

Case No. 74338-4-1

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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RACHELLE HONEYCUTT & GABRIEL WESTERGREEN,

Petitioners-Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent,

and

PHILLIPS 66 COMPANY,

Intervenor-Respondent,

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RESPONSE BRIEF OF INTERVENOR-RESPONDENT  
PHILLIPS 66 COMPANY

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## I. INTRODUCTION

In this appeal, Petitioner-Appellants improperly invoke the Washington Family Care Act to obtain what is essentially unlimited paid leave for family care, in contravention of both the statute and the terms of Intervenor-Respondent Phillip 66's Disability Plan.

Washington enacted the Family Care Act (WFC) so that employees could take *reasonable* paid leaves for family care. The WFC does not require employers to offer paid time off such as vacation, sick leave, or PTO, but if such leave is offered and available, employees may use it to care for sick family members.

With respect to disability benefits, the WFC is clear on its face: if employees are *allowed* to take any type of paid time off for their own illness other than disability leave, then they may not use disability benefits for family care:

“Sick leave or other paid time off” means time allowed . . . 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 . . . 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.

*See* RCW 49.12.265(5) (emphasis added). In other words, disability benefits (whether ERISA or non-ERISA) cannot be used under WFCA if employees have any other option for paid time off when they are sick.

Here, Petitioner-Appellants (Appellants) do not dispute that Phillips 66 *allows* employees to use paid vacation time and floating holidays for illness. That undisputed fact is dispositive and ends the inquiry. The issue presented here has already been reviewed four times, with all four decision-makers reaching the same conclusion: under the WFCA, Appellants may not choose to save their vacation and personal holidays and instead use disability benefits for family care. The Department of Labor and Industries and Judge Ira Uhrig of the Whatcom County Superior Court agreed, and found Phillips 66 complied with WFCA when it allowed Appellants to use their vacation and personal holidays for paid leave for family care.

Nevertheless, Appellants urge this Court to ignore the statute's plain language and the terms of the Phillips 66 Disability Plan (an ERISA plan), and grant them up to 52 weeks per year of paid disability leave to care for sick family members. This is not a result allowed or intended by WFCA and it would violate the terms of the Phillips 66 Disability Plan.

In sum, Appellants cannot establish any violation of the Washington Family Care Act. Phillips 66 allowed Appellants to use their

available vacation time and floating holidays to take paid time off for family care, but they chose to take unpaid leave instead. Phillips 66 respectfully requests that the Court deny Appellants' assignments of error and uphold the Director's Final Order affirming the Determinations of Compliance and Judge Uhrig's Order.

## II. STATEMENT OF THE ISSUES

1. The Department did **not** erroneously interpret RCW 49.12.265(5) in finding that Phillips 66 complied with WFCRA when it allowed Appellants to use their vacation and floating holidays for paid leave for family care.

2. The Department did **not** err in determining it unnecessary to reach the issue of whether the Phillips 66 Disability Plan is covered by ERISA. If the Court reaches this issue on first impression, then it should determine that the Phillips 66 Disability Plan is covered by ERISA and therefore excluded from the WFCRA's definition of "sick leave or other paid time off."

## III. STATEMENT OF THE CASE

### A. **The Phillips 66 Ferndale Refinery provides paid vacation and two floating holidays which employees may use for illness and paid family leave.**

The Phillips 66 Ferndale Refinery<sup>1</sup> employs approximately 160

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<sup>1</sup> Respondent Phillips 66 was Intervenor in the underlying proceedings.

hourly employees who are subject to a collective bargaining agreement (“CBA”) between the Company and the United Steel Workers Local 12-590 (the “Union”). CP<sup>2</sup> 552 (Pennington Decl., ¶ 2). Petitioner Rachelle Honeycutt and Gabriel Westergreen were employed by the Phillips 66 Ferndale Refinery and were in the bargaining unit at all times relevant to this proceeding. *See Id.*; CP 731, 735-745 (Simon Decl., ¶ 2, Att. A, Honeycutt Dep., 20:6-11); and CP 731, 748-764 (Simon Decl., ¶ 3, Att. B, Westergreen Dep., 23:9-14).

