer apply attendance policies to the use of sick leave?

Under the Family Care Act, an employer must not discharge, threaten to discharge, demote, suspend, discipline, or otherwise discriminate against an employee because the employee has exercised or attempted to exercise any right provided under the Family Care Act. The law does not limit the discretion of employers to establish and utilize attendance policies, provided they do not violate the law with regard to employees' access to sick leave or other paid time off to care for a sick family member. While "attendance policies" and "sick leave policies" are often intertwined, under these rules, employees are protected from punitive attendance policies when taking leave to care for a sick family member specified in these rules. However, where there is an abuse of a sick leave policy (e.g., use of leave for inappropriate reasons), an employer's attendance policy may then be applied.

12. Under what circumstances can an employee take time off to care for a child?

A "child" includes a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in for a parent. A parent may use available paid time off when their child has a "health condition that requires treatment and supervision", which includes:

- A medical condition requiring treatment or medication that the child cannot self-administer;
- A medical or mental-health condition which would endanger the child's safety or recovery without the presence of a parent or guardian; or,
- A condition warranting treatment or preventive health care such as physical, dental, optical or immunization services, when a parent must be present to authorize the treatment and when sick leave may otherwise be used for the employee's preventative health care.

13. Are behavioral disorders included in the definition of a "health condition that requires treatment and supervision" for a child under the age of 18?

Not necessarily. The law and associated rules describe a "health condition that requires treatment or supervision" as any medical condition requiring treatment or medication that the child cannot self-administer, any medical or mental health condition that would endanger the safety of the child or their recovery from an illness without supervision, or any condition warranting treatment or preventative health care when the parent must be present to authorize

treatment. If the child's treatment is preventative care, it is also a prerequisite that the parent is allowed to use earned leave for the parent's own preventative care. Behavioral disorders that do not fall under these situations requiring treatment, supervision, or a parent's presence are not covered under the law.

14. Under what circumstances can an employee take time off to care for an adult son or daughter?

The law includes all children regardless of age, school attendance, or marital status. If an adult son or daughter (i.e., 18 years of age or older) is "incapable of self-care because of a mental or physical disability that limits one or more activities of daily living," then s/he is covered under this law. The disability does not need to be a chronic condition to be covered. Traumatic injuries, surgery, illness, and some conditions relating to pregnancy may also cause a temporary disability for an individual. A disabling condition is one that prevents an individual from engaging in activities such as bathing, dressing, eating, cooking, shopping, or using public transportation without active assistance.

15. Under what circumstances can an employee take time off to care for a spouse, registered domestic partner, parent, parent-in-law, or grandparent?

An employee may use "sick leave or other paid time off" when a spouse, registered domestic partner, parent, parent-in-law, or grandparent has an emergency health condition demanding immediate action or a serious health condition (defined by WAC 296-130-020) that:

- Requires an overnight stay in a hospital or other medical-care facility;
- Results in a period of incapacity or treatment or recovery following inpatient care; or
- Involves continuing treatment under the care of a health care services provider and includes any period of incapacity to work, attend school, or perform other regular daily activities.

16. Are same-sex spouses, domestic partners, or common-law spouses covered by this law?

Same-sex marriages are recognized in Washington State and same-sex spouses have all of the rights and privileges of any spouse. Washington also recognizes domestic partners who meet the qualifications of RCW 26.60.030 and are registered with the Office of the Secretary of State. A registered domestic partner would be covered by the Family Care Act the same as a spouse. Washington State does not have common-law marriages, but the state recognizes any legal marriage from another state.

17. Under what circumstances would an employee be entitled to use sick leave to care for a spouse, registered domestic partner, or child who is pregnant?

An employee would be entitled to use sick leave or other paid time off to care for a spouse, registered domestic partner, or child *while she is incapacitated* as a result of pregnancy or childbirth. This would generally include some prenatal and postpartum examinations, hospitalization, and recovery from childbirth. (Note: If the pregnant child is a minor, the employee would be allowed to use their paid leave to care for a child with a health condition that requires treatment or supervision as described in WAC 296-130-020(10)).

18. Is there any type of verification of illness allowed under these rules?

The law does not require that an employee seek medical certification. The law also does not restrict the employer's ability to require certification or verification of an illness or other health condition. If the employer has a policy that requires medical certification of illness, then an employee must follow that policy to the extent that it does not affect the employee's choice of leave.

An employer must take care when requesting medical certification for a health condition requiring treatment or supervision for a minor child. Treatment by a medical provider is not a prerequisite for an employee to use earned leave to care for minor under Family Care Act. Employers should also be aware that there may be some medical confidentiality restrictions under state and federal law that limit what type of information may be requested from the employee. Employers should seek clarification on medical confidentiality laws from other resources. Finally, employers should also take care to avoid violating the Family Care Act's discrimination provisions by treating employees who take leave for family care purposes differently than they would treat employees who take leave for their own illnesses.

19. Are disability plans included under the law?

It depends on whether the employer provides paid leave for sickness and the type of disability plan or policy provided. Generally, self-administered disability plans are provided by an employer and provide for the continuing payment of all or a part of an employee's wages for a period of time when the employee is on leave due to an illness or disability. These plans, which are typically considered to be short-term disability plans, may be included as part of the employee's choice of paid time off to care for a sick family member if the employer does not allow other paid leave for sickness. Specific plans may need to be assessed on a case-by-case basis to determine if an employee is covered.

