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Division I
NO. 74338-4-1 State of Washington

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

RACHELLE HONEYCUTT & GABRIEL WESTERGREEN,

Appellants,

v.

PHILLIPS 66 COMPANY,

and

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

The Family Care Act (FCA) allows an employee to use his or her own available leave to care for a sick family member in certain circumstances. In the case of short-term disability leave, the Legislature limits use of such leave to situations where the employer does not otherwise compensate the employee for time taken off for illness. Here, Phillips 66 Company provided vacation leave and personal holidays to Rachelle Honeycutt and Gabriel Westergreen and allowed them to use this leave for illness. Because they could use other paid leave for time taken off for illness, Phillips 66 was not required to allow them to access short-term disability for family care. The plain language of RCW 49.12.265(5) does not require Phillips 66 to allow employees to use their short-term disability leave benefits for family care because “paid time . . . allowed to an employee for illness” includes other types of paid leave such as vacation and personal holidays when an employer allows employees to use that leave for illness.

If the Court decides for Honeycutt and Westergreen on the statutory interpretation question, it should remand to the Department to determine whether Phillips 66’s short-term disability plan was covered by the Employee Retirement Income Security Act of 1974 (ERISA). The

Department has not addressed this question and if the Court were to decide this issue, it would usurp the Department's executive branch role to initially determine issues.

II. STATEMENT OF THE ISSUES

1. Phillips 66 allowed its employees, including Honeycutt and Westergreen, to use paid vacation leave and personal holidays for illness and family care. Do the terms "paid time" and "for illness" in RCW 49.12.265(5) include any type of paid leave an employer permits its employees to use for illness?
2. The Department did not need to reach the ERISA question because it determined that Phillips 66 need not allow its employees to use the short-term disability plan for family care. If Honeycutt and Westergreen prevail on their statutory interpretation argument, should the Court remand the issue of whether Phillips 66's short-term disability plan is subject to ERISA in order to allow for original adjudication of this question?

III. STATEMENT OF THE CASE

A. **Phillips 66 Allows the Use of Vacation and Personal Holidays for Employee Illness and Family Care**

Phillips 66 allows its employees to use vacation time and personal holidays for their own illnesses and injuries, as well as for family care. CP 726, 744, 760. Employees may use vacation time for family care if it has not already been used before the date of the family care leave, but advance approval to use vacation time for family care is not required. CP 726.

Phillips 66 does not provide "sick leave" to their bargaining unit employees, such as Honeycutt and Westergreen. CP 379, 552. If a Phillips

66 employee is unable to work due to a non-job related illness or injury, Phillips 66 has a short-term disability plan that provides paid leave for an employee's own illness or injury for up to 52 weeks. CP 553, 587. Phillips 66 does not mandate that the employee use the short-term disability for illness and permits them to use vacation leave for that purpose. CP 726, 744, 760.

B. Honeycutt and Westergreen Could Have Used Available Vacation Leave for Family Care but Chose To Take Leave Without Pay

Both Honeycutt and Westergreen had vacation leave available to use for care of sick family members at the time they requested Family and Medical Leave Act (FMLA) leave for family care.¹ CP 251, 327, 913-14. Honeycutt and Westergreen chose to take leave without pay instead of vacation leave or personal holidays for family care because they had already made plans for vacation for later in the year. CP 251, 328, 913-14.

C. The Department Determined Phillips 66 Complied With the Family Care Act and the Administrative Law Judge, Director, and Superior Court Affirmed

Honeycutt and Westergreen filed complaints with the Department, alleging that Phillips 66 did not allow them to use their own short-term disability plan benefits for family care leave they had requested. CP 353-55, 359-60, 915. The Department found that Phillips 66 did not violate the

¹ Phillips 66 approved FMLA leave for both Honeycutt and Westergreen. CP 251, 327.

FCA because Phillips 66's short-term disability leave did not constitute "sick leave or other paid time off" that must be made available for family care under the FCA. CP 540-45, 915.

Upon Honeycutt's and Westergreen's appeal, an administrative law judge (ALJ) granted summary judgment in favor of the Department and Phillips 66. CP 907-23. The Director affirmed the ALJ's order:²

It is undisputed that Phillips 66 policies allow its employees to use vacation and personal holidays for family care purposes. In this matter, both Honeycutt and Westergreen had available vacation hours that they could have used to care for their family members. They each made the personal choice, though, not to use vacation hours in order to save the leave for other planned uses later in the year.

CP 919.

Honeycutt and Westergreen petitioned for review in Whatcom County Superior Court. CP 1-5. The superior court affirmed the Department's decision. CP 1121-28. Honeycutt and Westergreen appeal. CP 1118-29.

IV. STANDARD OF REVIEW

Honeycutt and Westergreen have the burden of demonstrating the invalidity of the Director's order, which is the final order of the agency. RCW 34.05.570(1)(a). Legal conclusions are reviewed de novo. RCW

² The Director adopted the Findings of Fact and Conclusions of Law, and the Determinations of Compliance in the ALJ's Initial Order. CP 902-23.

34.05.570(3); *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015). However, deference is given to the agency's interpretation of the law within its area of expertise. *PT Air Watchers v. Dep't of Ecology*, 179 Wn.2d 919, 925, 319 P.3d 23 (2014).

V. ARGUMENT

Employees may use their own leave to take care of a sick family member if they have "sick leave or other paid time off" available. RCW 49.12.270. It should be noted that the FCA does not require an employer to provide leave. But if such leave is available, the employee may use the time to care for a sick family member under certain circumstances. The FCA requires that employees be allowed to use their choice of "sick leave or other paid time off" as defined by RCW 49.12.265(5) to care for sick family members. RCW 49.12.270.

