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Inside this Issue

SUPPLEMENTAL PFMLA BENEFITS

Some of our favorite articles in past years have resulted from client inquiries. This article deals with the bargaining obligations that might arise when a union requests to bargain about the apportionment or sharing of the employees' premiums due under Washington's Paid Family and Medical Leave Act (PFMLA), codified at Title 50A of the Revised Code of Washington.

Does the public employer of firefighters or police officers in Washington have a duty to bargain over PFMLA premiums? Our answer is a qualified "yes" unless there is a contract bar or waiver defense. Now we will explain that opinion in detail and with reference to pertinent PERC precedent. (PERC is the Washington Public Employment Relations Commission.)

But first, a bit of background. The federal Family and Medical Leave Act has been the law for many years. It provides for *unpaid* leave if an eligible employee has a "serious medical condition" or if the employee has a family-related need for leave such as birth or adoption of a child. The federal law allows for 12 weeks of unpaid leave per year. Although the federal law applies to public employers, only the employees of an agency with 50 or more employees are eligible for federal FMLA benefits.[1]

[1] https://www.dol.gov/agencies/whd/fmla

However, in 2017 the Washington State Legislature created a *paid* family and medical leave program for both public and private employers' employees. The PFMLA program is administered by the state Employment Security Department, which pays the benefits and collects the premiums.[2] The PFMLA allows for voluntary plans administered directly by the employer instead, but such plans are rare thus far, and must be state-approved.

The obligation to pay PFMLA premiums began on January 1, 2019, an important date to remember when you read the cases that we discuss below. One-third of the premiums are for family leave benefits, and two-thirds for medical leave benefits. RCW 50A.10.030(1)(b) and (c). For 2019 and 2020, the total premium was set at .4 or 1% of the employee's wages.[3] The employer was allowed to deduct the full amount of the premium for the family leave but only 45% of the premium for the medical leave portion, from the wages of the employee, as those were negotiated or agreed prior to the law's passage.

Importantly for our discussion, however, the law allowed for the employer and employee, or a union representing employees to share those premium costs by providing as follows:

> "(d) An employer **may** elect to pay all or any portion of the employee's share of the premium for family leave or medical leave benefits, or both." (emphasis added)

[2] https://paidleave.wa.gov/

[3] See changes as to 2023 PFMLA premiums here: https://paidleave.wa.gov/updates/

While this might sound as if the matter is up to the "election" of the employer, as we discuss herein, the issue is not that simple.

Also important is the concept embodied in RCW 50A.05.090, which is that the law does not apply to change collective bargaining agreements (CBAs) in force on October 19, 2017. In the vernacular, such CBAs are "grandfathered." Of course, when those CBAs have expired, are re-opened, or otherwise agreed to be modified by the parties, then the law does apply. However, the section also stated that it expires or sunsets on December 31, 2023.

At this point, we want to discuss some recent PERC decisions that discuss two separate issues: PFMLA premium cost allocation and PFMLA "supplemental benefits" which the employer is not obligated by the PFMLA to provide, as per RCW 50A.15.060 (2).[4] Discussion of these issues will also remind our readers of some basic concepts applicable to labor-management relations in Washington.

The first case is an interest arbitration decision and award, written by the neutral arbitrator, in City of Richland and IAFF Local 1052 (December 29, 2022).[5] As our readers should know, under RCW 41.56.450 bargaining units of firefighters and police are entitled to interest arbitration in Washington. Under this system, after bargaining and impasse, such parties can have contract provisions decided for them, by

[4] "An employer **may** offer supplemental benefit payments to an employee on family or medical leave in addition to any paid family or medical leave benefits the employee is receiving." (emphasis added).

[5] https://decisions.perc.wa.gov/waperc/interest-arbritations/en/item/521087/index.do?q=City+of+Richland+and+IAFF+Local+1052+2022

a three-member arbitration panel (but the neutral is the key arbitrator, as the two partisan arbitrators usually cancel each other out).

