

CHAPTER 11

[Substitute House Bill No. 1581]

FAMILY LEAVE

AN ACT Relating to family leave; adding new sections to chapter 49.12 RCW; adding a new chapter to Title 49 RCW; creating new sections; prescribing penalties; and providing effective dates.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. The legislature finds that the demands of the workplace and of families need to be balanced to promote family stability and economic security. Changes in workplace leave policies are desirable to accommodate changes in the work force such as rising numbers of dual-career couples and working single parents. In addition, given the mobility of American society, many people no longer have available community or family support networks and therefore need additional flexibility in the workplace. The legislature declares it to be in the public interest to provide reasonable family leave upon the birth or adoption of a child and to care for a child under eighteen years old with a terminal health condition.

NEW SECTION. Sec. 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Child" means a biological or adopted child, or a stepchild, living with the employee.

(2) "Department" means the department of labor and industries.

(3) "Employee" means a person other than an independent contractor employed by an employer on a continuous basis for the previous fifty-two weeks for at least thirty-five hours per week.

(4) "Employer" means: (a) Any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and includes any unit of local government including, but not limited to, a county, city, town, municipal corporation, quasi-municipal corporation, or political subdivision, which (i) employed a daily average of one hundred or more employees during the last calendar quarter at the place where the employee requesting leave reports for work, or (ii) employed a daily average of one hundred or more employees during the last calendar quarter within a twenty mile radius of the place where the employee requesting leave reports for work, where the employer maintains a central hiring location and customarily transfers employees among workplaces; and (b) the state, state institutions, and state agencies.

(5) "Family leave" means leave from employment to care for a newborn or newly adopted child under the age of six or a child under eighteen years old with a terminal health condition, as provided in section 3 of this act.

(6) "Health care provider" means a person licensed as a physician under chapter 18.71 RCW or an osteopath under chapter 18.57 RCW.

(7) "Parent" means a biological or adoptive parent, or a stepparent.

(8) "Reduced leave schedule" means leave scheduled for fewer than an employee's usual number of hours or days per workweek.

(9) "Terminal health condition" means a condition caused by injury, disease, or illness, that, within reasonable medical judgment, is incurable and will produce death within the period of leave to which the employee is entitled.

NEW SECTION. Sec. 3. (1) An employee is entitled to twelve workweeks of family leave during any twenty-four month period to: (a) Care for a newborn child or adopted child of the employee who is under the age of six at the time of placement for adoption, or, (b) care for a child under eighteen years old of the employee who has a terminal health condition. Leave under subsection (1)(a) of this section shall be completed within twelve months after the birth or placement for adoption, as applicable. An employee is entitled to leave under subsection (1)(b) of this section only once for any given child.

(2) Family leave may be taken on a reduced leave schedule subject to the approval of the employer.

(3) The leave required by this section may be unpaid. If an employer provides paid family leave for fewer than twelve workweeks, the additional workweeks of leave added to attain the twelve-workweek total may be unpaid. An employer may require an employee to first use up the employee's total accumulation of leave to which the employee is otherwise entitled before going on family leave; however, except as provided in subsection (4) of this section, nothing in this section requires more than twelve total workweeks of leave during any twenty-four month period. An employer is not required to allow an employee to use the employee's other leave in place of the leave provided under this chapter.

(4) The leave required by this section is in addition to any leave for sickness or temporary disability because of pregnancy or childbirth.

(5) An employer may limit or deny family leave to either: (a) Up to ten percent of the employer's workforce in the state designated as key personnel by the employer. Any designation made under this section shall take effect thirty days after it is issued and may be changed no more than once in any twelve-month period. An employer shall not designate key personnel on the basis of age or gender or for the purpose of evading the requirements of this chapter. No employee may be designated as key personnel after giving notice of intent to take leave pursuant to section 4 of this act. The designation shall be in writing and shall be displayed in a conspicuous place; or (b) if the employer does not designate key personnel, the highest paid ten percent of the employer's employees in the state.

NEW SECTION. Sec. 4. (1) An employee planning to take family leave under section 3(1)(a) of this act shall provide the employer with written notice at least thirty days in advance of the anticipated date of delivery or placement for adoption, stating the dates during which the employee intends to take family leave. The employee shall adhere to the dates stated in the notice unless:

- (a) The birth is premature;
- (b) The mother is incapacitated due to birth such that she is unable to care for the child;
- (c) The employee takes physical custody of the newly adopted child at an unanticipated time and is unable to give notice thirty days in advance; or
- (d) The employer and employee agree to alter the dates of family leave stated in the notice.

