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## DRAFT VERSIONS OF 2017 FORMS 1094/1095 RELEASED BY IRS

The Internal Revenue Service (IRS) has released draft versions of Form 1094-B, Form 1095-B, Form 1094-C, and Form 1095-C for the 2017 tax year, which will be filed in early 2018. As a reminder, Forms 1094-B and 1095-B are used by insurance issuers to report minimum essential coverage (MEC), and Forms 1094-C and 1095-C are used by applicable large employers (ALEs) to report an offering of health coverage to their employees. These revisions are only drafts; final revisions to these Forms should be forthcoming in the next few months.

Draft instructions for the 2017 forms have not been released, but are expected to be issued by the IRS in the coming weeks.

Highlights of the 2017 draft revisions (to the 2016 Forms) are as follows:

### Form 1094-C

In line 22 "Certifications of Eligibility", the box for "Section 4980H Transition Relief" was removed. This relief was only applicable to the 2015 plan year; however this option remained on the 2016 Form because some non-calendar year plans may have qualified for transition relief for certain months in the 2016 calendar year.

### Forms 1095-B and 1095-C

No substantive changes were made on these Forms. A new paragraph entitled "Additional Information" was added in the Instructions for Recipients (which is attached to the Forms), and refers recipients to a new IRS webpage detailing provisions of the individual shared responsibility payment, employer shared responsibility payment, and premium tax credits. This webpage also contains contact information for the IRS Healthcare hotline.

### Form 1094-B

This Form remains unchanged.

### No Action Required

Employers subject to the reporting requirements should continue to prepare these Forms for the 2017 tax year. Despite continued attempts to repeal, replace, or change provisions of the Affordable Care Act, no changes have been made to the reporting requirements at this time.

For 2017 draft versions, see:

Form 1094-B, here: <https://www.irs.gov/pub/irs-dft/f1094b--dft.pdf>

Form 1095-B, here: <https://www.irs.gov/pub/irs-dft/f1095b--dft.pdf>

Form 1094-C, here: <https://www.irs.gov/pub/irs-dft/f1094c--dft.pdf>

Form 1095-C, here: <https://www.irs.gov/pub/irs-dft/f1095c--dft.pdf>

For additional information for form recipients, see: <https://www.irs.gov/affordable-care-act/individuals-and-families>

# INCREASE IN 2017 SERVICE CONTRACT ACT HEALTH & WELFARE FRINGE BENEFITS RATE

On July 25, 2017, the U.S. Department of Labor (the Department) issued All Agency Memorandum Number 225 (Memo No. 225) communicating a rate increase for federal services contracts under the McNamara-O'Hara Service Contract Act (SCA) health and welfare fringe benefits program. For all government contract bids or other service contracts awarded under the SCA on or after August 1, 2017, the new health and welfare fringe benefits rate is \$4.41 per hour (an increase from the 2015 - 2016 rate of \$4.27 per hour). Different rates may apply to employers with employees in Hawaii, or employers that provide paid sick leave required by Executive Order 13706 (EO 13706). Highlights of Memo No. 225 are discussed below.

## Overview of SCA Wage Determination

Employers who are contractors or subcontractors with services contracts under the SCA in excess of \$2,500 must pay service employees certain wage rates and fringe benefits. SCA wage determinations contain two different health and welfare fringe benefit levels – a low level benefit and a high level benefit. To comply with the low level benefit, employers must provide a minimum employee-by-employee benefit of \$4.41 per hour. Compliance with the high level benefit is determined based on the federal contractor's average fringe benefit cost for all service employees working on the contract (also \$4.41 per hour). The high level benefit only applies to certain contracts where the formerly grandfathered average cost benefit rate would have applied.

## Lower Rates for Contracts Covered By Executive Order 13706

Memo No. 225 provides a special, reduced health and welfare fringe benefits rate of \$4.13 per hour for employees performing on services contracts covered by EO 13706. Signed by President Obama on September 7, 2015, EO 13706 mandates that employers awarded certain federal government contracts after January 1, 2017, including services contracts covered by the SCA, must provide employees with fifty-six (56) hours of paid sick leave per year. Because the cost of the paid sick leave under EO 13706 cannot be counted towards the employer's contributions towards an SCA employee's health and welfare benefits, this reduced rate takes into account the required paid sick leave benefit for employees performing contracts under EO 13706.

Please refer to our October 2016 issue of Legislative Compliance Monthly newsletter for additional information on the Department's final regulations implementing EO 13706.