Unfortunately, the recitation of the facts and circumstances in the decision does not fully elucidate the bargaining history of the parties or other relevant facts. However, it appears that the parties had negotiated somewhat on a Paid Family and Medical Leave "policy" and discussed a potential Memorandum of Understanding. After some negotiations, the parties reached impasse, went to mediation without success and then proceeded to interest arbitration. Thus, no question was raised about the duty to bargain over the issue, which was what if any supplemental benefits of paid family or medical leave should be allowed by a CBA or policy, above and beyond what state law requires.

The arbitrator stated that in 2019 the legislature did permit employers and employees to negotiate supplemental benefits, in an apparent reference to the above-mentioned RCW 50A.10.030(1)(d). As the union argued, without supplementation by agreement, the represented employees would not receive their previously existing full pay when on PMFLA leave. With supplementation, such as use of their own sick leave, the employees could obtain full pay, and that could be done without any added cost to the city—or so the employees argued.

The arbitrator then compared what other public agencies or jurisdictions had done on the same subject. Of the nine comparative agencies traditionally relied upon by the parties (the comparables) three had not yet engaged in bargaining about it, two agencies had bargained about it, and three or four had successfully agreed to some form of supplementation. Statewide, according to a management exhibit, which summarized 98 fire agencies, 28 already provided for supplementation.

The neutral arbitrator ruled that supplementation "shall be included" in the PFML policy for the two bargaining units (rank and file firefighters and a unit of supervisors), that the parties must bargain and finalize a CBA by about one month later and if they did not agree, the union's 14-day proposal would be implemented. (The decision and award did not state the terms of that proposal, but we can assume it provided for substantial sharing by the employer of premium costs, above and beyond the statutory minimums.)

Importantly, the arbitrator noted that the employer raised only an argument about "administrative burdens" arising out of PFML supplementation and did not raise an "ability to pay" argument. If the employer had presented a more robust financial analysis showing the long-term costs and potential financial risk of implementing supplementation, that might have persuaded the arbitrator. Demonstrating potential future fiscal risk could have been impactful to the arbitrator.

Another case worth discussing is an unfair labor practice decision of the PERC Commission itself: *Whatcom County,* Decision 13082-A (PECB, 2020).[6] In this case, the Whatcom County Sheriff's Guild contended that the employer committed an unfair labor practice when it unilaterally changed wages of uniformed personnel by deducting pay of the sheriff's personnel for PFMLA premiums on January 4, 2019.

[6] https://decisions.perc.wa.gov/waperc/decisions/en/item/470895/index.do?q=Decision+13082-A+

The employer claimed that the Washington PFMLA created a new status quo, so it was not the employer who unilaterally changed the wages. The union countered by arguing that the status quo was the existing wages negotiated by the parties in their CBA prior to the applicable law going into effect. The PERC Hearing Examiner actually ruled that RCW 50A.10.030 established a "premium sharing apportionment" procedure. Because the parties did not negotiate a different apportionment formula before finalizing their CBA (which was effective between December 5, 2017 and December 31, 2019) the Examiner ruled that the formula in the law became the status quo. Since the employer adhered to that formula, he held that the employer did not unilaterally change wages without bargaining. He dismissed the ULP complaint and the union appealed to the PERC commissioners, which act as an appellate body within the agency.

The PERC commissioners reversed, holding that the term "status quo" refers to existing collective bargaining relationship between the parties. Citing *Walla Walla County,* Decision 11877 (PECB, 2013) the commissioners stated: "The status quo is established by the parties' collective bargaining agreement or by established practice." They noted that before the deductions pursuant to the PFMLA, the employees received full pay and after the employer began deducting partial PFML premiums they received less than full pay, i.e. wages were changed.

We think it is important to note that various provisions of RCW 50A.10.030(1) expressly allow for an employer to pay all or some of the relevant employees' premiums. The PERC commissioners pointed directly to RCW 50A.10.030(3) (b) and (c), which provide for the employer to deduct *up to* 45% of the medical leave premium and up to the full amount of the family leave premium from the employee's pay. When read together with (3)(d), of course this means that the employer can (elect) or agree to pay the rest of the employee's premium or all of it. Nowhere in the statute, the commissioners said, did the statute provide that the employer could just adopt the statutory apportionment without bargaining with the union.

