
JOINT TASK FORCE ON FAMILY LEAVE INSURANCE

FINAL REPORT

JANUARY 23, 2008

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Asterisk (*) Denotes Subcommittee Members

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PART I BACKGROUND ON THE TASK FORCE

In 2007 the Legislature enacted Engrossed Second Substitute Senate Bill 5659 relating to family and medical leave insurance.¹ The Final Bill Report and the full text of the bill are available online at <http://apps.leg.wa.gov/billinfo/>.

Findings and Declarations

The bill expressed legislative findings and declarations. The Legislature found that many individuals do not have access to family leave laws, that those who do may not be in a financial position to take unpaid leave, and that employer-paid benefits meet only a small part of this need. The Legislature declared it to be in the public interest to establish a program that allows bonding, provides income support, reduces impacts on state programs, and establishes benefits to be coordinated with current leave laws.

Family Leave Insurance Program

The bill established the framework for the family leave insurance program. This framework included family leave insurance benefits of \$250 per week for up to five weeks for individuals on leave for the birth or placement of a child. It also included job protection following leave for individuals who work for an employer with more than 25 employees for at least 12 months, and who have worked for at least 1,250 hours over the previous 12 months.

Joint Legislative Task Force

The bill created a joint legislative task force to study the establishment of the family leave insurance program. See Appendix.

The Task Force was directed to study the establishment of the family leave insurance program including, but not limited to, the following: financing for benefits and administrative costs; program implementation and administration; government efficiencies which improve program administration and reduce program costs; and impacts, if any, on the unemployment compensation system, and options for mitigating such impacts.

The Task Force was required to report its findings and recommendations, including recommendations as to the specific manner in which benefits and administrative costs should be financed as well as proposed legislation, to the Legislature by January 1, 2008.

The Task Force consisted of thirteen members: four legislative members that are the chairs and the ranking members of the Senate Labor, Commerce, Research, and Development Committee

¹ Prior to enactment of E2SSB 5659 in 2007, the Legislature considered other proposals to establish a partial wage replacement benefit for persons on family and/or medical leave. These proposals included: HB 1185, HB 1520, and SB 5420 in 2001; HB 2399 and SB 6272 in 2004; HB 1173 and SB 5069 in 2005; and HB 1658 in 2007.

and the House Commerce and Labor Committee; four legislative members that are one member of each of the largest caucuses in the Senate, appointed by the majority leader of the Senate, and one member of each of the largest caucuses in the House of Representatives, appointed by the speaker of the House of Representatives; four non-legislative members that are one large business representative, one small business representative, one labor representative, and one representative of advocates for family leave; and one gubernatorial appointee. Both the Department of Labor and Industries and the Employment Security Department maintained nonvoting liaison representatives to the Task Force.

PART II ACTIVITIES OF THE TASK FORCE

In 2007 the Task Force studied the establishment of the family leave insurance program. The Task Force focused on the following issues listed in E2SSB 5659: financing for benefits and administrative costs; program implementation and administration; potential government efficiencies; and any impacts on the unemployment compensation system. The Task Force also took up the following issues of concern to members: coordination of leave and benefits, application of job protection provisions to staffing companies, voluntary plans, and reporting requirements. (Dates in parentheses are dates of the meetings at which particular issues were discussed.)

Organizational Matters

Before beginning its study of substantive issues, the Task Force addressed the following organizational matters.

Procedures: The Task Force reviewed, revised, and approved its procedures. (August 22.) The procedures addressed the organization and conduct of the Task Force, the decision making process, the participation of alternates, and the data request process.

Schedule: The Task Force reviewed and approved its schedule. (August 22.) The original schedule included four definite meetings dates plus one tentative meeting date.

The business members subsequently expressed concern about the structure of the meetings and the ability of the Task Force to comply with its statutory mandate. The business members asked that a short period of time be added to the length of the meetings and that the tentative meeting date be made definite. In response to these concerns, the co-chairs of the Task Force recommended lengthening meetings from two hours to three hours and making definite the tentative meeting date.