## Wage Determination for Hawaii Employers

A reduced health and welfare fringe benefits rate of \$1.91 per hour is available to employers with employees in Hawaii, which takes into consideration the state's mandatory health insurance coverage under the Hawaii Prepaid Health Care Act (PHCA). However, an employer can only use the lower rate if they actually make contributions for employees under the PHCA. Under Section 2(a)(2) of the SCA, fringe benefit payments required by state law cannot be used to satisfy an employer's fringe benefit obligations. Accordingly, this lower rate takes into account the state mandated employer payments towards an employee's health care coverage.

For employees working in Hawaii, **and** on contracts covered by EO 13706, the health and welfare fringe benefit rate is \$1.63 per hour. Again, the employer must actually make contributions towards an employee's health coverage under the PHCA in order to take advantage of this lower rate. If the employer is not contributing towards PHCA benefits, then the \$4.41 per hour rate applies (or, the \$4.13 rate for employees performing work under contracts covered by EO 13706).

## Action Required

Federal contractors and subcontractors who are awarded, or renew government contract bids or other service contracts after August 1, 2017 must use the new health and welfare fringe benefits rate of \$4.41 per hour (or \$4.13 for EO 13706 employees). Employers that contribute toward Hawaii's mandatory health insurance coverage under the Hawaii Prepaid Health Care Act can use the special rate of \$1.91 per hour for those employees (or \$1.63 per hour for EO 13706 employees).

**For All Agency Memorandum Number 225, see:** <https://www.dol.gov/whd/govcontracts/sca/sf98/aam225.htm>

# WASHINGTON STATE PASSES PAID FAMILY AND MEDICAL LEAVE LAW

On July 5, 2017, the state of Washington passed Senate Bill 5975 (Leave Law), which generally requires covered employers to offer qualified employees 12 weeks of paid family or medical leave. The Leave Law will become effective on January 1, 2020. However, the Leave Law will be funded through employer and employee contributions, and those contributions will begin January 1, 2019. Highlights of the Leave Law are detailed below.

## Covered Employer

The Leave Law applies to private and public employers with one or more employees working in Washington. The Leave Law does not apply to the Federal government.

## Covered Employee

The Leave Law applies to an employee working in Washington. The Leave Law does not apply to an employee of the Federal government.

Employees are eligible for benefits once the employee has worked at least 820 hours during a “qualifying period.” The qualifying period is the first four (4) of the last five (5) calendar quarters, or, if an employee has not worked 820 hours within that period, then the last four (4) calendar quarters immediately prior to requesting leave.

The Leave Law does not apply where there is an existing collective bargaining agreement in place. However, once that collective bargaining agreement is renewed or expires, the Leave Law would apply to those parties.

## Permitted Uses of Leave

A covered employee may use leave for the following purposes:

1. the employee has a serious health condition or the employee needs to care for a family member with a serious health condition
2. to bond with a child after birth or placement; or
3. there is a qualifying exigency under the Family and Medical Leave Act (FMLA)

The Leave Law broadly defines a family member as an employee’s child, grandchild, grandparent, parent, sibling, or spouse. An employee’s “parent” includes the biological, adoptive, *de facto* or foster parent, stepparent, legal guardian of the employee or employee’s spouse, or an individual who stood *in loco parentis* to the employee when the employee was a child.

## Waiting Period for Use of Leave

Benefits are not payable to an employee until after the seventh (7<sup>th</sup>) day that an employee is on family or medical leave. However, there is no waiting period for an employee to receive benefits if the employee is on leave due to the birth or placement of a child.

## Duration of Leave

Generally, an employee is entitled to twelve (12) weeks of family or medical leave per year. However, the length of leave may be extended up to eighteen (18) weeks for an employee who experiences pregnancy-related health conditions or for combined family and medical leave.

Due to the complexity of the coordination of leave rules, we advise that you speak with a labor and employment attorney or leave administrator for additional questions regarding the extension of this leave time beyond twelve (12) weeks.

## Expiration of Leave Entitlement

An employee has twelve (12) months from the date of the event (i.e., birth of child) to request to use family or medical leave. If the employee does not use leave within those twelve (12) months, the employee loses the right to leave for that event. For example, if an employee has a baby, and does not take family leave within twelve (12) months of the child’s birth, the employee loses the right to take leave in order to care for or bond with that child.