This case presents a question regarding the circumstances in which short-term disability plan benefits are included within the leave available as "sick leave or other paid time off." RCW 49.12.265(5) defines "[s]ick leave or other paid time off" as time allowed to an employee for illness, vacation, and personal holidays. It permits use of certain non-ERISA disability plans for family care purposes "[i]f paid time is not allowed to an employee for illness." Under the statute's plain language, "paid time . . . for illness" includes time off when the employer has paid for time off due

to illness. This includes compensation from vacation leave or a personal day if the employer permits an employee to use such time for illness. Because Phillips 66 employees may use their vacation time or personal day for illness, Phillips 66 need not allow access to short-term disability for family care.

A leave devoted to illness is not required under the statute. The Legislature elected to limit the circumstances in which an employer must allow access to disability leave by not requiring a dedicated sick leave benefit, despite a previous version of the bill that did so. Instead, it used broad language that incorporates any leave used to compensate time taken off for illness. The intent of the statute is to allow an employee to access disability plans if an employer does not allow the employee to take any type of paid leave for illness.

A. The Plain Language of RCW 49.12.265(5) Broadly Defines the Terms “Paid Time . . . for Illness” To Include Any Type of Paid Leave the Employer Allows Employees To Use for Illness

The Legislature does not allow unrestricted access to short-term disability for the purpose of taking family care leave. RCW 49.12.265(5). Instead, the Legislature designed a statute that allows the use of short-term disability when there is no other option for family care leave. Disability plans would only be considered for coverage under the FCA where an employer does not provide any paid time off if an employee is sick:

“Sick leave or other paid time off” means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for illness, vacation, and personal holiday. *If paid time is not allowed to an employee for illness*, “sick leave or other paid time off” also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability under a plan, fund, program, or practice that is: (a) Not covered by the employee retirement income security act of 1974, 29 U.S.C. Sec. 1001 et seq.; and (b) not established or maintained through the purchase of insurance.

RCW 49.12.265(5) (emphasis added).

The fundamental purpose in interpreting a statute is to give effect to the Legislature’s intent. *In re Estate of Haviland*, 177 Wn.2d 68, 75-76, 301 P.3d 31 (2013). If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of the Legislature’s intent. *Id.* at 76. A statute is only ambiguous if it is susceptible to two or more reasonable interpretations. *Columbia Physical Therapy, Inc. v. Benton Franklin Orthopedic Assocs., P.L.L.C.*, 168 Wn.2d 421, 433, 228 P.3d 1260 (2010). Here, only the Department and Phillips 66 offer a reasonable interpretation of the statute.

Under the statute for family care purposes, “[s]ick leave or other paid time off” means time allowed for illness, vacation, or personal holidays. It also extends to use of a disability plan if the employer does not compensate the employee through anything but a short-term disability

plan when an employee has to take time off for illness: namely, “[i]f paid time is not allowed to an employee for illness.” The term “time allowed . . . to an employee for illness” includes any type of paid “[s]ick leave or other paid time off” as long as an employer allows an employee to use it for illness. RCW 49.12.265(5). This includes compensation from vacation leave or a personal day if the employer permits an employee to use such time for illness.

The statute does not specify that paid time for illness must be leave exclusively designated for illness, as Honeycutt and Westergreen assert. RCW 49.12.265(5); App. Br. 11. There is simply no requirement for a dedicated sick leave benefit for illness under the FCA’s plain language. A court may not read into a statute matters that are not in it. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

The plain language of the word “allow[.]” in RCW 49.12.265(5) indicates there is employer discretion or permission given to the employee to use paid time in the event the employee is ill. *See Webster’s Third New International Dictionary* 58 (2002) (“allow” includes the meaning “permit”).³ Employees are “allowed” to use paid time “for illness” as well as for vacation and personal holidays. This time is, therefore, “[s]ick leave

³ If the Legislature has not defined a term, the court will give the term its plain and ordinary meaning from a dictionary. *State v. Watson*, 146 Wn.2d 947, 956, 51 P.3d 66 (2002).

or other paid time off” that the FCA ensures can be used for family care.

This could be a different case if the employer did not allow employees to use paid time off for illness, such that the employees could only use a disability plan for illness. If that were the case, only then would the employer fall under the second sentence in RCW 49.12.265(5), where “paid time is not allowed to an employee for illness.” But Phillips 66 allows an employee to use paid time for illness. This distinguishes Phillips 66 from the employers that are addressed by the second sentence of subsection (5)—the employers who do *not* allow their “[s]ick leave or other paid time off” to be used for illness.⁴

A statute must be construed as a whole by looking at its wording, the context, the statutory scheme as a whole, and the “consequences that would result from construing the particular statute in one way or another.” *Burns v. City of Seattle*, 161 Wn.2d 129, 146, 164 P.3d 475 (2007) (quoting *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (internal quotation marks omitted). RCW 49.12.265(5) defines “[s]ick leave or other paid

⁴ There are employers who do not allow employees to use vacation leave for illness because of advance vacation scheduling policies (it is a separate question how family care is handled for the vacation time under those circumstances). See Dep’t Admin. P. ES.C.10, Q.9 (2014) at <http://lni.wa.gov/WorkplaceRights/files/policies/esc10.pdf>. (This is the current version of the policy revised in 2014). The Department is familiar with the many different types of leave scenarios that employers offer. Its expertise in this regard provides a basis for deference to its application of this statute, because the determination it made was based on factual matters “close to the heart of the agency’s expertise.” *Hillis v. Dep’t of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139 (1997).

time off,” which in the first sentence looks at time off allowed to the employee “for illness, vacation, and personal holiday.” The employer does not have to provide a benefit titled “vacation leave,” “sick leave,” or “personal holiday.” Instead, an employer can provide a flexible benefit that covers all three. (Many employers do provide a benefit called “paid time off.” *See* WAC 296-130-030 (Note).⁵)

Ignoring the broad reach of the first sentence, Honeycutt and Westergreen assert that there needs to be a dedicated sick leave benefit under the second sentence; otherwise, short-term disability must be provided. But this construction of the second sentence is inconsistent with the first sentence. Under their interpretation, short-term disability would be available for family care when an employer provides flexible time off that can be used for all three purposes in the first sentence. In other words, an employer who provided general “paid time off” would have to allow access to the short-term disability leave because the employer did not provide a dedicated sick leave benefit. When examining the phrase “time . . . allowed . . . for illness” in the second sentence, nothing in the grammar or words of this sentence limits it to situations where the paid time is a designated sick leave benefit, as Honeycutt and Westergreen argue. Such an argument would frustrate the

⁵ As noted above, the Department has expertise in the types of leave offered and the Court should defer to this expertise. *See Hillis*, 131 Wn.2d at 396 (court defers to agency expertise in factual matters).