The revised schedule, which incorporated these recommendations, was approved by the Task Force. (October 27.) Ultimately, the Task Force met five times (August 22, September 26, October 17, November 14, and December 13).

Subcommittee: The co-chairs also created a subcommittee in response to a request from the business members. (October 27.) The Subcommittee met two times (November 2 and December 6).

Substantive Issues

Financing of Benefits and Administrative Costs

The Task Force studied the costs of family leave insurance benefits and administration as well as various funding options.

The costs of administering California's paid family leave program were reviewed by staff. (September 26.) Estimates of the costs of administering Washington's family leave insurance program were presented by the Department of Labor and Industries and the Employment Security Department. (September 26 and October 17.)

Materials describing various funding options were provided by the Office of Financial Management and discussed by the Task Force. (November 14.) These funding options included a sales tax on carbonated beverages, a sales tax on candy and gum, a liquor surcharge, a premium based on hours worked, and a premium based on wages paid. Another funding option – use of the General Fund-State – was also discussed.

Implementation and Administration of Program

The Task Force examined both public and private sector options for initial implementation and ongoing administration of the family leave insurance program.

Profiles of five state agencies were presented by staff and agency representatives. These agencies included: the Department of Community, Trade, and Economic Development; the Department of Health; the Department of Labor and Industries; and the Employment Security Department; and the Public Employment Benefits Board/Health Care Authority. (August 22 and September 26.) As noted above, estimates of the costs of administering Washington's family leave insurance program were also presented by the Department of Labor and Industries and the Employment Security Department. (September 26 and October 17.)

A Request for Information (RFI) to explore private sector interest in program implementation and administration was suggested by the Subcommittee and issued by the Task Force. Two responses to the RFI were received. A report on the responses to the RFI was provided by staff. Further analysis of the RFI and review of the responses will be provided by the Employment Security Department before the 2008 session convenes. (December 13.)

Government Efficiencies

The Task Force evaluated potential government efficiencies that could be adopted to improve program administration and reduce program costs.

Materials describing potential government efficiencies were prepared by the Department of Labor and Industries and the Employment Security Department and distributed to the Task Force. (October 17.) These materials were presented by the agencies and discussed by the Task Force at subsequent meetings. (November 14 and December 13.)

Unemployment Compensation

The Task Force considered whether the family leave insurance program has any impacts on the unemployment compensation system.

Examples of how particular facts would lead to particular determinations were presented by the Employment Security Department. (September 26.) Data measuring the impacts of family leave on the unemployment compensation system was not available. Further discussion of potential impacts occurred at both Subcommittee meetings. (November 2 and December 6.)

Other Issues

The Subcommittee reviewed coordination of leave and benefits, reporting requirements, and other technical concerns. (November 2.)

Information about coordination of leave under various laws was presented by staff. (November 2.) These laws included the federal Family and Medical Leave Act, the state Family Leave Act, the state Family Care Act, the state Family Leave Insurance law, and state rules governing temporary disabilities related to pregnancy or childbirth.

Information about California's voluntary plan and elective coverage provisions was also presented by staff. (November 2 and December 6.) Feedback on California's voluntary plan provisions was provided by Susan Fagan. (December 6.)

Concerns about the absence of a definition of "employee" for purposes of the job protection provisions were expressed. (October 17 and November 2.) Information about definitions of "employee" and explanations of what it means to employ a specified number of employees was provided by staff. (December 6.)

Concerns about the application of job protection provisions to staffing companies and the contents of annual reports were expressed. (November 2.) Draft language addressing these concerns was presented by stakeholders. (December 6.)

Strategies for helping employers understand family leave insurance were also a topic of discussion. (December 6.) Stakeholders explained that business associations provide many services, such as training sessions and fact sheets, to help their members understand new laws. They also noted, however, that technical assistance provided by state agencies is especially important for employers who may not be members of an association.