## Maximum Benefit Amount

An employee may receive up to 90% of his/her weekly wage while on leave. The amount of the benefit received while on leave will vary, depending on the employee’s wage compared to Washington’s average weekly wage.

The maximum weekly benefit amount per employee is \$1,000. The Commissioner of the Washington State Employment Security Department (Commissioner) will adjust the maximum weekly benefit amount annually on September 30<sup>th</sup>, to equal 90% of Washington’s average weekly wage, and the adjustment will be effective the following January 1<sup>st</sup> of each year.

## Washington State Passes Paid Family and Medical Leave Law (continued)

### Funding of Paid Family and Medical Leave

The benefits provided under the Leave Law are funded by employer and employee contributions through payroll deductions. Beginning on January 1, 2019, both the employer and employee will pay a total of 0.4% of the employee's wages into a state insurance account. The employer will be responsible for at least 37.5% of this total premium, and the employee will pay the remaining 62.5% of the premium. One-third of the premium contributions will apply to family leave benefits and two-thirds of the premium contribution will go towards medical leave benefits.

An employer may, but is not required to, pay for all or a portion of the employee's required premium contribution.

#### ***Small Employer Exception***

Employers with less than 50 employees are not required to pay the employer contribution towards the cost of the premiums.

#### ***Small Employer Wage Offset***

Employers with 150 or less employees may apply for a grant to offset the cost of an employee's wages while that employee is on family or medical leave.

An employer may receive a \$1,000 grant to offset the wage-related costs of an employee on leave. If an employer hires a replacement worker for an employee that is on leave for seven (7) days or more, the employer may receive a grant of up to \$3,000.

Employers may request a grant up to ten (10) times per calendar year, but may only request a grant once per employee.

#### ***Waiver of Employer Contribution***

An employer may request a waiver from paying the employer portion of premiums for the following employees:

- an employee physically based outside of the state of Washington
- an employee employed in the state of Washington on a limited or temporary work basis; and
- an employee that is not expected to work in the state of Washington for at least 820 hours during a "qualifying period."

### Employer Opt-Out Option

If an employer offers a family and medical leave plan comparable to what the Leave Law requires, the employer can opt-out of the state-run program, but must pay a \$250 fee to the Employment Security Department.

### Employee Health Coverage While on Leave

Employers must continue an employee's health coverage while that employee is on family or medical leave.

### Employee Job Protection

Employees are entitled to their same or equivalent job when they return from family or medical leave.

### Employer Notice Requirement

Employers have two notice obligations under the Leave Law. First, covered employers are required to post a notice detailing employees' rights under the Leave Law in a conspicuous location in the workplace. Failure to post this notice can result in penalties of up to \$100 for each failure. The Leave Law suggests that a model notice will be provided by the Commissioner. A model notice has not been released at this time, but we advise that employers monitor the Employment Security Department website for the posting of a model notice in the future.

Second, if an employee takes leave for more than seven (7) consecutive days, an employer is required to provide an employee a written document detailing the employee's rights while on leave. This notice must be provided within five (5) days after the seventh (7<sup>th</sup>) consecutive day of leave, or within five (5) days of the employer receiving notice that the employee's absence is due to family or medical leave.

### Recordkeeping Requirement

Employers are required to keep employment records for a period of six (6) years documenting an employee's use of family and medical leave, and also document the employer and employee premium contributions made as required by the Leave Law.

### Prohibited Employer Actions

Employers may not restrict or deny an employee's rights under the Leave Law, nor can an employer discriminate against an employee for exercising his/her rights to take leave that is protected under the Leave Law.

## Washington State Passes Paid Family and Medical Leave Law (continued)

### Employer Penalties for Violations

An employer who violates any of the provisions of the Leave Law is subject to penalties including repayment of wages improperly withheld and additional monetary penalties per violation.

### Action Required

Covered employers with one (1) or more employees in Washington should ensure that employees are provided Paid Family and Medical Leave by January 1, 2020, and that they begin employer and employee premium payments by January 1, 2019. Employers should also ensure that they have written policies in their employee handbook or similar materials. Finally, employers should check the Washington Employment Security Department website for a model notice, and post the notice in their places of business once it is available.

For text of the Leave Law, see: <http://lawfilesexternal.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/5975-S.PL.pdf>

# STATE OF NEW YORK ADOPTS PAID FAMILY LEAVE FINAL REGULATIONS

On July 19, 2017, the New York Workers' Compensation Board (the Board) adopted final regulations (Final Regulations) implementing the New York State Paid Family Leave Benefits Law (PFL law). Starting January 1, 2018, employers must provide employees in New York with paid family leave (PFL) benefits through the state's existing Disability Benefits Law.