Legislature's intent to limit the availability of short-term disability to situations when the employer does not pay an employee who takes off time for illness.

Honeycutt and Westergreen argue that the Department has created two different meanings to the term illness in the first two sentences of the statute. App. Br. 12. This is incorrect. The first sentence of RCW 49.12.265(5) concerns an explicitly broad topic, defining “[s]ick leave or other paid time off[.]” That broad topic is defined with multiple options and means “time allowed . . . for illness, vacation, and personal holiday.” Thus, the first sentence naturally means any type of paid time allowed to an employee that can be used for the three uses of illness, vacation, and personal holiday.

The Legislature added the second sentence of RCW 49.12.265(5) in 2005 to address the situation in which an employer does not allow its employees to use any kind of paid leave other than a disability plan for their own illness.⁶ The phrase “time allowed . . . for illness” in the first sentence is worded in a broad manner to include any type of paid leave (illness, vacation, and personal holiday) where an employer allows those types of leave to be used “for illness.” In the second sentence, the phrase “[i]f paid time is not allowed to an employee for illness,” uses illness in

⁶ See Laws of 2005, ch. 499, § 1; App. 8-10.

the same manner. Thus, the term “illness” has the same meaning in both the first and second sentence of RCW 49.12.265(5) because it relates to the *purpose* for which the leave can be used. The leave can be used “for” illness. This reflects the fact, as noted above, that employers often provide certain leave categories such as “paid time off,” personal holiday, and vacation that can be used for more than one purpose. *See* WAC 296-130-030 (Note).

The FCA, moreover, does not require employers to provide any additional paid leave for its employees or a set amount of any particular type of leave. It applies to the paid leave the employers already provide to their employees under an employer policy or a collective bargaining agreement. Phillips 66 allows its employees to use other types of paid leave for illness, and the FCA requires that it be available for family care. But the FCA does not require Phillips 66 to allow access to disability plan benefits. In other words, the FCA does not give employees a right to certain leave to use for family care unless an employer already provides that paid leave to its employees and if the FCA mandates this type of paid leave to be available for family care; it is truly a “choice of leave” statute that gives employees the right to choose between the available types of paid leave for family care.

Honeycutt and Westergreen disagree with the ability of an employer to make a business decision to prevent the use of 52 weeks of leave for family care. But Phillips 66 established its short-term disability plan for a specific purpose for the protection of employees in a certain set of circumstances, *i.e.* for employees who are ill or disabled, not for care of their family members. The Legislature did not preclude this kind of business decision by employers like Phillips 66; it expressly provided employees only a choice of leave—not a creation of leave benefit.

B. Even if the Statute Was Ambiguous—Which It Is Not—the Legislative History Supports the Department’s Interpretation

The Court need not resort to legislative history to resolve the questions here because the statute is not ambiguous. *See Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (legislative history not considered for unambiguous statutes). But if it does find the language ambiguous, the legislative history establishes that “paid time . . . for illness” means any type of paid time that may be used for illness. *See* CP 99. While a previous version of Substitute Senate Bill 5850 included language that would have included disability plans in the definition of “[s]ick leave or other paid time off” unless the employer maintains a “separate bona fide paid sick leave policy plan or practice,” the Legislature rejected that policy choice. *See* Substitute S.B. 5850, 59th

Leg., 2005 Reg. Sess. (Wash. 2005).⁷ The Legislature did not end up using the words “sick leave,” nor did it require a “separate bona fide paid sick leave policy plan or practice.” See Laws of 2005, ch. 499, § 1. The Legislature considered and rejected proposals to link short-term disability to a dedicated sick leave benefit.

That legislative history is more persuasive than one statement that may have been made by a representative, as Honeycutt and Westergreen presuppose. They point to a statement by a legislator (or the staff person that prepared the language) to bolster their position. App. Br. 15-16. The Supreme Court recognized one of the chief dangers of relying on legislative history in the form of the intent of an individual legislator: what may have been the intent of an individual legislator may not have been the intent of the legislative body that passed the act. *Convention Ctr. Coal. v. City of Seattle*, 107 Wn.2d 370, 375, 730 P.2d 636 (1986). Accordingly, a legislator’s comments are not necessarily indicative of legislative intent. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 63, 821 P.2d 18 (1991). The clarification of the amendment offered by one representative stated, in relevant part, that: “if an employee does not have paid sick leave, the employee may use disability leave not covered by

⁷ See App. 1-2. The courts may look to successive versions of the legislation to determine intent. *Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006).

[ERISA].” Substitute S.B. 5850 AMH CL Rein 183 (Wash. 2005).⁸ This inartful use of the phrase “sick leave” is simply not what the statutory language said before the 2005 amendments or after. And even if the representative (or a staff person) intentionally used the narrower term “sick leave,” that person’s view about the amendment is of no moment when it is not expressed in the language of the statute. The actual consideration and rejection of language is more indicative of the Legislature’s intent than one statement by a legislator (or staff person).

Here the Legislature’s intent in the 2005 amendments was to extend the choice of leave available under the FCA to include short-term disability only if the employee is precluded from using “other paid time off” compensation if he or she is ill. In doing so, the Legislature designed the language to allow employees a choice of leave within the types of paid leave employers allow their employees to use for illness.