Represented employees, including the Appellants, receive paid vacation time pursuant to Article XVIII of the CBA. CP 552, 556-569 (Pennington Decl., ¶ 2, Att. A (CBA Excerpt, Art. XVIII, Vacation)); CP 735-745 (Honeycutt Dep., 20:12-22); CP 748-764 (Westergreen Dep., 23:9-22). The Company also provides represented employees with two floating holidays annually. CP 552 (Pennington Decl., ¶ 2). The Company and Union have not negotiated a dedicated sick leave plan for represented employees as part of the CBA or any side agreement (*see Id.*), but Phillips 66 allows employees to use vacation and personal holidays for illness, and further offers a Disability Plan with a short term disability benefit of up to 52 weeks per year. CP 553-554 (Pennington Decl., ¶ 8).

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<sup>2</sup> Respondent Phillips 66 uses the same abbreviation as Appellants for reference to the Clerk’s Papers (CP).

The Company and Union have also negotiated a vacation scheduling agreement covering the order in which employees bid, by seniority, for prime vacation days such as the winter holidays. CP 552, 570-573 (Pennington Decl., ¶ 3, Att. B, (Vacation Scheduling Policy)); CP 748-764 (Westergreen Dep., 24:1-2). Bidding occurs each fall for the subsequent calendar year. CP 552 (Pennington Decl., ¶ 3). Pre-scheduled vacation days are not set in stone. *Id.* Employees may work with their supervisors to change their vacation days. *Id.* Likewise, the Company sometimes may require employees to change their vacation schedules. *Id.*

It is undisputed that Phillips 66 allows employees to use vacation time and personal holidays for their own illnesses and injuries as well as for family care obligations. CP 726 (Waggoner Decl., ¶ 2); CP 735-745 (Honeycutt Dep., 22:11-13); CP 748-764 (Westergreen Dep., 25:13-16). Employees' use of available vacation time and personal holidays is always allowed for family care needs pursuant to WFCA. CP 726 (Waggoner Decl., ¶ 2). Vacation time is "available" if it has not already been used before the date of the family care leave. *Id.* Accordingly, any vacation time tentatively scheduled later in the year during the bidding process remains "available" for family care needs. *Id.* Employees do not need advance permission to use vacation time for family care needs under the

WFCA; coding time off as vacation time can be accomplished after the fact when the employee returns to work. *Id.*

**B. Petitioner Honeycutt had vacation hours available to use for family care but chose to take unpaid leave instead.**

Petitioner Honeycutt's underlying protected leave complaint concerns leave that she took from February 19 to March 1, 2013 to care for a family member. CP 735-745 (Honeycutt Dep. 8:22-9:5, 9:22-25); *see also* CP 731, 766-768 (Simon Decl., ¶ 4, Att. C (Honeycutt PLC)). She requested FMLA leave from the Company's Absence Management Group on January 28, 2013, and her request was approved. CP 726 (Waggoner Decl., ¶ 4); CP 735-745 (Honeycutt Dep., 9:17, 13:22); CP 731, 770-777 (Simon Decl., ¶ 4, Att. D (Honeycutt FMLA approval), Att. E (Thanjan email), and Att. F (Waggoner email)).

It is undisputed that, as of February 19, 2013, the date Petitioner Honeycutt began her family leave, she had used only 35 hours of the 200 vacation hours she had available for use in 2013. CP 553 (Pennington Decl., ¶ 5); CP 735-745 (Honeycutt Dep., 16:7-20); CP 731, 779 (Simon Decl., ¶ 5, Att. G (Honeycutt vacation hours 2013)). Accordingly, she still had 165 vacation hours and two floating holidays available for use in 2013. *Id.*

Ms. Honeycutt testified that during her leave, her temporary supervisor Bill Rinesmith asked her husband, Bliss Honeycutt (who is also an employee at the Phillips 66 Ferndale Refinery), how Ms. Honeycutt would like to have her leave coded for pay purposes: vacation or unpaid family leave? CP 735-745 (Honeycutt Dep., 14:7-15). Ms. Honeycutt conceded that she chose not to use her vacation, and instead chose unpaid family leave. *Id.*, 15:1-2. Ms. Honeycutt explained that she wanted to save her vacation for use later in the year. *Id.*, 16:16-18. Ms. Honeycutt further testified that after she returned from her family care leave, she confirmed with her supervisor, Dale Thanjan, that her pay code options for family leave were vacation or unpaid family leave. CP 735-745 (Honeycutt Dep., 15:3-8). She filed the protected leave complaint (“PLC”) with the Department on June 24, 2013. CP 731, 766-768 (Simon Decl., ¶ 4, Att. C (Honeycutt PLC)).

