



Washington State Legislature

December 5, 2007

MEMORANDUM

TO: Subcommittee on Implementation
Joint Legislative Task Force on Family Leave Insurance

FROM: Jill Reinmuth, Counsel
House Office of Program Research

RE: Definitions of "Employee"

During the Task Force meeting on October 17, concern was expressed that E2SSB 5659 (2007) does not include a definition of "employee." Stakeholders noted that Section 11 provides for job protection following leave for certain individuals who work for an employer with more than 25 employees. Stakeholders explained that, without a definition, it is unclear which employers have more than 25 employees.

During the Subcommittee meeting on November 2, members discussed this concern. Members requested information about definitions of "employee" that may have appeared in earlier versions of E2SSB 5659 or other leave-related laws.

The following information is provided in response to that request. It includes both definitions of "employee" as well as explanations of what it means to employ a specified number of employees.

Legislation Related to Family Leave Insurance

- Earlier versions of E2SSB 5659 (2007) and past legislation did not limit job protection following leave to individuals who work for an employer with a particular number of employees. They also did not include a definition of "employee."
- One amendment to 2SSB 5069 (2005) would have added a definition of "individual" which included the federal Family and Medical Leave Act definition of "employee." See 5069-S2 AMS HONE S2712.1 (not adopted) (2005). By defining "individual" in this manner, the amendment would have made the eligibility requirements for family leave insurance benefits and leave under state law similar to those for leave under federal law.

Laws Related to Family Leave

- The federal Family and Medical Leave Act, the state Family Leave Act, and the state Family Care Act include definitions of "employee" or borrow definitions from other laws. For example, the federal Family and Medical Leave Act borrows its definition from the federal Fair Labor Standards Act.
- For purposes of the federal Family and Medical Leave Act, federal regulations include an explanation of what it means to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.
- For purposes of the Washington Law Against Discrimination, state rules include standards for determining who is counted as employed when deciding whether a person is an employer.

Please let me know if you have further questions about these definitions of "employee" or these explanations of what it means to employ a specified number of employees.

Attachment A - Excerpts from Federal Family and Medical Leave Act

Attachment B - Excerpts from Washington Family Leave Act

Attachment C - Excerpts from Washington Family Care Act

Attachment D - Excerpts from Washington Law Against Discrimination

ATTACHMENT A
EXCERPTS FROM FEDERAL FAMILY AND MEDICAL LEAVE ACT

Federal Law - 29 U.S.C. § 2611

"(3) Employ; employee; State.

The terms "employ", "employee", and "State" have the same meanings given such terms in subsections (c), (e), and (g) of section 3 of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(c), (e), and (g)).

(4) Employer.

(A) In general. The term "employer"--

(i) means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includes--

(I) any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and
(II) any successor in interest of an employer;

(iii) includes any "public agency", as defined in section 3(x) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(x)); and

(iv) includes the General Accounting Office [Government Accountability Office] and the Library of Congress."

Federal Regulations - 29 CFR § 825.105

"In determining whether an employer is covered by FMLA, what does it mean to employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year?

(a) The definition of "employ" for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term "employ" as defined in the Act includes "to suffer or permit to work". The courts have indicated that, while "to permit"

requires a more positive action than "to suffer", both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on "isolated factors" or upon a single characteristic or "technical concepts", but depends "upon the circumstances of the whole activity" including the underlying "economic reality." In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who "follows the usual path of an employee" and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of August 5, 1993, subsequently dropped below 50 employees before the end of 1993 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 1994, the employer would continue to be covered throughout calendar year 1994 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 1993) calendar year."

Federal Fair Labor Standards Act - 29 U.S.C. § 203

"(e) (1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

- (i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),
- (ii) in any executive agency (as defined in section 105 of such title),
- (iii) in any unit of the judicial branch of the Government which has positions in the competitive service,
- (iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,
- (v) in the Library of Congress, or
- (vi) the Government Printing Office;

(B) any individual employed by the United States Postal Service or the Postal Rate Commission [Postal Regulatory Commission]; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who--

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed

by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4) (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

(B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries."

ATTACHMENT B
EXCERPTS FROM WASHINGTON FAMILY LEAVE ACT

RCW 49.78.020

"(4)(a) "Employee" means a person who has been employed: (i) For at least twelve months by the employer with respect to whom leave is requested under RCW 49.78.220; and (ii) for at least one thousand two hundred fifty hours of service with the employer during the previous twelve-month period.

(b) "Employee" does not mean a person who is employed at a worksite at which the employer as defined in (a) of this subsection employs less than fifty employees if the total number of employees employed by that employer within seventy-five miles of that worksite is less than fifty."

RCW 49.78.410

"This chapter must be construed to the extent possible in a manner that is consistent with similar provisions, if any, of the federal family and medical leave act of 1993 (Act Feb. 5, 1993, P.L. 103-3, 107 Stat. 6), and that gives consideration to the rules, precedents, and practices of the federal department of labor relevant to the federal act."