PART III
RECOMMENDATIONS OF THE TASK FORCE

The majority of the Task Force recommends the following to the Legislature:

Financing of Benefits and Administrative Costs

1. The General Fund-State should be the source used to finance benefits and administrative costs during the first two biennia of the family leave insurance program.

Implementation and Administration of Program

2. Except as specified in Recommendation #3 below, the Employment Security Department should be the agency directed to administer the family leave insurance program.
3. The Department of Labor and Industries should be the agency directed to enforce the labor standard set forth in RCW 49.86.090 (requiring restoration to employment for certain individuals).

Government Efficiencies

4. An administrative law judge should not be authorized to award attorneys' fees and costs to a prevailing party if, upon administrative review, the final decision of the agency administering the family leave insurance program is reversed or modified. (ESD Estimated Savings: Attorney's fee savings of \$1,140,000 in FY 2013. Staff savings \$300,000 in FY 2013 as a result of using ESD staff rather than AAG staff in most cases.)
5. An individual should not be required to file a claim for benefits in each week in which the individual is on family leave. (ESD Estimated Savings: Reduces upfront computer programming costs by at least \$50,000. This will also reduce operating costs by an additional \$100,000 (reduced printing, 1-800 calls and staff time.)
6. An individual should be allowed to file a claim for benefits after the individual begins to take family leave, so long as the claim is timely. (depending on circumstances) (ESD Estimated Savings: Savings linked to Recommendation #5 above. Additional savings would be some reduction in number of checks mailed to claimants.)
7. For benefits to be payable, an applicant should not be required to:
 - a. Verify the birth of a child or the placement of a child for adoption. (Instead, the applicant should be required to attest to the birth or adoption. The agency administering the family leave insurance program should subsequently use a computer cross-match to verify the birth or adoption.)

- b. Document that he or she has provided the employer from whom family leave is to be taken with written notice of the individual's intention to take family leave. (Instead, the applicant should attest that notification has occurred, if applicable.)

(ESD Estimated Savings: \$115,000 (FY 2013) from reduced application processing, scanning and phone calls.)

- 8. The agency administering the family leave insurance program should not be required to give an individual the option to elect to have federal income tax deducted and withheld from benefits. (ESD Estimated Savings: \$50,000 in up front computer programming costs.)
- 9. The agency administering the family leave insurance program should be given warrant, garnishment, lien, and other collection authority similar to collection authority available to the Employment Security Department for the unemployment compensation program and the Department of Labor and Industries for the workers' compensation program. (ESD Estimated Savings: Indeterminate.)

Unemployment Compensation

- 10. The Employment Security Department should begin tracking the impacts of the family leave insurance program on the unemployment compensation system and report to the Legislature at a later date.
- 11. A contribution paying base year employer should be allowed to request relief of charges that result from payment to an individual who:
 - a. Worked for the employer for six weeks or less; and
 - b. Is laid off at the end of temporary employment when that individual has temporarily replaced a permanent employee taking family leave as defined in Chapter 49.86 RCW and the layoff is due to the return of that permanent employee.

Other

- 12. The agency administering the family leave insurance program should establish an advisory committee to aid the agency in formulating policies and discussing problems related to the administration of the program.
- 13. RCW 49.86.090 (requiring restoration to employment for certain individuals) should be amended to specify that it applies only if the employer from whom the individual takes family leave employs more than twenty-five employees "for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year."

14. Chapter 49.86 RCW (establishing the family leave insurance program) should be amended to address concerns unique to the agricultural, construction, and staffing company sectors.
15. RCW 49.86.210 (reports) should be amended to require that benchmarks and reporting requirements be created to assess the effectiveness of the family leave insurance program over time.