**C. Petitioner Westergreen had vacation hours available to use for family care but chose to take unpaid leave instead.**

Petitioner Westergreen filed a PLC regarding leave he took to care for a family member from May 3-5, 2013. CP 748-764 (Westergreen Dep. 8:1-9:2); *see also* CP 731-732, 781-782 (Simon Decl., ¶ 6, Att. H (Westergreen PLC)). He requested FMLA leave from the Company’s Absence Management Group on April 19, 2013, and his request was

approved. CP 726 (Waggoner Decl., ¶ 5); CP 748-764 (Westergreen Dep. 12:11-17); CP 731-732, 784 (Simon Decl., ¶ 6, Att. I (Westergreen FMLA approval)). On April 18, 2013, Mr. Westergreen via email asked Ms. Waggoner how to request paid family leave under the WFCA. CP 726 (Waggoner Decl., ¶ 5); CP 748-764 (Westergreen Dep., 9:8-24); CP 731-732, 786 (Simon Decl., ¶ 6, Att. J (Westergreen/Waggoner email)). Ms. Waggoner replied that “Employees can . . . access other paid time off (i.e., vacation) to care for a sick family member.” *Id.* Mr. Westergreen never specifically requested to use short term disability benefits for his family leave of May 3-5, 2013 in his email to Ms. Waggoner. CP 748-764 (Westergreen Dep., 17:16-24); CP 726 (Waggoner Decl., ¶ 5). Neither Kathleen Pennington, then HR Director, Phillips 66 Ferndale Refinery, nor Ms. Waggoner recall having any conversation with Mr. Westergreen in which he asked to use short term disability benefits for his family care leave. CP 553 (Pennington Decl., ¶ 6); CP 726 (Waggoner Decl., ¶ 5); *cf.* CP 748-764 (Westergreen Dep., 30:18-31:1).<sup>3</sup>

It is undisputed that as of May 3, 2013, the date Petitioner Westergreen began his family leave, he had used only 24 hours of the 126

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<sup>3</sup> The absence of any request by Mr. Westergreen to use his short term disability benefits, and thus the absence of any refusal by the Company, constitutes an independent basis to conclude there was no WFCA violation.

vacation hours he had available for use in 2013. CP 553 (Pennington Decl., ¶ 6); CP 748-764 (Westergreen Dep., 11:3-7, 15:19-16:6, 17:7-10); CP 731-732, 788 (Simon Decl., ¶ 6, Att. K (Westergreen vacation hours 2013)). Accordingly, he still had 102 vacation hours and two floating holidays available for use in 2013. *Id.* Mr. Westergreen conceded that he chose not to use his vacation for his family leave, and instead chose unpaid family leave. CP 748-764 (Westergreen Dep., 17:7-10).

Mr. Westergreen explained that he wanted to save his vacation for use later in the year. *Id.*, 17:11-15. Mr. Westergreen filed the instant PLC with the Department on July 2, 2013. CP 731-732, 781-782 (Simon Decl., ¶ 6, Att. H (Westergreen PLC)).

**D. The Department found no violation of WFCA occurred and issued Determinations of Compliance.**

The Department investigated the PLCs filed by Appellants. The Department concluded that Phillips 66 fully complied with the WFCA, and issued Determinations of Compliance. CP 732, 790-798 (Simon Decl., ¶ 7, Att. L (Determinations of Compliance and Protected Leave Agent Report and Recommendations)). Specifically, the Department found no violation of the WFCA occurred with respect to either Appellant because they “had earned leave to use (vacation) and w[ere] allowed to use” their vacation, yet the Appellants “chose to take leave without pay”:

Per RCW 49.12.265, because **the definition of sick leave or other paid time off *only* includes disability plans if the company does *not* allow for paid leave for sickness,** and because there is no dispute by either party that **the company allows the use of paid vacation for sickness,** the disability plan is not considered sick leave or other paid time off for purposes of the Family Care Act *regardless* of whether or not the plan is covered by ERISA.