For these reasons, the PERC commissioners ruled that a ULP had been committed.

It is important to note that in this case, the employer notified the union of its intent to deduct the employee premiums, about 60 days prior to the January effective date in 2019. The union made a timely demand for bargaining. **The parties met once and negotiated concerning PFMA premiums. No further negotiations occurred.** Neither party requested mediation but the union filed this ULP complaint. Thus, the matter did not proceed to interest arbitration and the employer implemented its decision to deduct according to the statutory formula. The PERC commissioners held this was a unilateral change to wages without bargaining to impasse. The commissioners held there was no waiver by the union, since after all, the union requested bargaining and there was in fact some bargaining.

In laying out the basic precedents applicable to the issues, the PERC commissioners defined what is a "unilateral change." They stated that: "The parties' collective bargaining obligation requires that the status quo be maintained regarding all mandatory subjects of bargaining, except when any changes …are made in conformity with the statutory collective bargaining obligation or a term of a [CBA] *City of Yakima,* Decision 3503-A (PECB, 1990), *aff'd*

City of Yakima v. International Association of Fire Fighters, Local 469, 117 Wn.2d 655 (1991)."

To prove a unilateral change, the commissioners said, "The complainant must establish the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining." They cited, among other cases *Municipality of Metropolitan Seattle (Amalgamated Transit Union, Local 587)* Decision 2746-B (PECB, 1990.

We mention these PERC precedents to show that many important basic principles of PERC jurisprudence were established in the first twenty years or so of PERC's existence. Joseph F. Quinn served as a PERC commissioner between 1986 and 1990, having been appointed by Governor Booth Gardner. Quinn participated in the *City of Yakima and Metro Seattle* cases cited on this page.

Now what can we learn from these cases? And what if the facts were different? Suppose instead that the parties had negotiated successfully a CBA (or even two CBAs) after the "grandfathering" of their pre-PFMLA contract? Presently, suppose they have a comprehensive CBA that does not really mention Paid Family and Medical leave, other than to state that the parties will abide by it, and the employer will deduct employee premiums. Now, the union comes to the employer, during the term of the current three-year contract and says, "How come we do not get all of our PFML premiums paid by the employer like our brethren in neighboring departments do?"

Does the employer refuse to bargain, claiming that there is a "contract bar" defense? They could, but should they? Could the employer say the union waived that right to bargain in the last negotiation sessions, because the situation was the same as now? They could, but should they?

Another alternative is to say to the union that the employer is always willing to listen and to bargain in good faith if there is an issue that needs resolution. The reply could basically be, "Of course, but what are you offering in the good faith, give and take of collective bargaining?" Or maybe, "Well, we would be willing to open that issue for bargaining even though technically we do not have to, because we would like to re-open bargaining on _____." Fill in the blanks. You can see where there is going: <u>In true, good-faith bargaining, you have to give something if you want to get something.</u>

SLIGHT CHANGE TO RCW 51.32.090

House Bill 1197, which was approved this year and will become effective July 1, 2025, effected a slight change to RCW 51.32.090, the statute dealing with temporary total disability. The subsection changed—RCW 51.32.090(4)(b)—deals with light duty.

Section 7 of the bill really just broadens the language to substitute "attending provider" for the previous language, which spoke to "physician or licensed advanced registered nurse practitioner." It would appear that the legislature realized that the medical professionals involved as providers to disabled workers were not limited to doctors and RNs. The Department of Labor and Industries regulations already recognized various types of medical professionals as treating injured workers, including the following professions: medicine and surgery, osteopathic medicine and surgery, chiropractic, naturopathic physician, podiatry, dentistry, optometry, and advanced

registered nurse practitioner, so this change just recognizes the reality in the various fields of medicine.

And don't forget that this change is not effective until two years from now.