C. The Department’s Regulation Explains RCW 49.12.265(5)’s Provision That Short-Term Disability Is Used Only if an Employee Is Prohibited From Using Other Leave for Illness

The Department’s regulations further explain the application of RCW 49.12.265(5). Deference is given to an agency’s interpretation of its own regulations. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004).

⁸ See App. 3.

WAC 296-130-020(8) uses the words “with a sick leave or pay benefit” with the phrase “for illness” in RCW 49.12.265(5):

If paid time is not allowed to an employee for illness *with a sick leave or pay benefit*, “sick leave or other paid time off” also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability

WAC 296-130-020(8).⁹ (emphasis added). Consistent with the statutory language, WAC 296-130-020(8) affirms that disability plans are only included in the definition of “[s]ick leave or other paid time off” if paid time is not allowed to an employee “for illness with a sick leave or pay benefit.” The Department interprets time allowed for illness under the definition of “[s]ick leave or other paid time off” to include a “pay benefit” such as paid vacation and other types of paid leave when it is allowed by an employer for an employee’s own illness. WAC 296-130-020(8). This interpretation correctly implements RCW 49.12.265(5), and this Court should use it here.

Additionally, the Department’s rules recognize that there are employers who provide leave that can be used for multiple purposes. WAC 296-130-030 explains that a number of employers do not provide a dedicated sick leave benefit, rather they combine paid leave categories,

⁹ See App. 12.

often described as “paid time off” or PTO, that can be used for illness, vacation, or personal holiday:

Many employers combine paid leave categories such as sick leave and vacation leave, often described as “paid time off” or PTO. Such PTO allows employees the choice as to their use of this leave, thereby maintaining the intent of this chapter. In addition, employers may require employees to use PTO (provided it may be used for any purpose) as a prerequisite to using leave designated for a specific purpose, such as extended illness leave, without violating this chapter, provided other leave is available for employees to use to care for sick family members on the same terms that it is available for an employee’s health condition.

WAC 296-130-030 (Note).¹⁰

Here, although Phillips 66 does not provide its employees a combined leave category labelled as PTO, it is undisputed that Phillips 66 allows its employees to use paid time (vacation leave and personal holiday) for illness. CP 726, 744, 760. This practice operates in a similar manner to paid time off. Because Phillips 66 compensates its employees for time taken off for illness, the short-term disability provisions do not apply.

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¹⁰ App. 13-14.

D. The Department's Policy Is Consistent With RCW 49.12.265(5)'s Requirement That an Employer Must Allow No Time Off for Illness Before an Employee May Access Short-Term Disability for Family Care

The Department's interpretation of RCW 49.12.265(5) in its policy is also consistent with the plain language of the statute. Honeycutt and Westergreen erroneously focus only on the general statement in Department Administrative Policy ES.C.10, that an employer is not required to allow the employee access to disability benefits if it provides a paid sick leave benefit. CP 103. This statement does not mean that the converse of the statement is true, *i.e.* an employer is required to allow access to a disability plan *unless* they provide a paid sick leave benefit.

In Department Administrative Policy ES.C.10, the Department addresses the limited circumstances in which disability plans are included in the definition of "[s]ick leave or other paid time off" in RCW 49.12.265:

15. Are disability plans included under these rules?

It depends on the type of plan or policy. Generally, self-administered plans provided by an employer and which provide for the continuing payment of all or a part of an employee's wages for a period of time when the employee is on leave due to an illness or disability, typically considered a short-term disability plan, may be included as part of the employee's choice of paid time off to care for a sick family member. Specific plans may need to be assessed on a case-by-case basis to determine if an employee is covered.

If an employer provides both a paid sick leave benefit and a disability plan, the employer is not required to allow the employee access to the disability benefit for care of a sick family member. Any disability plan or policy governed under ERISA, the Employee Retirement Income Security Act, or provided by an employer through the purchase of an insurance policy is not covered under the new rules

Dep't Admin. P. ES.C.10 (2009); CP 103.

The answer to Question 15 does not address the particular scenario that is present here: the employer allows employees to use other types of paid leave for illness. The Department's policy is not intended to address every single factual scenario that can arise, such as here where Phillips 66 allows employees to use other types of paid leave for illness instead of only a dedicated paid sick leave benefit. Dep't Admin. P. ES.C.10 (2009) at 1; CP 100, 726.

The Department policy is consistent with the conclusion that the employer need not give access to short-term disability leave for family care leave purposes so long as paid leave may be used when an employee takes time off for illness.

E. If the Court Decides for Honeycutt and Westergreen, the Court Should Remand the Case to the Department To Determine if Phillips 66's Short-Term Disability Plan Is Covered by ERISA

The Department decided that Phillips 66's short-term disability plan did not fall within the definition of "[s]ick leave or other paid time

off” because the employer allowed its employees to access “other paid time off” for illness. Thus, there was no need to address any other matter, including whether the disability plan was covered by ERISA and therefore not subject to the FCA. If the Department determines the short-term disability plan is covered by ERISA, then Phillips 66 would not be required to allow employees to use it for family care.¹¹

Under RCW 34.05.570(3)(f), an agency is not required to consider all issues presented by the parties; it is only required to consider issues that require resolution. *Skagit Cty. v. Skagit Hill Recycling, Inc.*, 162 Wn. App. 308, 321-22, 253 P.3d 1135 (2011). In *Skagit County*, Skagit Hill appealed the denial of a landfill permit renewal by the Pollution Control Hearings Board. 162 Wn. App. at 311. The Court held that the agency was not required to decide alternative arguments, such as whether some of Skagit Hill’s activities might have been exempt from permitting in general, where the agency properly considered all of the issues requiring resolution related to the primary issue of whether Skagit Hill violated the conditions of its 2007 inert waste permit. *Skagit Cty.*, 162 Wn. App. at 321-22. Thus, like in *Skagit County*, the Department did not have to consider all arguments if it made a dispositive decision on one issue.