*Id.* (Agent's Report at p. 2). (emphasis added).

Appellants appealed. CP 732, 800-803 (Simon Decl., ¶ 8, Att. M (Notices of Appeal)). The Office of the Attorney General of Washington, Labor & Industries Division, requested an administrative hearing for the purposes of seeking "Affirmance of the Department's Determinations of Compliance dated November 6, 2013." *Id.*, CP 732, 805-810, ¶ 9, Att. N (Hearing Request). The Company became an Intervenor.

**E. Administrative Law Judge and Department Director find no violation of WFCA.**

On August 22, Administrative Law Judge Jane Cantor Shefler denied Appellants' Motion for Summary Judgment, and granted the Motions for Summary Judgment filed by Intervenor Phillips 66 and the Department, affirming that no violation of WFCA occurred:

6.23 RCW 49.12.265(5) is not ambiguous. "Sick leave or other paid time off" is defined to include time allowed under the terms of employer policy to an employee for illness, vacation, and personal holiday. The plain meaning

of the phrase “other paid time off,” therefore, includes vacation and personal holidays.

6.24 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.

6.25 Because Phillips 66 allowed the use of paid time off for Honeycutt and Westergreen to use for family care purposes, the Company complied with the Family Care Act. The Determinations of Compliance #01-14-PL and #02-14-PL are affirmed.

*See* CP 73-87 (Findings of Fact, Conclusions of Law, and Initial Order of August 22, 2014).

Appellants sought administrative review from the Department’s Director. *See* CP 1037-1049 (Petition for Administrative Review of August 22, 2014). On February 2, 2015, the Director issued a Director’s Order, adopting the Administrative Law Judge’s Findings of Fact, Conclusions of Law, and Initial Order in their entirety. *See* CP 898-906 (Director’s Order of February 2, 2015).

**F. Whatcom County Superior Court Judge Uhrig affirms the Director’s Order finding no violation of WFCA.**

Appellants appealed the Director’s Order to the Whatcom County Superior Court. CP 1-5. On November 6, 2015, Judge Ira Uhrig affirmed the Director’s Order. CP 1110-1117.

**G. Phillips 66's Disability Plan is partially funded by an insurance contract and is subject to ERISA.**

Phillips 66 offers a Disability Plan to employees which includes both a long term disability benefit and a short term disability benefit. CP 553-554 (Pennington Decl., ¶ 8). The Disability Plan covers employees who become disabled and who are therefore unable to work. *Id.* The short term disability benefit provides up to 52 weeks of benefits per year. *Id.* The Disability Plan is partially funded by an insurance contract through The Hartford.<sup>4</sup> *Id.*

Phillips 66 has designed and documented its disability plan to comply with ERISA's requirements. CP 553-554 (Pennington Decl., ¶ 8). Phillips 66 annually reports on the plan by filing an Internal Revenue Service Form 5500 to the U.S. Department of Labor, as required by ERISA, 29 U.S.C. § 1024(a)(1). *Id.* The report covers both the short term and long term disability benefits of the Disability Plan, which share an ERISA plan number (i.e., 503). *Id.*, CP 574-580 Att. C (Form 5500).<sup>5</sup>

Phillips 66 also developed and adopted a Summary Plan Description ("SPD") for the Disability Plan. CP 554, 581-723 (Pennington

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<sup>4</sup> From May 1, 2012 through December 31, 2012, Phillips 66 partially insured the Disability Plan through Metlife. CP 553-554 (Pennington Decl., ¶8).

<sup>5</sup> The codes referenced in Question 8b of the Form 5500 refer to both the short-term disability benefits [4F] and the long-term disability benefits [4H]. CP 554 (Pennington Decl., ¶8).