(2) In cases of premature birth, incapacity, or unanticipated placement for adoption referred to in subsection (1) of this section, the employee must give notice of revised dates of family leave as soon as possible but at least within one working day of the birth or placement for adoption or incapacitation of the mother.

(3) If family leave under section 3(1)(b) of this act is foreseeable, the employee shall provide the employer with written notice at least fourteen days in advance of the expected leave and shall make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the employer. If family leave under section 3(1)(b) of this act is not foreseeable fourteen or more days before the leave is to take place, the employee shall notify the employer of the expected leave as soon as possible, but at least within one working day of the beginning of the leave.

(4) If the employee fails to give the notice required by this section, the employer may reduce or increase the family leave required by this chapter by three weeks.

NEW SECTION. Sec. 5. (1) In the event of any dispute under this chapter regarding premature birth, incapacitation of the mother, maternity disability, or terminal condition of a child, an employer may require confirmation by a health care provider of: (a) The date of the birth; (b) the date on which incapacity because of childbirth or disability because of pregnancy or childbirth commenced or will probably commence, and its probable duration; or (c) for family leave under section 3(1)(b) of this act, the fact that the child has a terminal health condition.

(2) An employer may require, at the employer's expense, that the employee obtain the opinion of a second health care provider selected by the employer concerning any information required under subsection (1) of this section. If the health care providers disagree on any factor which is determinative of the employee's eligibility for family leave, the two health care providers shall select a third health care provider, whose opinion, obtained at the employer's expense, shall be conclusive.

NEW SECTION. Sec. 6. If both parents of a child are employed by the same employer, they shall together be entitled to a total of twelve workweeks of family leave during any twenty-four month period, and leave need be granted to only one parent at a time.

NEW SECTION. Sec. 7. (1) Subject to subsection (2) of this section, an employee who exercises any right provided under section 3 of this act shall be entitled, upon return from leave or during any reduced leave schedule:

(a) To the same position held by the employee when the leave commenced; or

(b) To a position with equivalent benefits and pay at a workplace within twenty miles of the employee's workplace when leave commenced; or

(c) If the employer's circumstances have so changed that the employee cannot be reinstated to the same position, or a position of equivalent pay and benefits, the employee shall be reinstated in any other position which is vacant and for which the employee is qualified.

(2) The entitlement under subsection (1) of this section is subject to bona fide changes in compensation or work duties, and does not apply if:

(a) The employee's position is eliminated by a bona fide restructuring, or reduction-in-force;

(b) The employee's workplace is permanently or temporarily shut down for at least thirty days;

(c) The employee's workplace is moved to a location at least sixty miles from the location of the workplace when leave commenced;

(d) An employee on family leave takes another job; or

(e) The employee fails to provide timely notice of family leave as required under section 4 of this act, or fails to return on the established ending date of leave.

NEW SECTION. Sec. 8. (1) The taking of leave under this chapter shall not result in the loss of any benefit, including seniority or pension rights, accrued before the date on which the leave commenced.

(2) Nothing in this chapter shall be construed to require the employer to grant benefits, including seniority or pension rights, during any period of leave.

(3) All policies applied during the period of leave to the classification of employees to which the employee on leave belongs shall apply to the employee on leave.

(4) During any period of leave taken under section 3 of this act, if the employee is not eligible for any employer contribution to medical or dental benefits under an applicable collective bargaining agreement or employer policy during any period of leave, an employer shall allow the employee to continue, at his or her own expense, medical or dental insurance coverage, including any spouse and dependent coverage, in accordance with state or

federal law. The premium to be paid by the employee shall not exceed one hundred two percent of the applicable premium for the leave period.

NEW SECTION. Sec. 9. The department of labor and industries shall administer the provisions of this chapter.

NEW SECTION. Sec. 10. (1) Except as provided in this chapter, the rights under this chapter are in addition to any other rights provided by law. The remedies under this chapter shall be exclusive.

(2) Nothing in this chapter shall be construed to discourage employers from adopting policies which provide greater leave rights to employees than those required by this chapter.

NEW SECTION. Sec. 11. (1) Nothing in this chapter shall be construed to diminish an employer's obligation to comply with any collective bargaining agreement or any employment benefit program or plan which provides greater leave rights to employees than the rights provided under this chapter.

(2) The rights provided to employees under this chapter may not be diminished by any collective bargaining agreement or any employment benefit program or plan entered into or renewed after the effective date of this section.