¹¹ RCW 49.12.265(5) provides that disability plans can only be included in “[s]ick leave or other paid time off” if paid time is not allowed to an employee for illness and the disability plan is: (a) not covered by ERISA and (b) not established or maintained through the purchase of insurance.

Where an issue is not decided but remains relevant to the challenged action, the appropriate remedy is to remand for the agency to exercise its judgment and make a decision on the issue. *Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 778, 235 P.3d 812 (2010). This rule ensures that the courts do not invade the province of the executive branch to initially determine administrative matters. *See Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 244, 552 P.2d 163 (1976). Therefore, if the Court rules for Honeycutt and Westergreen on the statutory interpretation question, the case must be remanded to the Department.

VI. CONCLUSION

Under the plain language of RCW 49.12.265, Phillips 66 complied with the FCA by allowing employees to use their paid time off for illness and family care. It was therefore not required to allow its employees to access short-term disability leave. The Court should affirm.

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RESPECTFULLY SUBMITTED this 13th day of April 2016.

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COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON

RACHELLE HONEYCUTT & GABRIEL WESTERGREEN,

Petitioners-Appellants,

v.

PHILLIPS 66 COMPANY

and

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondents.

THE DEPARTMENT OF LABOR & INDUSTRIES
APPENDIX TO BRIEF OF RESPONDENT

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SUBSTITUTE SENATE BILL 5850

State of Washington

59th Legislature

2005 Regular Session

By Senate Committee on Labor, Commerce, Research & Development
(originally sponsored by Senators Spanel, Keiser, Kohl-Welles and Shin)

READ FIRST TIME 03/02/05.

1 AN ACT Relating to the definition of sick leave under the family
2 care act; and amending RCW 49.12.265.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 49.12.265 and 2002 c 243 s.2 are each amended to read
5 as follows:

6 The definitions in this section apply throughout RCW 49.12.270
7 through 49.12.295 unless the context clearly requires otherwise.

8 (1) "Child" means a biological, adopted, or foster child, a
9 stepchild, a legal ward, or a child of a person standing in loco
10 parentis who is: (a) Under eighteen years of age; or (b) eighteen
11 years of age or older and incapable of self-care because of a mental or
12 physical disability.

13 (2) "Grandparent" means a parent of a parent of an employee.

14 (3) "Parent" means a biological or adoptive parent of an employee
15 or an individual who stood in loco parentis to an employee when the
16 employee was a child.

17 (4) "Parent-in-law" means a parent of the spouse of an employee.

18 (5) "Sick leave or other paid time off" means time allowed under
19 the terms of an appropriate collective bargaining agreement, disability

1 policy, or employer policy, as applicable, to an employee for illness,
2 vacation, and personal holiday. It does not include any leave benefit
3 granted by a short-term or long-term disability policy covered by the
4 employment retirement income security act of 1974, 29 U.S.C. Sec. 18,
5 or by a third-party administered disability plan. Sick leave or other
6 paid time off shall include any self-administered short-term or long-
7 term disability plan unless the employer maintains a separate bona fide
8 paid sick leave policy plan or practice.

9 (6) "Spouse" means a husband or wife, as the case may be.

--- END ---

5850-S AMH CONW REIN 183

SSB 5850 - H AMD

By Representative Conway

1 On page 1, beginning on line 18, strike all of subsection (5)
2 and insert the following:

3 "(5) "Sick leave or other paid time off" means time allowed
4 under the terms of an appropriate state law, collective bargaining
5 agreement, or employer policy, as applicable, to an employee for
6 illness, vacation, and personal holiday. If paid time is not
7 allowed to an employee for illness, "sick leave or other paid time
8 off" also means time allowed under the terms of an appropriate
9 state law, collective bargaining agreement, or employer policy, as
10 applicable, to an employee for disability under a plan, fund,
11 program, or practice that is: (a) Not covered by the employee
12 retirement income security act of 1974, 29 U.S.C. Sec. 1001 et
13 seq.; and (b) not established or maintained through the purchase of
14 insurance."

EFFECT: Clarifies that, if an employee does not have paid sick leave, the employee may use disability leave not covered by the Employee Retirement Income Security Act (ERISA) and not established or maintained through the purchase of insurance to care for family members who have certain health conditions.

Specifies that an employee may use sick leave or other paid time off allowed under the terms of state law to care for family members who have certain health conditions.

Corrects citations to the ERISA.

HOUSE BILL REPORT

SSB 5850

As Passed House - Amended:
April 14, 2005

Title: An act relating to the definition of sick leave under the family care act.

Brief Description: Clarifying the definition of "sick leave" for family leave.

Sponsors: By Senate Committee on Labor, Commerce, Research & Development (originally sponsored by Senators Spanel, Keiser, Kohl-Welles and Shin).

Brief History:

Committee Activity:

Commerce & Labor: 3/21/05, 3/31/05 [DPA].

Floor Activity:

Passed House - Amended: 4/15/05, 58-38.

Brief Summary of Substitute Bill
(As Amended by House)

- Provides that, if paid time is not allowed for illness, an employee may use time allowed for disability to care for family members who have certain health conditions.
- Specifies that an employee may use time allowed for illness, vacation, and personal holiday under state law for such purposes.
- Modifies the definition of "parent" to include an adoptive parent.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass as amended. Signed by 4 members: Representatives Conway, Chair; Wood, Vice Chair; Hudgins and McCoy.

Minority Report: Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Sump, Assistant Ranking Minority Member; and Crouse.

Staff: Jill Reinmuth (786-7134).

Background:

The state Family Care Law provides that, if employees are entitled to sick leave or other paid time off, employers must allow employees to use their choice of that leave to care for children

with health conditions that require treatment or supervision, or spouses, parents, parents-in-law, or grandparents who have serious health conditions or emergency conditions.