Decl., ¶ 9, Att. D (SPD)). The SPD consists of the following three booklets that are provided to employees: the short term disability booklet, the long term disability booklet and the other information booklet. *Id.* Both the short term disability booklet and the long term disability booklet outline the Disability Plan's coverage terms and explain that Phillips 66's disability benefits are governed by ERISA. *Id.* Phillips 66 also provides employees with a thorough summary of their ERISA rights pertaining to the disability coverage in the other information booklet. *Id.*, at pp. 53-57, CP 680-84. Employees may appeal short term disability benefit claim denials in accordance with ERISA claims procedures outlined in the SPD, and Phillips 66 provides employees with information for filing appeals. *Id.* Neither Appellant filed an appeal pursuant to the Disability Plan's ERISA claims procedures. *Id.*

#### **IV. ARGUMENT**

Appellants cannot demonstrate that WFCA means anything other than what it says at face value: employees may not use disability benefits for paid family leave if the employer "allows" them to use other types of paid time off for illness. Because Phillips 66 allows employees to use vacation and personal holidays for illness, they may not use the Disability Plan's short term disability benefit for family care. The Department agrees, and its interpretation of WFCA should be granted deference.

The statutory interpretation urged by Appellants would require this Court to ignore the plain meaning of the word “allowed” and effectively rewrite the statute. Appellants argue that paid time off with more than one allowable use (here, vacation and illness) does not qualify as time off allowed “for illness” -- this is absurd. Moreover, the result they seek (52 weeks per year of paid leave for family care) contravenes the express purpose of WFCA in providing *reasonable* time off for family care.

Both the Department and Judge Uhrig deemed it unnecessary to analyze whether the Phillips 66 Disability Plan is covered by ERISA. Either way, Appellants may not use disability leave for family care, because they have access to other paid time off for illness. However, if this Court reaches the issue on first impression, Phillips 66 has demonstrated that its Disability Plan is covered by ERISA and therefore excluded from WFCA’s definition of “sick leave of other paid time off.”

**A. Standard of Review**

“The Washington Administrative Procedure Act (WAPA), chapter 34.05 RCW, governs review of a final decision by the director of a department.” *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 879, 154 P.3d 891 (2007), citing RCW 34.05.510. The Court of Appeals “sits in the same position as . . . the superior court, applying the WAPA standards directly to the record considered by the agency.” *Id.*,

citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Although questions of law are reviewed de novo, “an agency’s findings of fact *and its regulatory interpretations* are granted deference.” *Id.* (emphasis added), citing *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988); *Cobra Roofing Service, Inc. v. Dept. of Labor & Indus.*, 122 Wn. App. 402 409, 97 P.3d 17 (2004) (courts “give substantial weight to the agency’s interpretation of statutes and regulations within its area of expertise” and “will uphold an agency’s interpretation of a regulation if ‘it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent.’”). As the party challenging the Director’s Order, Appellants bear the burden of demonstrating the invalidity of the Department’s determination that Phillips 66 complied with the WFCRA. *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015), citing RCW 34.05.570(1)(a).

Where the challenge involves statutory interpretation, “if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Darkenwald, supra*, at 244. “When determining a statute’s plain meaning, [courts] consider ‘the ordinary meaning of words, the basic rules of grammar, and the statutory context to conclude what the legislature has provided for in

the statute and related statutes.” *Id.* at 244-245. Courts resort to legislative history only after analyzing the statute’s plain meaning and determining it is ambiguous. *Id.* at 245.

**B. The Director’s Order should be upheld because the Company *allows* employees to use vacation for illness and paid family leave.**

**1. WFCA’s intent is to provide “reasonable” paid leave for family care.**

The intent of WFCA is to provide “reasonable” paid leaves for family care. *See* Legislative findings – 1988 c 236 § 1; Ch. 236, Laws of 1988 (Substitute House Bill 1319), RCW 49.12.270 through 49.12.295, the Family Care Act (“The legislature further finds that it is in the public interest for employers to accommodate employees by providing *reasonable* leaves from work for family reasons”) (emphasis added).

Appellants contend that they may save their vacation and instead draw up to 52 weeks of paid disability leave per year to care for family members.