PART IV MINORITY REPORT

We were dismayed when E2SSB 5659 passed the Legislature with critical components missing, including failure to identify a funding source and failure to select an agency to implement the program. A Family Leave Task Force was established to fill in the blanks left by the Legislature. In addition to our disappointment with the bill, we are further discouraged with the operation of the Task Force. Important issues went without a full discussion, and it seems that other issues were side-stepped. Critical issues are still unresolved and some are being left to an agency to decide, which is contrary to both the legislation and the creation of the task force. We believe this process is going in a direction that is at the very least counter to common sense. It is irresponsible to continue down this path with no long-term funding plan and a lack of agreement on implementation and administration details.

We continue to be concerned that, even before these details have been discussed, advocates have testified before the Task Force that they will seek to expand the scope of benefits available under this program to include higher benefit levels and publicly-financed benefits for medical leave. Does it really make sense to expand a program that has so many flaws it cannot be implemented by the Oct. 1, 2009 deadline and is in such disarray?

Some of the decisions currently underway on this issue are being made for political reasons rather than practical ones. For instance, we believe the majority has decided to fund the start-up costs out of the general fund in order to avoid raising payroll taxes in an election year. Once the benefits begin, there will have to be a decision to raise taxes in order to keep the program solvent. This was one of the fundamental purposes of the Task Force – to determine how the program will be funded. The majority has chosen to postpone the decision; a move we believe is irresponsible. A simple solution would be to permanently fund this new social entitlement in the general fund so that it can at least be budgeted within the context of other state social priorities.

At this point, despite the many meetings of the Paid Leave Task Force, we feel that we are in no better position to answer a number of critical questions than we were before the task force began. Here are some of our major concerns, broken out by issue area:

Financing:

- One of the most glaring problems is the excessive **cost of administration versus benefits**;
- According to fiscal estimates, there will be about **\$10 million in preliminary startup costs**;
- Once the program reaches “maturity” after six years, there could be up to **\$87 million paid out for benefits** each biennia. It could be less but we have no way of knowing;
- What we do know is that ongoing **administrative costs will be at least \$16 million** per biennia (This does not include additional costs for Labor and Industries to handle the employment law portion of the program);

- In addition, this does not include the cost of collecting a tax to pay for these benefits or for funds, including interest, to pay back additional start-up money borrowed from the workers' compensation fund. These are very substantial costs based on fiscal estimates provided to the task force.

Policy Issues:

- There are many questions about how a family leave benefit will integrate and/or **conflict with the other four leave laws we have in our state**: Federal Family and Medical Leave Act, State Family Leave Law, State Family Care Act, and the State Pregnancy Discrimination Law. This is a tremendous administrative burden to employers, who will be left to figure out which law applies when and what requirements apply to them;
- How will the Family Leave benefit work with **unemployment insurance benefits and taxes**? The task force recommended non-charging benefits for temporary workers who are hired to replace workers on family leave. This increases socialized costs in the system, which will increase taxes for all employers. This may also complicate our efforts to reach compliance with the federal government;
- For seasonal workers, such as those in agriculture or retail, the bill appears to allow the worker to receive the benefit after the season ends, and thereafter demand job reinstatement. Since there is little work available at that time, the **farmer or other employer could be forced to re-instate a person to a job that does not exist**;
- Why shouldn't we allow **employers who already provide a more comprehensive benefit** to opt-out of the program?;
- Why shouldn't there be some kind of **means/income level testing**? Is it fair to have lower income families paying for benefits for higher income families? This will more than likely be the case under the current structure of the program;
- The statute allows individuals who are ineligible to legally work in the state to receive this benefit. If that is not the intent of this program, the Legislature should pass a bill that clearly makes that change;
- Advocates talk about low wage earners, but **high paid employees and those with paid leave programs** will also receive this public entitlement benefit.

Administration:

- The Task Force was charged with determining which existing agency would administer the program. Several agencies made presentations before the committee explaining the positives and pitfalls of running the Paid Leave Program, but in all cases none could deliver the benefits by the required Oct.1, 2009 effective date;
- The Employment Security Department was selected to administer the program, but representatives of the agency have clearly stated that **they need 22 months to fully implement the program**. This timeline would leave the agency out of compliance with the law's deadline of Oct. 1, 2009.
- Therefore, the program should either be delayed or the **Legislature must clearly authorize a third-party administrator to run the program**. This option would not only save taxpayers money on administration, it would also ease the administrative burden placed on our employers.