"Sick leave or other paid time off" is defined as time allowed under the terms of an appropriate collective bargaining agreement or employer policy, as applicable to an employee for illness, vacation, and personal holiday. The definition of "sick leave or other paid time off" does not explicitly exclude disability leave. However, when the Legislature added this definition to the state Family Care Law in 2002, colloquies on the floors of the House of Representatives and the Senate explained that "sick leave or other paid time off" do not include disability leave. "Parent" is defined as a biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a child.

The state Family Care Law is administered by the Department of Labor and Industries (Department). It requires the Department to investigate alleged violations of these requirements. It also authorizes the Department to issue a notice of infraction and impose a civil penalty if the Department reasonably believes an employer has violated these requirements.

The federal Employee Retirement Income Security Act of 1974 (ERISA) governs employee pension, health, and welfare benefit plans, and expressly preempts state laws which "relate to any" such plans. These plans include ones that provide employees with benefits in the event of sickness or disability. The U.S. Supreme Court has noted that most of the benefits provided by ERISA-regulated plans accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee. These plans do not include certain payroll practices. The U.S. Secretary of Labor's regulations specify that ERISA-regulated plans do not include the "payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons . . ." The U.S. Supreme Court has noted that these payroll practices generally involve payments that are fixed, due at known times, not dependent on contingencies outside the employee's control, and payable from the employer's general assets.

Summary of Amended Bill:

Employees may use sick leave or other paid time off, which may include time allowed for disability in some circumstances, to care for certain family members, which must include adoptive parents, who have certain health conditions.

The definition of "sick leave or other paid time off" is modified to specify that:

- If paid time is not allowed to the employee for illness, "sick leave or other paid time off" includes time allowed to the employee under a state law, collective bargaining agreement, or employer policy for disability under practices not covered by the Employee Retirement Income Security Act (ERISA).

- If paid time is not allowed to the employee for illness, "sick leave or other paid time off" includes time allowed under a state law, collective bargaining agreement, or employer policy for disability under plans, funds, programs, or practices that are not covered by the ERISA and not established or maintained through the purchase of insurance.
- "Sick leave or other paid time off" also includes time allowed under an appropriate state law to an employee for illness, vacation, and personal holiday.
- "Sick leave or other paid time off" does not include time allowed to an employee under plans covered by the ERISA.

The definition of "parent" is modified to include an adoptive parent of an employee.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The language before you was agreed to by labor and business before the bill was passed out of the Senate committee.

(Neutral) We have received complaints about the current law from LEOFF I employees. This bill would probably draw them in. It is sometimes difficult to distinguish disability leave policies. We want to clarify which types of leave are in and which are out.

This bill may encourage employers to drop paid sick leave, and use self-administered policies instead. The term "bona fide" is not defined.

(With concerns) We have concerns and questions about the language of this bill, especially with regard to LEOFF I employees. They receive up to six months of temporary disability leave. Some get sick leave, but others do not. It is not clear whether LEOFF I employees are in or out, or whether this is an expansion of LEOFF I benefits.

Testimony Against: None.

Persons Testifying: (In support) Senator Spanel, prime sponsor.

(Neutral) Rich Ervin and Mary Miller, Department of Labor and Industries; and Kris Tefft, Association of Washington Business.

(With concerns) Jim Justin, Association of Washington Cities.

Persons Signed In To Testify But Not Testifying: None.

FINAL BILL REPORT

SSB 5850

C 499 L 05

Synopsis as Enacted

Brief Description: Clarifying the definition of "sick leave" for family leave.

Sponsors: Senate Committee on Labor, Commerce, Research & Development (originally sponsored by Senators Spanel, Keiser, Kohl-Welles and Shin).

Senate Committee on Labor, Commerce, Research & Development
House Committee on Commerce & Labor

Background: If, under the terms of either a collective bargaining agreement or an employer policy, the employee is entitled to sick leave or other paid time off, the employer must allow the employee to use any sick leave or other paid time off, to care for a sick child or a spouse, parent, parent-in-law, or grandparent of the employee who has a serious health or emergency condition.

Summary: If an employee does not have paid time off for illness, the term "sick leave or other paid time off" in the Family Care Act includes time allowed to the employee under a state law collective bargaining agreement, or employer policy for disability under plans, funds, programs, or practices that are not covered by The Employee Retirement Income Security Act (ERISA) or maintained through purchase of insurance.

The definition of "parent" is amended to include adoptive parents.

Votes on Final Passage:

Senate	48	0	
House	58	38	(House amended)
Senate			(Senate refused to concur)
House	71	27	(House refused to recede)
Senate	38	4	(Senate concurred)

Effective: July 24, 2005

CERTIFICATION OF ENROLLMENT

SUBSTITUTE SENATE BILL 5850

Chapter 499, Laws of 2005

59th Legislature
2005 Regular Session

FAMILY CARE--SICK LEAVE

EFFECTIVE DATE: 7/24/05

Passed by the Senate April 22, 2005
YEAS 38 NAYS 4

BRAD OWEN

President of the Senate

Passed by the House April 19, 2005
YEAS 71 NAYS 27

FRANK CHOPP

Speaker of the House of Representatives

Approved May 17, 2005.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Thomas Hoemann, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SUBSTITUTE SENATE BILL 5850** as passed by the Senate and the House of Representatives on the dates hereon set forth.

THOMAS HOEMANN

Secretary

FILED

May 17, 2005 - 1:52 p.m.

Secretary of State
State of Washington

SUBSTITUTE SENATE BILL 5850

AS AMENDED BY THE HOUSE

Passed Legislature - 2005 Regular Session

State of Washington 59th Legislature 2005 Regular Session

By Senate Committee on Labor, Commerce, Research & Development
(originally sponsored by Senators Spanel, Keiser, Kohl-Welles and Shin)

READ FIRST TIME 03/02/05.

1 AN ACT Relating to the definition of sick leave under the family
2 care act; and amending RCW 49.12.265.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 49.12.265 and 2002 c 243 s 2 are each amended to read
5 as follows:

6 The definitions in this section apply throughout RCW 49.12.270
7 through 49.12.295 unless the context clearly requires otherwise.