NEW SECTION. Sec. 12. (1) In the case of employees covered by an unexpired collective bargaining agreement that expires on or after September 1, 1989, or by an employee benefit program or plan with a stated year ending on or after September 1, 1989, the effective date of this chapter shall be the later of: (a) The first day following expiration of the collective bargaining agreement; or (b) the first day of the next plan year.

(2) Notwithstanding the provisions of sections 14 through 21 of this act, where this chapter has been incorporated into a collective bargaining agreement, the grievance procedures contained in the respective collective bargaining agreement shall be used to resolve complaints related to this chapter.

NEW SECTION. Sec. 13. No employer, employment agency, labor union, or other person shall discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a complaint, testified, or assisted in any proceeding under this chapter.

NEW SECTION. Sec. 14. (1) An employee who believes that his or her employer has violated any provision of this chapter may file a complaint with the department within ninety days of the alleged violation. The complaint shall contain the following:

(a) The name and address of the employee making the complaint;

(b) The name, address, and telephone number of the employer against whom the complaint is made;

(c) A statement of the specific facts which constitute the alleged violation, including the date(s) on which the alleged violation occurred.

(2) Upon receipt of a complaint, the department shall forward written notice of the complaint to the employer.

(3) The department may investigate any complaint filed within the required time frame. If the department determines that a violation of this chapter has occurred, it may issue a notice of infraction.

NEW SECTION. Sec. 15. The department may issue a notice of infraction to an employer who violates this chapter. The employment standards supervisor shall direct that notices of infraction contain the following when issued:

(1) A statement that the notice represents a determination that the infraction has been committed by the employer named in the notice and that the determination shall be final unless contested;

(2) A statement that the infraction is a noncriminal offense for which imprisonment shall not be imposed as a sanction;

(3) A statement of the specific violation which necessitated issuance of the infraction;

(4) A statement of the penalty involved if the infraction is established;

(5) A statement informing the employer of the right to a hearing conducted pursuant to chapter 34.05 RCW if requested within twenty days of issuance of the infraction;

(6) A statement that at any hearing to contest the notice of infraction the state has the burden of proving, by a preponderance of the evidence, that the infraction was committed, and that the employer may subpoena witnesses including the agent that issued the notice of infraction;

(7) If a notice of infraction is personally served upon a supervisory or managerial employee of a firm or corporation, the department shall within seventy-two hours of service send a copy of the notice by certified mail to the employer;

(8) Constructive service may be made by certified mail directed to the employer named in the notice of infraction.

NEW SECTION. Sec. 16. (1) If an employer is a corporation or a partnership, the department need not serve the employer personally. In such a case, if no officer or partner of a violating employer is present, the department may issue a notice of infraction to any managerial employee.

(2) If the department serves a notice of infraction on a managerial employee, and not on an officer, or partner of the employer, the department shall mail by certified mail a copy of the notice of infraction to the employer. The department shall mail a second copy by ordinary mail.

NEW SECTION. Sec. 17. In any case in which the department shall issue an order against any political or civil subdivision of the state, or any agency, or instrumentality of the state or of the foregoing, or any officer or

employee thereof, the department shall transmit a copy of such order to the governor of the state. The governor shall take such action to secure compliance with such order as the governor deems necessary.

NEW SECTION. Sec. 18. (1) If an employer desires to contest the notice of infraction issued, the employer shall file two copies of a notice of appeal with the department at the office designated on the notice of infraction, within twenty days of issuance of the infraction.

(2) The department shall conduct a hearing in accordance with chapter 34.05 RCW.

(3) Employers may appear before the administrative law judge through counsel, or may represent themselves. The department shall be represented by the attorney general.

(4) Admission of evidence is subject to RCW 34.05.452 and 34.05.446.

(5) The administrative law judge shall issue a proposed decision that includes findings of fact, conclusions of law, and if appropriate, any legal penalty. The proposed decision shall be served by certified mail or personally on the employer and the department. The employer or department may appeal to the director within thirty days after the date of issuance of the proposed decision. If none of the parties appeals within thirty days, the proposed decision may not be appealed either to the director or the courts.

(6) An appellant must file with the director an original and four copies of its notice of appeal. The notice of appeal must specify which findings and conclusions are erroneous. The appellant must attach to the notice the written arguments supporting its appeal.

The appellant must serve a copy of the notice of appeal and the arguments on the other parties. The respondent parties must file with the director their written arguments within thirty days after the date the notice of appeal and the arguments were served upon them.