Technical Issues:

- The bill appears to allow a person to collect benefits, **even if he or she wasn't working**;
- **This is clearly an entitlement benefit.** Even though it's called an insurance program, there are no elements of insurance included;

The Task Force does not know the full cost of the program, which must include the cost of collecting whatever tax is eventually chosen to fund the benefit. The Task Force hasn't addressed a number of important issues and questions detailed above. Additionally, the group has not offered an adequate opportunity for the private sector to work with the state to administer the program. What we do know is that the administrative costs are excessive when compared with the benefit to be paid out. Furthermore, the Employment Security Department has told us that it needs 22 months to create, in effect, a new sub-agency to administer the program since they cannot legally administer this program within their existing structure.

With so many uncertainties still remaining, we must look at California, the only other state that has implemented such a benefit. Even though they already had the administration in place, Gov. Schwarzenegger has stated that the program is confusing and makes California appear unfriendly to business. He has vetoed expansion of the program at this time.

While this benefit was developed by well-intentioned people, we see no way to make this program work in a fair and sustainable manner. The only logical and responsible choice is to delay the benefit until these issues are resolved. If they cannot be resolved, and so far that is the case, the program should be suspended.

Submitted by:

Senator Janéa Holmquist
Senator Linda Evans Parlette
Representative Bruce Chandler
Representative Cary Condotta

PART V BUSINESS REPRESENTATIVES COMMENTS

Introduction

This brief set of comments on behalf of the business representatives to the Joint Legislative Task Force on Family Leave Insurance is submitted because the business representatives concur in some parts of the Final Report and do not concur in other parts. This document is intended to explain the rationale underlying those positions and the continued concerns of the business community heading into the 2008 legislative session.

As employers, the business community believes the family is the first and most fundamental unit of society. It is in the family that the core values which lead to an educated and productive workforce, which spark entrepreneurship and economic dynamism, and which contribute to the growth and flourishing of communities are first nurtured. The business community in no way opposes the principle that workers be given opportunities to care for circumstances central to the strength and cohesiveness of the family unit, such as the birth or adoption of a child.

However, the business community did not support the enactment of Engrossed Second Substitute Senate Bill 5659 nor does the business community support, on public policy grounds, the implementation of its labor standards regulations and its social welfare entitlement. The business community believes this new program is unlikely to help those workers who most need assistance with family leave, will cost more in administration than its benefits or utilization rate justifies, will result in new direct and indirect costs taxed to workers and employers, and, as it is relatively unique in the United States, will further undermine the competitiveness of Washington's business climate. These costly negatives, in our estimation, outweigh the meager benefit this program promises to Washington workers.

At the same time, this program is a reality. It has an implementation date and the work of the Task Force toward that end is important. As representatives of the community most directly impacted by its mandates, we have appreciated the opportunity, despite our principled opposition, to participate and provide constructive feedback that we hope will help shape this program in a manner that is less costly, less burdensome, and more likely to contribute to outcomes that make sense for workers, employers, and most importantly, families.

I. Issues Before the Task Force

A. Financing Benefits and Administration

We voted with the Task Force majority to recommend the initial benefits and administration for this program come from the general fund. We do not, however, believe this is an ideal or lasting solution, and we are aware of the political difficulty of implementing this recommendation. Particularly for initial start-up, use of the state's general fund makes much more sense than enacting a new sales or consumption tax or any other kind of taxing mechanism

that bears no nexus to this program, and we did not support any of those other mechanisms under consideration.