8 (1) "Child" means a biological, adopted, or foster child, a
9 stepchild, a legal ward, or a child of a person standing in loco
10 parentis who is: (a) Under eighteen years of age; or (b) eighteen
11 years of age or older and incapable of self-care because of a mental or
12 physical disability.

13 (2) "Grandparent" means a parent of a parent of an employee.

14 (3) "Parent" means a biological or adoptive parent of an employee
15 or an individual who stood in loco parentis to an employee when the
16 employee was a child.

17 (4) "Parent-in-law" means a parent of the spouse of an employee.

18 (5) "Sick leave or other paid time off" means time allowed under
19 the terms of an appropriate state law, collective bargaining agreement,

1 or employer policy, as applicable, to an employee for illness,
2 vacation, and personal holiday. If paid time is not allowed to an
3 employee for illness, "sick leave or other paid time off" also means
4 time allowed under the terms of an appropriate state law, collective
5 bargaining agreement, or employer policy, as applicable, to an employee
6 for disability under a plan, fund, program, or practice that is: (a)
7 Not covered by the employee retirement income security act of 1974, 29
8 U.S.C. Sec 1001 et seq.; and (b) not established or maintained through
9 the purchase of insurance.

10 (6) "Spouse" means a husband or wife, as the case may be.

Passed by the Senate April 22, 2005.

Passed by the House April 19, 2005.

Approved by the Governor May 17, 2005.

Filed in Office of Secretary of State May 17, 2005.

FAMILY CARE

Chapter Listing

WAC Sections

- 296-130-010 Purpose.
- 296-130-020 Definitions.
- 296-130-030 Employee rights.
- 296-130-035 Prohibited action.
- 296-130-040 Employee complaints.
- 296-130-050 Posting.
- 296-130-060 Notices of infraction.
- 296-130-065 Service on employers.
- 296-130-070 Appeal of infraction notice.
- 296-130-080 Penalty assessment.
- 296-130-100 Collective bargaining not impaired.

DISPOSITION OF SECTIONS FORMERLY CODIFIED IN THIS CHAPTER

- 296-130-500 Collective bargaining not impaired. [Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-500, filed 8/31/88.] Repealed by WSR 03-03-010, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 49.12.033 , 49.12.280 , 49.12.285 , 43.22.270 , 2002 c 243, and chapters 49.12 and 43.22 RCW. Later promulgation, see WAC 296-130-100.

296-130-010

Purpose.

It is in the public interest for employers to accommodate employees by providing reasonable leaves from work for family reasons. This chapter serves to establish a minimum standard allowing an employee to use the employee's sick leave or other paid time off to care for a sick family member.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-010, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-010, filed 8/31/88.]

296-130-020

Definitions.

(1) "Employer" means 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 employs one or more employees. Employer also includes the state, any state institution, any state agency, political subdivisions of the state, and any municipal corporation or quasi-municipal corporation.

(2) "Employee" means a worker who is employed in the business of an employer. "Employee," for the purposes of this chapter, also includes workers performing in an executive, administrative, professional, or outside sales capacity.

(3) "Employ" means to engage, suffer, or permit to work.

(4) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is:

(a) Under eighteen years of age; or

(b) Eighteen years of age or older and incapable of self-care because of a mental or physical disability.

(5) "Grandparent" means a parent of a parent of an employee.

(6) "Parent" means a biological or adoptive parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a child.

(7) "Parent-in-law" means a parent of the spouse of an employee.

(8) "Sick leave or other paid time off" means time allowed under the terms of an appropriate collective bargaining agreement or employer policy, as applicable, to an employee for illness, vacation, and personal holiday. If paid time is not allowed to an employee for illness with a sick leave or pay benefit, "sick leave or other paid time off" also means time allowed under the terms of an appropriate state law, collective bargaining agreement, or employer policy, as applicable, to an employee for disability. A disability plan, fund, program or practice is excluded if it is covered by the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. Sec. 1001 et seq.; and those established or maintained through the purchase of insurance.

(9) "Spouse" means a husband or wife, as the case may be.

(10) "Health condition that requires treatment or supervision" includes:

(a) Any medical condition requiring treatment or medication that the child cannot self administer;

(b) Any medical or mental health condition which would endanger the child's safety or recovery without the presence of a parent or guardian; or

(c) Any condition warranting treatment or preventive health care such as physical, dental, optical or immunization services, when a parent must be present to authorize and when sick leave may otherwise be used for the employee's preventive health care.

(11) "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, and any period of incapacity or subsequent treatment or recovery in connection with such inpatient care; or that involves continuing treatment by or under the supervision of a health care provider or a provider of health care services and which includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities).

(12) "Emergency condition" means a health condition that is a sudden, generally unexpected occurrence or set of circumstances related to one's health demanding immediate action, and is typically very short term in nature.

(13) "Incapable of self-care" means that the individual requires active assistance or supervision to provide daily self-care in several of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(14) "Physical or mental disability" means a physical or mental impairment that limits one or more activities of daily living or instrumental activities of daily living.

(15) "Infraction" means an alleged violation of RCW 49.12.270 through 49.12.295 as cited by the department.

(16) "Administrative law judge" means any person appointed by the chief administrative law judge, as defined in RCW 34.12.020(2) to preside at contested cases convened under RCW 49.12.270 through 49.12.295.

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

[Statutory Authority: Chapter 49.12 RCW and 2005 c 499. WSR 06-09-070, § 296-130-020, filed 4/18/06, effective 6/1/06. Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-020, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-020, filed 8/31/88.]

296-130-030

Employee rights.

(1) If, under the terms of a collective bargaining agreement or employer policy applicable to an employee, the employee is entitled to sick leave or other paid time off, then an employer must allow an employee to use any or all of the employee's choice of sick leave or other paid time off to care for:

- (a) A child of the employee with a health condition as defined in WAC 296-130-020(10); or
- (b) A spouse, parent, parent-in-law, or grandparent of the employee who has a serious health condition or emergency condition, also defined in WAC 296-130-020 (11) and (12).