(7) The director shall review the proposed decision in accordance with the administrative procedure act, chapter 34.05 RCW. The director may: Allow the parties to present oral arguments as well as the written arguments; require the parties to specify the portions of the record on which the parties rely; require the parties to submit additional information by affidavit or certificate; remand the matter to the administrative law judge for further proceedings; and require a departmental employee to prepare a summary of the record for the director to review. The director shall issue a final decision that can affirm, modify, or reverse the proposed decision.

(8) The director shall serve the final decision on all parties. Any aggrieved party may appeal the final decision to superior court pursuant to RCW 34.05.570 unless the final decision affirms an unappealed proposed decision. If no party appeals within the period set by RCW 34.05.570, the director's decision is conclusive and binding on all parties.

NEW SECTION. Sec. 19. An employer found to have committed an infraction under this chapter may be subject to a fine of up to two hundred

dollars for the first infraction. An employer that continues to violate the statute may be subject to a fine of up to one thousand dollars for each infraction. An employer found to have failed to reinstate an employee as required under section 7 of this act may also be ordered to reinstate the employee, with or without back pay.

NEW SECTION. Sec. 20. The department shall develop and furnish to each employer a poster which describes an employer's obligations and an employee's rights under this chapter. The poster must include notice about any state law, rule, or regulation governing maternity disability leave and indicate that federal or local ordinances, laws, rules or regulations may also apply. The poster must also include a telephone number and an address of the department to enable employees to obtain more information regarding this chapter. Each employer must display this poster in a conspicuous place. Nothing in this section shall be construed to create a right to continued employment.

NEW SECTION. Sec. 21. (1) The department will cease to administer and enforce this act upon the effective date of any federal act it determines, with the consent of the legislative budget committee, to be substantially similar, in substance and enforcement, to this act. A federal act shall be considered substantially similar even where the duration of leave required or size of employer covered is different than that under this chapter.

(2) No employee shall have a private right of action for any alleged violation of this chapter.

NEW SECTION. Sec. 22. The legislature finds that employers often distinguish between biological parents, and adoptive parents and stepparents in their employee leave policies. Many employers who grant leave to their employees to care for a newborn child either have no policy or establish a more restrictive policy regarding whether an adoptive parent or stepparent can take similar leave. The legislature further finds that many employers establish different leave policies for men and women regarding the care of a newborn or newly placed child. The legislature recognizes that the bonding that occurs between a parent and child is important to the nurturing of that child, regardless of whether the parent is the child's biological parent and regardless of the gender of the parent. For these reasons, the legislature declares that it is the public policy of this state to require that employers who grant leave to their employees to care for a newborn child make the same leave available upon the same terms for adoptive parents and stepparents, men and women.

NEW SECTION. Sec. 23. A new section is added to chapter 49.12 RCW to read as follows:

(1) An employer must grant an adoptive parent or a stepparent, at the time of birth or initial placement for adoption of a child under the age of

six, the same leave under the same terms as the employer grants to biological parents. As a term of leave, an employer may restrict leave to those living with the child at the time of birth or initial placement.

(2) An employer must grant the same leave upon the same terms for men as it does for women.

(3) The department shall administer and investigate violations of this section. Notices of infraction, penalties, and appeals shall be administered in the same manner as violations under RCW 49.12.285.

(4) For purposes of this section, "employer" includes all private and public employers listed in RCW 49.12.005(3).

(5) For purposes of this section, "leave" means any leave from employment granted to care for a newborn or a newly adopted child at the time of placement for adoption.

(6) Nothing in this section requires an employer to:

(a) Grant leave equivalent to maternity disability leave; or

(b) Establish a leave policy to care for a newborn or newly placed child if no such leave policy is in place for any of its employees.

NEW SECTION. Sec. 24. A new section is added to chapter 49.12 RCW to read as follows:

In the case of employees covered by an unexpired collective bargaining agreement that expires on or after September 1, 1989, or by an employee benefit program or plan with a stated year ending on or after September 1, 1989, the effective date of section 23 of this act shall be the later of: (1) The first day following expiration of the collective bargaining agreement; or (2) the first day of the next plan year.

NEW SECTION. Sec. 25. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 26. Sections 1 through 21 of this act shall constitute a new chapter in Title 49 RCW.

NEW SECTION. Sec. 27. This act shall take effect September 1, 1989.

Passed the House May 10, 1989.

Passed the Senate May 10, 1989.

Approved by the Governor June 1, 1989.

Filed in Office of Secretary of State June 1, 1989.