We unequivocally oppose two potential funding mechanisms for this program, now or in the future. The first funding mechanism opposed is any direct or indirect tie between this program and any proprietary trust account maintained by the state for other benefit programs employers and/or workers pay into. The linkage between the initial start-up of this program and the state workers' compensation supplemental pension fund in E2SSB 5659 is an example of this kind of inappropriate linkage. Other state benefit programs, such as workers' compensation or unemployment insurance, maintain trust funds intended for specific purposes and benefits. It is wrong, and indeed a breach of fiduciary duty to the payors and beneficiaries of those systems, to divert funds to programs bearing no relationship to them.

The second funding mechanism opposed is any kind of direct or indirect tax to be paid by employers. This is entirely a state-mandated employee benefit. Its use and administration will create adverse practical and logistical challenges for employers. It should not be underwritten by employer payments.

B. Administration

From the very first Task Force meeting, the business community recommended the Employment Security Department (ESD) as the agency best situated to administer this program. We have also maintained an active interest in the availability of private sector options that may help deliver benefits and administration at competitive costs. We were happy to see the Task Force issue a Request For Interest (RFI) to the private sector, although we do not believe adequate time was given for a response or that the most promising response to the RFI was given adequate consideration. We believe private sector administration could be more efficient than state administration, and hope that in the event the Legislature charges ESD to administer this program that it will continue to consider any efficiencies that could result from partnership with the private sector.

C. Impacts on Unemployment Insurance

Very early in the legislative discussion of this program, when the worker's right to return to his or her position was extended from the current Family and Medical Leave Act threshold of 50 or more employees to the level of 25 or more employees, the business community identified two problems related to a small employers' unemployment insurance (UI) costs. First, if a business that is not under a mandate to hold the position open does not do so, there is the concern that the individual, after taking family leave, would simply take unemployment insurance. This could significantly increase an employer's experience rating and premium taxes.

Secondly, if an employer holds a position open but must hire temporary help to cover the loss in productivity during the worker's absence, then the temporary worker might become eligible for unemployment insurance upon the permanent worker's return, at a cost to the employer's experience rating and premium taxes.

At the request of the Task Force, ESD crafted language that would address both of these concerns. The first concern would be addressed by language specifying that absent an agreement with the employer to the contrary, separation from employment by virtue of this program is not cause for receiving UI benefits and would be considered a “voluntary quit.” The second concern would be addressed by providing relief from benefit charges for employers facing a benefit scenario after letting go a temporary worker.

Unfortunately, the task force only made a recommendation with respect to the latter concern (Recommendation 11). The business community supports moving forward on ESD’s language with respect to voluntary quits. **Indeed, from the business community perspective, the UI problem with paid family leave is not solved without both fixes.** The Task Force’s recommendation in this regard is insufficient.

D. Administrative Efficiencies

The business community supports any number of administrative efficiencies that have or may come to be known in order to reduce the cost and size of this program. Proposed efficiencies should not, however, come at the expense of accountability on the part of the agency or the claimant, nor should efficiencies create circumstances where the potential for fraud or gaming is enhanced.

With that principle in mind, the Task Force’s proposed efficiencies 4, 6, and 7 raise concerns, both individually and in combination.

Proposed Efficiency 4: Benefit applicant need not be required to (a) verify birth or adoption or (b) document that written notice was provided to employer of intent to take leave. It is only right that an employee provide his or her employer with written notice of the intent to take leave from work for this program. In order to effectuate that policy, it makes sense that the employee ought to document that he or she has provided notice in order to receive benefits. Excusing the worker from this eligibility requirement does nothing to further the goal of the employer receiving notice of absences that will affect its workforce stability. At least subpart (b) of this efficiency ought to be carefully re-examined.

Proposed Efficiency 6: Individual need not file application for benefits in each week the individual is on paid leave. There is nothing per se wrong with weekly filing. It works fine in the UI context. The issue here is that the leave need not, and may not, be taken all in “one chunk.” The agency may have no way to know how much, how often, and in what increment, leave is taken and benefits are payable, without concurrent filing. Allowing “one time” filing seems to only encourage situations where benefits will be payable despite leave not being taken. This could lead to overpayments which are unlikely to be recovered.