Previously, the Board issued proposed rules in February 2017, revisions to the proposed rules on May 24, 2017, and an Assessment of Public Comments (Assessment). For details about the proposed rules and revisions to the proposed rules, please see our April 2016 and March 2017 issues of the Legislative Compliance Monthly Newsletter.

Highlights of the key provisions of the PFL law, as clarified by the Final Regulations and Assessment, are detailed below.

### Covered Employers

This law applies to private employers that employ one (1) or more employees in the state of New York for thirty (30) or more days in any calendar year.

### Covered Employees

Employees who work at least twenty (20) hours per week are eligible for PFL benefits once they have worked at least twenty-six (26) consecutive weeks in a fifty-two (52) week period for the same employer. An amendment in the Final Regulations clarifies that the "consecutive" weeks may be tolled during periods of absence due to the nature of that employee's employment, when employment is not terminated (e.g., semester breaks), so that the required consecutive twenty-six (26) week employment period does not restart again for certain categories of employees who may be unable to work due to the nature of their employment (e.g., for teachers who are absent, but remain employed, during summer breaks).

Employees who work less than twenty (20) hours per week are eligible for PFL benefits after working 175 days in a fifty-two (52) week period for the same employer. The Assessment clarifies that 175 days means days **worked**, not calendar days (e.g., a part-time employee who works three (3) days a week is eligible for PFL after the 175th day **worked**, not the 175th day after the employee's start date).

In addition, paid time off counts towards the hours an employee needs to work to be eligible for PFL (i.e., towards the twenty-six (26) weeks for employees who work twenty (20) or more hours per week, or 175 days for employees who work less than twenty (20) hours per week).



## State of New York Paid Family Leave Law Final Regulations (continued)

### Employers Must Provide Opt-Out Waivers to Ineligible Employees

The Final Regulations clarify that employers must provide an option for employees to waive PFL coverage, if that employee will never be eligible to use the PFL coverage, based upon their regular work schedule (e.g., temporary or seasonal employees whose regular work schedule will not add up to twenty-six (26) weeks, or 175 days in a fifty-two (52) week period). If employees waive PFL coverage, then they are not subject to payroll deductions for the PFL premiums. The employer must provide waivers for these employees to sign, and keep copies of the signed waivers on file for as long as the employee is employed.

If the employee's regular work schedule changes such that the employee is required to work for at least twenty-six (26) weeks (for employees who work twenty (20) or more hours per week) or 175 days (for employees who work less than twenty (20) hours per week) or more during a fifty-two (52) week period, then the waiver will be deemed to be revoked within eight (8) weeks of the change. Subsequently, the employee must begin contributing to the cost of PFL coverage, including retroactive amounts due from date of hire, as soon as the employer notifies the employee of the change.

### Employees Subject to Collective Bargaining Agreements

Employers do not need to provide PFL benefits to employees subject to a collective bargaining agreement (CBA) if:

1. The CBA provides benefits at least as favorable as the PFL law; and
2. The CBA does not permit employees to waive their rights to PFL (except when the employee would be ineligible for PFL benefits).

### Amount of PFL Benefits

For 2018, an employee's PFL benefit is the lesser of 50% of the employee's average weekly wage, or 50% of New York State's average weekly wage (NYSAWW). The NYSAWW, set by the New York State Department of Labor each year based on wages from the prior calendar year, is currently \$1,305.92 for 2018 (50% of the NYSAWW of \$1,305.92 is \$652.96).

Under the PFL law, an employer would calculate the average weekly wage of an employee by dividing an employee's total wages paid by the employer for the last eight (8) weeks the employee worked prior to taking leave, by eight (8). For example, if the employee earned \$2,000 over the past eight weeks, then the employee's weekly wage is \$2000 divided by 8 weeks, or \$250 per week. The Final Regulations clarify that the eight (8) weeks excludes the week or partial week in which the employee began taking PFL. In other words, an employer should calculate the average weekly wage using the last eight (8) full weeks before the employee's PFL began.

The Final Regulations also clarify that employers may convert the average weekly wage into an average daily wage. For example, if an employee requests PFL in daily increments (e.g., every Monday off for six weeks, instead of one week of PFL), the employer should calculate a daily benefit based on the employee's average weekly wage, divided by the average number of days the employee worked per week.