The Director ruled Appellants’ interpretation was “contrary to the manifest legislative intent for ‘employers to accommodate employees by providing reasonable leaves from work for family reasons.’” CP 919 at ¶ 6.22. The Director’s Order should be upheld.

2. **WFCA excludes disability leave when employers allow use of other paid leave for illness and family care.**

To accomplish its purpose of providing reasonable paid leaves family care, WFCA permits employees to use their “sick leave or other paid time off” to care for certain family members with serious health conditions to the extent the employer offers such paid time off. *See* RCW 49.12.270(1). The statute defines “sick leave or other paid time off” as follows:

“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.

*See* RCW 49.12.265(5) (emphasis added).

The statute is best understood when the two sentences are considered in sequential order, with the first establishing the general rule

and the second carving out a limited exception. First, the statute sets forth the baseline definition of “sick leave or other paid time off”:

**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.”**

*Id.* (emphasis added). Here, Phillips 66 offers paid vacation and two floating personal holidays, and allows both types of leave to be used for illness and family care.

Second, the statute provides a limited expansion of “sick leave or other paid time off” only where the employer does *not allow* employees to take any type of paid time off for illness:

***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.***

*Id.* (emphasis added). The statutory language excluding disability plans from the definition of “sick leave or other paid time off” is mirrored in the accompanying regulations:

“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.

See WAC 296-130-020(8) (emphasis added). Notably, the regulations expressly state that “a pay benefit” for illness other than dedicated sick leave qualifies as time off for illness and precludes resort to disability plans. *Id.*

In sum, the WFCA provides that employees may use disability benefits for family care *only* if three conditions are met (and all must be met):

***First***, the employer does *not allow* employees to take any paid time off for illness other than disability leave;

***Second***, the disability benefit must not be covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 *et seq.* (“ERISA”); *and*

*Third*, the disability benefit must not be established or maintained through the purchase of insurance.

*See* RCW 49.12.265(5). None of the three conditions is met here.

As the Department correctly determined at the compliance stage, in the Initial Order, and in the Director's Order, and as confirmed by Judge Uhrig, the plain language of the WFCA and its interpretive rules limit the definition of "sick leave or other paid time off" to vacation, sick leave, and personal holidays so long as the employer offers any one or more of those benefits to employees and *allows* use for illness and family care. Here, the Company's Disability Plan is excluded from the definition of "sick leave or other paid time off" because Phillips 66 does offer paid vacation and floating holidays and allows employees to use those "pay benefits" for illness and family care. *See* WAC 296-130-020(8).

**3. Appellants' argument distorts the plain language of WFCA.**

Appellants' erroneous argument that "other paid time off" must be exclusively dedicated to illness to preclude the use of disability benefits for paid leave for family care defies the plain language of the WFCA. As the Department properly concluded, "the Legislature clearly intended that employers could have available more than one type of leave for employees to use for family care needs. The legislature did not restrict the definition

of ‘other paid time off’ to leave specifically designated for illness or family care only.” CP 919 at ¶ 6.22.

The WFCA provides that employees may use certain disability benefits only “[i]f paid time is not *allowed* to an employee for illness...” See RCW 49.12.265(5) (emphasis added). The key word is “allowed.” The word “allowed” contemplates that “other paid time off” (including vacation and personal holidays) may have several permissible uses, including illness. If employees have paid time off where one of the permissible uses is for illness, then employees may not use their disability benefits for paid family leave. The statute noticeably does *not* say that employees may use disability benefits if employers do not offer “dedicated sick leave.” The trigger for WFCA’s limited coverage of disability benefits is not the absence of dedicated sick leave; rather, the trigger is the absence of *any* paid leave an employee is *allowed* to use for illness. Indeed, the accompanying regulations (which define time off for illness as sick leave *or* any non-disability “pay benefit”) confirm the conclusions reached by the Department and Judge Uhrig and discredit the Appellants’ argument. See WAC 296-130-020(8).

Here, Appellants may use their vacation and personal holidays for illness, therefore they may not use the Phillips 66 Disability Plan’s short term disability benefit for family care. Their attempt to rewrite the statute

to substitute sick leave in place of time off “allowed” for illness should be rejected.