Proposed Efficiency 7: An individual should be allowed to file a claim for benefits after the individual begins to take family leave, so long as the claim is timely. This efficiency needs further definition. On its face, it could disrupt the employer’s right to notice of leave, the employer’s right to coordinate this leave benefit with other benefits, and the administering agency’s ability to verify the timing, amount, and increment of leave. The right to leave and the

right to benefits are intertwined in this law. Allowing “retroactive” application for benefits leaves unanswered the question how the employee, vis-à-vis his or her employer, actually initiates the time away from work. In connection with Proposed Efficiency 4 above, which lessens the emphasis on providing notice to the employer of the intent to take leave, this could create confusion and headaches for employers.

II. Issues Before the Implementation Subcommittee

The statutorily mandated study of the establishment of the paid family leave program was expressly not limited to the four issues discussed above. Accordingly, the following issues were discussed, largely through the establishment of a subcommittee on implementation. These issues represent substantive business community concerns going forward with the program.

A. Voluntary Compliance

It is a key policy position of the business community that those employers who meet or (in most cases) exceed the time-off and payment standards of this program may provide this benefit as a substitution for the state program. Allowing (and encouraging) such voluntary compliance, or “self-insurance,” would give employers with progressive voluntary leave benefits or collectively bargained leave benefits an opportunity to continue these programs without facing potential burdens inherent in interfacing with another labor-related state program. Voluntary compliance also eliminates a market incentive to reduce benefits to the common denominator mandated by the state and instead allows employers to continue to use these types of benefits as incentives to attract employees. Furthermore, allowing voluntary compliance furthers the policy goal evident in other legislative discussions of employers shouldering their “fair share” of the costs of employee benefits rather than shifting those costs onto the limited resources of the state. Voluntary compliance would reduce pressure on the state general fund and to the extent benefits are funded from the general fund, this policy makes enormous sense.

B. Coordination of Program with Other Leave Laws

As staff presentations and research demonstrated, Washington already has (at least) three state laws and one federal law governing related leave from employment: the federal Family and Medical Leave Act, the state Family Leave Act, the state Family Care Act, and the state Maternity Disability Regulation. Despite the intended section of E2SSB 5659 providing for coordination of benefits and concurrent use of leave time, staff presentations demonstrated that this will now always be the case.

In fact, the new substantive leave entitlements in this program, combined with expanded job-protection mandates will result in situations where employees will be away from the job well in excess of the 12 weeks contemplated by the FMLA. Attempting to determine which leaves apply at which times, under which circumstances, and under which eligibility criteria an employee has the right to take a leave of absence is difficult and confusing, particularly for small businesses that are now covered by this law but do not have in-house legal or Human Resource staffing.

It is imperative that the substantive leave entitlements of this program be coordinated with, and if necessary relocated, in the other areas of law that grant substantive leave rights. The right to leave, and the definitions, criteria, and other provisions that govern it, should be separate from the right to a benefit payment during leave. Once the legal provisions are in the right place, it should be clear that this program is not meant to expand upon existing amounts of leave from work. The current statutory framework is insufficient.

C. Definition of “Employee”

The business community is supportive of the Task Force’s recommendations in this regard. Although E2SSB 5659 was passed without a definition of “employee,” it mandated job reinstatement rights on employers who employ 25 or more employees. Because not all workforces are sized the same throughout the year, for many employers, it is important to know how to determine whether they employ 25 or not and at what relevant time. In this regard, the FMLA manner of defining “employee” and supporting regulations (e.g., 29 C.F.R. § 825.105) should provide a sufficient template to follow.

D. Scope of Job Protection in Temporary Employment

Advanced primarily by representatives of agriculture and the temporary staffing companies, the concern arose about reinstatement requirements in situations where job assignments are by nature temporary and no project may exist upon return from leave in which to be reinstated. The staffing industry brought forward language that would solve this concern, and the business community is supportive of that effort. At the same time, it may make sense to entertain a technical fix which would apply to all employers in such a situation.