### Duration of PFL Benefits

The PFL benefits will be phased in as follows:

- Starting January 1, 2018, employees can receive up to eight (8) weeks of PFL benefits per fifty-two (52) week period;
- Starting On January 1, 2019, employees can receive up to ten (10) weeks of PFL benefits per fifty-two (52) week period, and
- Starting January 2021, employees can receive up to twelve (12) weeks of PFL benefits per fifty-two (52) week period.

The fifty-two (52) week period in which an employee may take PFL is measured backward from the day that leave is taken (rather than on a calendar year basis). For example, if an employee takes eight (8) weeks of leave from July 2, 2018 through August 27, 2018, then that employee would be entitled to another ten (10) weeks of PFL on July 1, 2019, **not** on January 1, 2019.

### Permitted Uses of Leave

PFL benefits are available to care for a family member's serious health condition, bond with a new child, or to relieve family pressures associated with a family member's military service. The Assessment confirms that an employee can use PFL to care for a grandparent or grandchild's serious health condition, but the employee can only use PFL if a spouse, domestic partner, child, or parent of the employee is called due to the military service of those individuals (but not if a grandparent or grandchild is called to military service).

### Maximum Limit for Employee Contributions

The PFL program is paid for with employee payroll deductions. The Department of Financial Services (DFS) explained that the employee contribution is limited to 0.126% of an employee's weekly wage, not to exceed the NYSAWW, meaning the maximum employee contribution is \$1.65 per week for 2018 (0.126% of \$1,305.92). Again, this amount is subject to change on September 1<sup>st</sup> of each year.

## State of New York Paid Family Leave Law Final Regulations (continued)

### Coordination with Other Leave Laws

PFL may run concurrently with FMLA (e.g., an employee takes leave to bond with a child), or may run separately from FMLA (e.g., employee takes twelve (12) weeks of FMLA leave due to her own pregnancy-related health condition, then takes eight (8) weeks of PFL to bond with the new child). The Assessment clarifies that employees who exhausted twelve (12) weeks of FMLA leave in 2017 may be entitled to another eight (8) weeks of PFL in 2018 for the same event (e.g., birth of a baby, taking care of a sick spouse).

In contrast, employees may not collect benefits under state short-term disability and PFL concurrently, as these benefits are provided for different purposes (state disability benefits are available when an employee is unable to work due to a disabling condition; PFL benefits are not for the employee's own health condition).

### Action Required

Covered employers with one (1) or more employees in New York should ensure that employees are provided Paid Family Leave, as employers must have a policy in place by January 1, 2018. In addition, employers should adopt written policies in their employee handbook or similar materials. These policies should also be updated for the next four years, due to the amount and availability of paid leave that will be changing over the next four years. Finally, employers should display a Paid Family Leave poster in their place of business, once this is available.

**For text of the regulations, see:** <http://www.wcb.ny.gov/PFL/pfl-regs-text.jsp>

**For the Assessment of Public Comments, see:** <http://www.wcb.ny.gov/PFL/pfl-assessment-public-comment.jsp>

## QUESTION OF THE MONTH

### Can Our Health FSA Reimburse Insurance Premiums Paid by Our Employees?

**QUESTION:** An employee has asked whether our health FSA can reimburse the premiums he pays for private dental insurance. Am I right that a health FSA cannot reimburse insurance premiums?

**ANSWER:** You are correct that a health FSA cannot treat employees' premium payments for health insurance coverage as reimbursable expenses. Some employers are surprised by this rule because health FSAs reimburse expenses for medical care as defined in [Code § 213\(d\)](#), and premiums for health coverage fall within that definition. However, even though such premiums may be deducted on [Schedule A](#) of the Form 1040 (subject to the applicable deductibility threshold) and certain insurance premiums may be reimbursed by HRAs and HSAs, IRS regulations prohibit health FSAs from reimbursing insurance premiums. The IRS has repeatedly reaffirmed this rule (see our [article](#)).

Thus, for example, a health FSA cannot reimburse premiums for COBRA coverage, accidental death and dismemberment (AD&D) insurance, long-term or short-term disability insurance, or Medicare. Nor can a health FSA reimburse premiums for coverage under an employer-sponsored health plan, whether the plan is sponsored by the same employer that also sponsors the health FSA or another employer (e.g., the employer of an employee's spouse or dependent).

Source: EBIA

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