(2) An employee may not take leave until it has been earned. The employee taking leave under the circumstances described in this section must comply with the terms of the collective bargaining agreement or employer policy applicable to the leave, except for any terms relating to the choice of leave. Use of leave other than sick leave or other paid time off to care for a child, spouse, parent, parent-in-law, or grandparent under the circumstances described in this section shall be governed by the terms of the appropriate collective bargaining agreement or employer policy, as applicable.

Note: Many employers combine paid leave categories such as sick leave and vacation leave, often described as "paid time off" or PTO. Such PTO allows employees the choice as to their use of this leave, thereby maintaining the intent of this chapter. In

addition, employers may require employees to use PTO (provided it may be used for any purpose) as a prerequisite to using leave designated for a specific purpose, such as an extended illness leave, without violating this chapter, provided other leave is available for employees to use to care for sick family members on the same terms that it is available for an employee's health condition.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-030, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-030, filed 8/31/88.]

296-130-035

Prohibited action.

An employer must not discharge, threaten to discharge, demote, suspend, discipline, or otherwise discriminate against an employee because the employee:

- (1) Has exercised, or attempted to exercise, any right provided under RCW 49.12.270 through 49.12.295; or
- (2) Has filed a complaint, testified, or assisted in any proceeding under RCW 49.12.270 through 49.12.295.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-035, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-23-117 (Order 88-29), § 296-130-035, filed 11/23/88.]

296-130-040

Employee complaints.

(1) An employee who believes that his or her employer has not complied with RCW 49.12.270 through 49.12.295, or this chapter, may file a complaint with the department within six months of the alleged violation. The complaint should 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; and
- (c) A statement of the specific fact which constitutes the alleged violation, including the date(s) on which the alleged violation occurred.

(2) Upon receipt of a complaint, the department will forward written notice of the complaint to the employer, along with a warning of prohibited actions as stated in WAC 296-130-035.

(3) The department may investigate any complaint it deems appropriate. If the department determines that a violation of this chapter has occurred, it may issue a notice of infraction pursuant to WAC 296-130-060.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-040, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-040, filed 8/31/88.]

296-130-050

Posting.

- (1) The department will furnish each employer a poster describing an employee's rights and an employer's obligations provided in this chapter.
- (2) The employer must keep posted a current edition department poster stipulating the provisions of this chapter. The employer must display this poster in a conspicuous place.
- (3) The employer must post its leave policies, if any, in a conspicuous place accessible to the employees at the employer's place of business.
- (4) The posting requirement for employees whose leave policies are specified by individual contracts may be satisfied by stating that leave for such employees will be governed by the terms of such contracts.
- (5) Employers with informal leave policies which are established on a case-by-case basis may satisfy the posting requirement by posting a statement explaining that policy.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-050, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-050, filed 8/31/88.]

296-130-060

Notices of infraction.

The department may issue a notice of infraction to an employer who violates RCW 49.12.270 through 49.12.295. The employment standards supervisor will 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 will be final unless contested;
- (2) A statement that the infraction is a noncriminal offense for which imprisonment will 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 will within ten days of service send a copy of the notice by certified mail to the employer; and

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

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-060, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-060, filed 8/31/88.]

296-130-065

Service on employers.

(1) If an employer is a corporation or a partnership, the department is not required to 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 supervisor or managerial employee.

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

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-065, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-065, filed 8/31/88.]

296-130-070

Appeal of infraction notice.

(1) If an employer desires to contest the notice of infraction issued, the employer will 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 must:

(a) Conduct a hearing in accordance with chapter 34.05 RCW and chapter 10-08 WAC; and

(b) Notify the employee who filed the initial complaint that resulted in the notice of infraction.

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

(4) All relevant evidence shall be admissible in a hearing convened pursuant to RCW 49.12.270 through 49.12.295. Admission of evidence is subject to the Administrative Procedure Act, chapter 34.05 RCW.

(5) The administrative law judge will issue a proposed decision that includes findings of fact, conclusions of law, and if appropriate, any legal penalty. The proposed decision will 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 or his/her designee will 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 or his/her designee will serve the final decision on all parties. Any aggrieved party may appeal the final decision to superior court pursuant to the Administrative Procedure Act, chapter 34.05 RCW unless the final decision affirms an unappealed proposed decision. If no party appeals within twenty days, the director's decision is conclusive and binding on all parties.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-070, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-070, filed 8/31/88.]

296-130-080

Penalty assessment.

An employer found to have committed an infraction under RCW 49.12.270 through 49.12.295 may be assessed the maximum penalty of a fine of two hundred dollars for the first noncompliance violation. An employer that continues to violate the terms of the statute may be subject to a fine not to exceed one thousand dollars for each violation.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-080, filed 1/6/03, effective 1/6/03. Statutory Authority: RCW 43.22.270 and 1988 c 236. WSR 88-18-044 (Order 88-20), § 296-130-080, filed 8/31/88.]

296-130-100

Collective bargaining not impaired.

Nothing in this chapter will be deemed to interfere with, impede, or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish leave benefits in excess of the applicable provisions of this chapter.

[Statutory Authority: RCW 49.12.033, 49.12.280, 49.12.285, 43.22.270, 2002 c 243, and chapters 49.12 and 43.22 RCW. WSR 03-03-010, § 296-130-100, filed 1/6/03, effective 1/6/03.]

NO. 74338-4-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

RACHELLE HONEYCUTT &
GABRIEL WESTERGREEN,

Petitioners-Appellants,

v.

PHILLIPS 66 COMPANY

and

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondents.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on April 13, 2016, she caused to be served the Brief of Respondent Department of Labor & Industries, Department of Labor & Industries Appendix to Brief of Respondent, and this Certificate of Service in the below-described manner:

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Signed this 13th day of April, 2016, in Seattle, Washington by:



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