**4. Legislative history does not support Appellants’ Arguments.**

There is no indication that the legislature intended WFCA to provide employees with 52 weeks of paid family care leave per year. To the contrary, the legislature opted to provide a safety net (i.e., use of certain disability benefits) for only those employees who have no alternative option for paid time off for illness. *Id.*

In 2005, the state legislature amended the definition of “sick leave or other paid time off” to provide more guidance regarding the use of disability benefits for family care. The legislature debated whether to include disability plans not subject to ERISA among the various types of paid leave employees generally may use for family care as a matter of course, but rejected such broad inclusion. *See*. Wash. SSB 5850, 59<sup>th</sup> Leg., 2005 Reg. Sess. (S-1368.1, February 9, 2005).<sup>6</sup>

The legislature next debated whether to include disability plans not subject to ERISA among the various types of paid leave employees may use for family care *if* the employer did not offer “a separate bona fide paid

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<sup>6</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/Senate%20Bills/5850.pdf>; <http://apps.leg.wa.gov/billinfo/summary.aspx?year=2005&bill=5850>.

sick leave policy plan or practice,” but rejected that idea as well. *See* Wash. SSB 5850, 59<sup>th</sup> Leg., 2005 Reg. Sess. (S-2164.2, March 2, 2005).<sup>7</sup>

Finally, the legislature settled on a definition of “sick leave or other paid time off” that included disability plans only if employees had no other recourse for paid leave for illness, and on April 24, 2005, this version passed and was signed into law on May 17, 2005. *See* Laws of 2005, ch. 499, § 1;<sup>8</sup> *see also* SSB 5850, Final Bill Report to Laws of 2005, Ch. 499, synopsis.<sup>9</sup>

“This court may consider sequential drafts of a bill in order to help determine the legislature’s intent.” *Lewis v. State*, 157 Wn.2d 446, 470, 139 P.3d 1078 (2006), citing *State v. Martin*, 94 Wn.2d 1, 19, 614 P.2d 164 (1980). Courts should acknowledge when the legislature rejects and amends proposed provisions throughout the life of the bill. *Bellevue Fire Fighters Local 1604, Int’l Ass’n of Fire Fighters, AFL-CIO, CLC v. City of Bellevue*, 100 Wn.2d 748, 753, 675 P.2d 592 (1984); *see also, C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 713 n.6, 985 P.2d 262 (1999) (giving no persuasive weight to Senate Bill Report where

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<sup>7</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/Senate%20Bills/5850-S.pdf>.

<sup>8</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bills/Session%20Laws/Senate/5850-S.SL.pdf>.

<sup>9</sup> Available at <http://apps.leg.wa.gov/documents/billdocs/2005-06/Pdf/Bill%20Reports/Senate/5850-S.FBR.pdf>.

“language in these brief summaries is in sharp contrast to the adopted statutory language”). Appellants misplace reliance on rejected and superseded draft amendments to the WFCOA. The legislative history of Substitute Senate Bill 5850 demonstrates that the legislature narrowed the WFCOA’s potential coverage of disability plans throughout the course of several amendments, reaching consensus only when crafted as an exception triggered solely where employees have no other resource for paid leave for illness.

**C. The Phillips 66 Disability Plan is covered by ERISA and partially funded by an insurance contract.**

As the Department correctly determined, the questions of whether the Phillips 66 short term disability benefit is subject to ERISA or covered by an insurance contract need not be reached if the employer allows use of paid vacation for illness and family care. To the extent this issue is nevertheless reached here on first impression, the WFCOA does not permit Appellants to use the Phillips 66 Disability Plan’s short term disability benefit for family care. Phillips 66’s short term and long term disability benefits are integrated into a single employee welfare benefit plan that is both governed by the Employment Retirement Income Security Act of 1974 (“ERISA”) and partially funded by an insurance contract.

The WFCA’s definition of “sick leave or other paid time off” expressly excludes disability plans that are “covered by the employee retirement income security act of 1974, 29 U.S.C. Sec. 1001 et seq.” or which are “established or maintained through the purchase of insurance.” *See* RCW 49.12.265(5); WAC 296-130-020(8).