In this regard, the regulations implementing the FMLA provide guidance. 29 C.F.R. § 825.216, “Are there any limitations on an employer’s obligation to reinstate an employee?” sets forth examples where there is no right to reinstatement that would be greater than had the employee been at work during the leave period. For example, 825.216(d) provides:

If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee.

E. Measurements and Benchmarks

The business community supports the Task Force’s recommendation of enhancing the reporting and benchmarking section of E2SSB 5659 in order to obtain data on a continuing basis to determine whether the program is meeting its goals and providing outcomes at a cost that is reasonable to workers, employers, and the state. Discussions between stakeholders should continue to further refine this component of a technical or implementation bill.

III. Conclusion

Despite well-grounded policy concerns over the enactment and implementation of this new program, as representatives of the business community we have committed to work with the Task Force in good faith to offer constructive concerns and suggestions that may help shape the implementation and administration of this program. Many of these issues and recommendations require further discussions, a project that will certainly continue into the legislative session, and a process in which we intend to participate. We trust the foregoing comments on the Task Force report and recommendations will be received in that spirit.

Judy Coover
Owner, Printcom, Inc., Seattle

Susan Fagan
Director of Public Affairs, Schweitzer Engineering Laboratories, Inc., Pullman

APPENDIX
SECTION 2 OF E2SSB 5659 (2007)

NEW SECTION. **Sec. 2. JOINT LEGISLATIVE TASK FORCE.** (1)(a) The joint legislative task force on family leave insurance is established, with thirteen members as provided in this subsection.

(i) The chair and the ranking member of the senate labor, commerce, research and development committee.

(ii) The chair and the ranking member of the house commerce and labor committee.

(iii) The majority leader of the senate shall appoint one member from each of the two largest caucuses of the senate.

(iv) The speaker of the house of representatives shall appoint one member from each of the two largest caucuses of the house of representatives.

(v) The majority leader of the senate and the speaker of the house of representatives jointly shall appoint four nonlegislative members of the task force, which shall include one member representing large business, one member representing small business, one member representing labor, and one member representing advocates for family leave.

(vi) The governor shall appoint one member of the task force.

(b) The department of labor and industries and the employment security department shall cooperate with the task force and shall each maintain a liaison representative, who shall be a nonvoting member.

(c) The majority leader of the senate and the speaker of the house of representatives jointly shall appoint the cochairs of the task force from among the legislative members of the task force. The cochairs shall convene the initial meeting of the task force. A steering committee consisting of the legislative members of the task force shall advise the cochairs on the meetings and other activities of the task force.

(2) The task force shall study the establishment of a family leave insurance program including, but not limited to, the following:

(a) The manner in which the benefits and the administrative costs should be financed;

(b) The manner in which the program should be implemented and administered;

(c) Any government efficiencies that should be adopted to improve program administration and reduce program costs; and

(d) The impacts, if any, of the family leave insurance program on the unemployment compensation system, and options for mitigating such impacts.

(3) Staff support for the task force must be provided by the senate committee services and the house of representatives office of program research. The task force may hire additional staff with specific technical expertise if such expertise is necessary to carry out the mandates of this study, and only if an appropriation is specifically provided for this purpose.

(4) Legislative members of the task force must be reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members, except those representing an employer or organization, are entitled to be reimbursed for travel expenses in accordance with RCW 43.03.050 and 43.03.060.

(5) The expenses of the task force must be paid jointly by the senate and the house of representatives. Task force expenditures are subject to approval by the senate facilities and operations committee and the house of representatives executive rules committee, or their successor committees.

(6) The task force shall report its findings and recommendations, which shall include recommendations as to the specific manner in which the benefits and the administrative costs should be financed as well as proposed legislation, to the legislature by January 1, 2008.

(7) This section expires July 1, 2009.