ATTACHMENT C
EXCERPTS FROM WASHINGTON FAMILY CARE ACT

RCW 49.12.265 - .295

The Washington Family Care Act itself does not include a definition of "employee."

RCW 49.12.005

The definitions in RCW 49.12.005 are for the purposes of chapter 49.12 RCW, including the Washington Family Care Act.

"(4) "Employee" means an employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise."

ATTACHMENT D
EXCERPTS FROM WASHINGTON LAW AGAINST DISCRIMINATION

RCW 49.60.040

"(3) "Employer" includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and does not include any religious or sectarian organization not organized for private profit;

(4) "Employee" does not include any individual employed by his or her parents, spouse, or child, or in the domestic service of any person;"

WAC 162-16-220

"(1) *Purpose and scope.* RCW 49.60.040 defines "employer" for purposes of the law against discrimination in part as "any person. . . who employs eight or more persons." This section establishes standards for determining who is counted as employed when deciding whether a person is an employer. The standards in this section do not define who is entitled to the protection of the law against discrimination.

(2) *Time of calculation.* A person will be considered to have employed eight if the person either:

(a) Had an employment relationship with eight or more persons for any part of the day on which the unfair practice is alleged to have occurred, or did occur; or

(b) Had an employment relationship with an average of eight or more persons over a representative period of time including the time when the unfair practice is alleged to have occurred.

An employment relationship is most readily demonstrated by a person's appearance on the employer's payroll. The representative period of time for (b) of this subsection will ordinarily be the twenty weeks prior to and including the date on which the unfair practice is alleged to have occurred. However, where this period will not accurately reflect the overall employment level, as in a seasonal industry, we will use the month during which the unfair practice is alleged to have occurred plus the preceding eleven months.

(3) *Part-time employees.* A person working part time will be counted the same as a person working full-time. Persons subject to call to work (such as volunteer fire fighters) will be considered to be employed at all times when they are subject to call.

(4) *Area of calculation.* A person who employs eight or more persons is an "employer" for purposes of the law against discrimination even though less than eight of the

employees are located in the state of Washington.

(5) *Multiple places of employment.* The count will include all persons employed by the same legal entity, whether or not the persons work in the same place of business or line of business.

(6) *Connected corporations.* Corporations and other artificial persons that are in common ownership or are in a parent-subsidary relationship will be treated as separate employers unless the entities are managed in common in the area of employment policy and personnel management. In determining whether there is management in common we will consider whether the same individual or individuals do the managing, whether employees are transferred from one entity to another, whether hiring is done centrally for all corporations, and similar evidence of common or separate management.

(7) *Persons on layoff.* Persons on layoff will not be counted.

(8) *Persons on leave.* Persons on paid leave will be counted. Persons on unpaid leave will not be counted.

(9) *Employee or independent contractor.* Independent contractors will not be counted. In determining whether a person is employed or is an independent contractor for the jurisdictional count we will use the same standards that we use for the purpose of determining whether a person comes within the protection of the law against discrimination. These standards are set out in WAC 162-16-230.

(10) *Pay.* Anyone who is paid for work and who otherwise meets the standards in this section will be counted. This includes paid interns and work study program participants. Pay includes compensation for work by the hour, by commission, by piecework, or by any other measure. For the treatment of unpaid persons, see subsection (11) of this section.

(11) *Unpaid persons.* An unpaid person will be counted if he or she is generally treated in the manner that employers treat employees. That is, if management selects the person (particularly if selected in competition with other persons), assigns work hours, disciplines the unpaid person like an employee, or provides employment benefits such as industrial insurance, then the person will be counted as an employee. The typical volunteer fire fighter would be counted. A person who comes into the food bank when he or she pleases, is put to work if there is anything to do, who leaves when he or she pleases, who has no expectation of paid employment, and who receives no employment benefits, would not be counted.

(12) *Family members.* Because of the definition of "employee" in RCW 49.60.040, we will not count "any individual employed by his or her parents, spouse, or child." Other family members will be counted.

(13) *Domestic help.* Because of the definition of "employee" in RCW 49.60.040, we will

not count a person in the domestic service of the employing person.

(14) *Directors*. Directors of corporations, and similar officers of other private or public artificial legal entities, will not be counted simply because they serve in that capacity.

(15) *Officers*. Officers of corporations, and officers of other private or public artificial legal entities, will be counted unless:

(a) They receive no pay from the corporation or other entity; and

(b) They do not participate in the management of the corporation or other entity beyond participation in formal meetings of the officers.

(16) *Partners*. Partners will not be counted as employed by the partnership or by each other.

(17) *Members of a professional service corporation*. All persons who render professional services for a professional service corporation will be counted as employees of the corporation.

(18) *Temporary employee placement services*. Persons placed with an on-site employer by a temporary employee placement service:

(a) Will be counted as employees of the temporary placement service; and

(b) Will also be counted as employees of the on-site employer if the on-site employer generally treated them in the manner that employers treat employees (please see the factors listed in WAC 162-16-230)."