LOCAL ELECTION PROCEDURES

As we approach the August primary election, we have noticed an increase in the number of questions concerning ballot measures. In particular, there have been many issues regarding explanatory statements, Statements For and Against, and the appointment of the Committee For and the Committee Against, if any. It is a bit late to help you this year, but save this column, because the deadline for filing with your elections department for the November general election is the day of the primary in August.

First, let us discuss the explanatory statement. An explanatory statement (ES) is required to be drafted, or at least reviewed, by an attorney for the agency. See RCW 29A.32.241(1)(d), which states that the ES is to be "prepared" by the attorney for the jurisdiction submitting the measure. The purpose of the ES is to explain the *legal effect* of approval by the electorate of the ballot measure. That is all it is supposed to be. It is not the same at all as a Statement For the ballot measure. The text of ES is always limited to a certain number of words, but check your local county's guidelines for ballot measures, which ordinarily would be displayed on the county's website. RCW 29A.32.230 authorizes the counties to establish such administrative rules. One reason to check is that the word limitations vary from a low of about 100 to a high of about 250. Also, each county is different in formatting. Pierce County's guidelines state that the ES should not have more than three paragraphs. Those guidelines also state that italics may be used for emphasis, but not underlining, bold or all caps. Again, the message is: check your local county rules! The ES should not urge the voters to approve the measure or even include the reasons why they should vote in favor. That is the purpose of the Statement For.

Second, there have been several questions about the role of the agency in appointing, or seeking members of, the For and Against committees. RCW 29A.32.280 appears to require that the legislative authority appoint both a committee for and a committee against any ballot measure. Since the statute uses the word "shall" it appears to be a mandatory statute. However, what happens when no person comes forward to be appointed to one of those two committees? (This seems to happen more often with the Committee Against.) The local county rules require the agency to attempt to identify and appoint members to these committees, but the rules of the Public Disclosure Commission would require that public funds and instrumentalities not be used for either of these committees' expenditures.

The Pierce County local election guide states that "If such persons are not immediately known, the jurisdiction is encouraged to employ some formal means of notifying the public that members [of the] committees are being sought." Yes, that is a bit vague.

The best practice, we believe, is to advertise locally (such as on your website) that these committees should be formed and the agency will appoint the members. The safest course is to appoint on a "first come, first served" basis. But if your procedures require the Against Committee hopefuls to respond in 10 days, we counsel against strict enforcement if they are a

day or two late. Of course, you should always be mindful of the county's deadlines for submittal of all your paperwork, such as the resolution calling for election, the election cover sheet, the ES and the information about the committees. May 12th was this year's deadline for the August primary election.

ANOTHER PUBLIC RECORDS ACT CASE ON STATUTE OF LIMITATIONS

Earlier this year, the Court of Appeals, Division II, decided a significant Public Records Act (PRA) case worth knowing about. In *Cousins v. State,* No. 56996-5-II,[7] the court held that the one-year PRA statute of limitations bars claims filed more than one year after the agency's definitive, final response. This holding points up the wisdom of our repeated suggestion to all clients to *always* send a closing letter when you provide the last installment of records. It is that final action which triggers the statute of limitations, or starts it running.

The interesting fact in this case was that the agency—the state Department of Corrections—actually *reopened the request* after the closure notice. One might think that the requestor could then argue that a new one-year period would be available, but the court rejected that argument. The Court reasoned that the finality purpose of the statute of limitations would be best served by ruling that the closure action is the final, definitive action giving notice to the requestor that time is running. It was also pointed out that the requestor could simply file a new PRA request.

Interestingly, this was a 2-1 decision with a fairly well-reasoned dissenting opinion. The dissenting judge pointed out that an agency could simply ignore the requestor's repeated requests after their closure letter and thereby trick the requestor into sleeping on their rights. Of course, this argument more or less presumes some bad faith on the part of the agency, which the majority of the Court said would require some evidence of the bad faith or lack of good faith on the part of the agency. This evidence was lacking in the *Cousins* case.

[7] https://caselaw.findlaw.com/court/wa-court-of-appeals/2186466.html