If an employer provides both a paid sick leave benefit and a disability plan, the employer is not required to allow the employee to access to the disability benefit for care of a sick family member. Any disability plan or policy governed under the Employee Retirement Income Security Act (ERISA) or provided by an employer through the purchase of an insurance policy is not covered under the law.

To learn more about laws governing ERISA plans, you can visit the U.S. Department of Labor's Employment Benefits Security Administration website.

20. What are the penalties under the law?

An employer found to have violated the Family Care Act may be assessed the maximum penalty of a fine of $200 for the first violation. An employer that continues to violate the terms of the statute may be subject to a fine not to exceed $1,000 for each violation.

21. How does this law affect state and other public employees?

State and other public employees must receive, at a minimum, the same benefits stated in these rules as for any other employee. Individuals should consult with their human resources manager for agency-specific questions.

Questions and answers about other related laws (How the Family Care Act relates to the Family Leave Act, Human Rights Commission rules, and the federal Family Medical and Leave Act.)

22. How does this law differ from the state's Family Leave Act?

The Family Leave Act (Chapter 49.78 RCW) mirrors the federal Family and Medical Leave Act (FMLA). It applies to employers with **50 or more** employees within a 75-mile radius and employees who qualify for the federal FMLA. The following additional provisions of the Family Leave Act, Chapter 49.78 RCW, are enforced by the department:

- The Family Leave Act allows more leave for pregnant women than the FMLA allows.
- The Family Leave Act allows for an employee to take leave to care for a registered domestic partner or same sex spouse with a serious health condition.

23. Is care of a newborn covered under the Family Care Act?

Not necessarily. Unless the newborn child has a health condition that requires treatment or supervision, then leave under this law may not be used for healthy newborn care. For guidance on rules for healthy newborn care, refer to the answers to questions 24 and 25.

24. How does the Family Care Act relate to the federal FMLA?

The federal Family Medical and Leave Act (FMLA) permits covered employees to take up to 12 weeks of **unpaid leave** to care for a new child (a newborn, newly adopted child, or new foster child), to recover from the employee's own serious illness, or to care for a child, spouse, or parent with a serious health condition. To be eligible for leave under the FMLA, an employee must work for an employer with 50 or more employees, have worked at least 12 months for the employer, and have worked at least 1,250 hours. Also, under the FMLA, an employer may be permitted to deny an employee the use of sick leave while caring for a sick family member. However, under the Family Care Act, all employees with access to paid sick leave or other paid time off have the choice to use this leave while caring for sick family members (regardless of whether the leave is also covered by the FMLA). If leave taken under the Family Care Act qualifies for leave under the FMLA, employers may count the time as FMLA leave.

25. Does this law apply to pregnant employees or mothers of newborns?

The law does not address leave for a pregnant employee, but covers any spouse, registered domestic partner, or parent who provides care as a result of any disability she may experience. Under rules set forth by the Human Rights Commission (Chapter 162-30-020 WAC), employers with 8 or more employees must provide a woman a leave of absence for the period of time that

she is sick or temporarily disabled due to pregnancy or childbirth; the length of time off is determined by the health care provider. The leave of absence may be paid or unpaid..

Mothers of newborns covered by FMLA are entitled to at least 12 weeks off during pregnancy and after childbirth. For more information about the FMLA, call the U.S. Department of Labor at 1-866-487-9243 or visit their website.

26. How does the Family Care Act differ from the federal FMLA?

Unlike the FMLA, this law applies to all employers who provide paid leave benefits regardless of size. The Family Care Act allows the use of paid leave to care for additional family members (i.e., parents-in-law and grandparents) not included under the FMLA requirements. The law also does not require illness of three consecutive days before leave may be used.

27. Must the employer allow coverage under the federal FMLA for the additional family members now covered under the Family Care Act?

No. The additional coverage afforded by the state Family Care Act does not change the coverage requirements of the federal FMLA.

28. Is the definition for "serious health condition" in the Family Care Act the same as the one in the FMLA?

The definition for "serious health condition" under the Family Care Act is similar to the federal definition, but has some differences. For example, subject to certain conditions, the federal regulations have a "continuing treatment" provision where three full consecutive calendar days of incapacity combined with at least two visits to health care provider, or one health care provider visit and a continuing treatment regimen, qualifies as serious health condition. The Family Care Act does not contain a similar requirement. For a specific definition of a serious health condition under the Family Care Act, see WAC 296-130-020(11).

29. Where can I get more information?

For more information about the Family Care Act, please contact the Employment Standards Program staff either at your local L&I field service location or the central office of the Employment Standards Program at 360-902-5316. A complaint may be filed by completing a protected leave complaint form and sending it to the address listed on the complaint form.

For more information about the FMLA, call the U.S. Department of Labor at 1-866-487-9243 or visit their website. For more information about discrimination issues regarding disability due to pregnancy or childbirth, contact the Human Rights Commission at 1-800-233-3247.