Under federal law, an employee benefit plan supported with funds beyond general assets cannot be categorized as a payroll practice. *See* 29 C.F.R. § 2510.3-1(b)(2). Federal law defines an ERISA plan as: “any plan, fund, or program which ... is ... established or maintained by an employer or by an employee organization, or by both, ... for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment....” 29 U.S.C. § 1002(1). Phillips 66’s Disability Plan clearly falls within that definition. Moreover, a short term disability benefit is not paid entirely from the general assets of the employer if the employer creates a beneficial ownership interest by the plan in an asset of the employer. *See* DOL Advisory Opinion 92-24A. In the instant case, Section 11 of the integrated Disability Plan creates a beneficial ownership interest in a category of its assets, and, therefore, the benefits are not subject to the employer’s sole discretion, removing the plan from the

“payroll exception”: “unclaimed self-insured STD Plan funds may be applied only to the payment of benefits (including administrative fees) under the STD Plan pursuant to ERISA.” *See* CP 210-214 (Disability Plan Document, attached as Exhibit E to Decl. of Franco-Malone).

Here, the Phillips 66 Disability Plan’s short term disability benefit is: a component of a single, fully integrated plan, the Phillips 66 Disability Plan; described in a single plan document; maintained under a single plan number; administered by a single named fiduciary; filed annually with the Department of Labor under a single ERISA Form 5500; communicated to participants as a single ERISA plan; subject to a single ERISA appeals procedure; fully integrated with the long term disability benefit that entitles a portion of the short term disability benefits to become partially insured and no longer taxable to the participant; and creates a beneficial interest under ERISA in a category of assets under the plan. For these reasons, the Phillips 66 Disability Plan is subject to ERISA and is not a “payroll practice” within the meaning of the Department of Labor regulations.

Moreover, a payment ceases to be a “payroll practice” and is subject to ERISA if it rises to the level of a “plan” and involves an “ongoing administrative scheme.” *See e.g., Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987) (“We have not hesitated to enforce ERISA’s

pre-emption provision where state law created the prospect that an employer's administrative scheme would be subject to conflicting requirements."); *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11<sup>th</sup> Cir. 1982) ("It is obvious that a system of providing benefits pursuant to a written instrument that satisfies ERISA §§ 102 and 402, 29 U.S.C. §§ 1022 and 1102, would constitute a "plan, fund or program."). Thus, in *Letourneau v. Life Ins. Co. of N. Am.*, No. 6:13-CV-00055-KKC, 2013 WL 5943923 (E.D. Ky. Nov. 5, 2013), the court held that the Kmart STD plan in which the employees were automatically enrolled and which was employer funded constituted a plan subject to ERISA. Here, the Phillips 66 short term disability benefit payments are paid pursuant to an ERISA plan document and are subject to complex rules regarding eligibility and coordination with long term disability benefits, social security and other income sources. It involves more than a single payment or determination and therefore involves an ongoing administrative scheme subject to ERISA and not a simple payroll practice.

The authority Appellants submit in support of their argument that the Phillips 66 Disability Plan's short term disability benefit is not covered by ERISA and not partially funded by an insurance contract is inapposite. The case of *Bassiri v. Xerox Corp.*, 463 F.3d 927 (9<sup>th</sup> Cir. 2006) is not on point because the employer did not offer a single integrated disability plan

that was partially funded by an insurance contract. Rather, the employer created one short term disability plan, one long term disability plan, and an extended disability plan, each of which was independent from the others and treated as such. *Id.* at 928-29.

In contrast, in *McMahon v. Digital Equipment Corp.*, 162 F.3d 28 (1st Cir. 1998), the employer offered three short term disability benefits that were part of a single short term disability program, communicated the plan's coverage under ERISA, complied with ERISA reporting requirements, and filed a single Form 5500 under a single plan number. *Id.* at 33-34. The Court concluded that the integrated disability plan should be considered as a whole, thus the fact that the integrated plan was partially funded by insurance rendered it an ERISA plan, not a payroll practice. *Id.* at 37. Moreover, there is another reason to reject the application of the payroll practice rule to Plan 502: Digital's treatment of the Plan as an ERISA plan:

Digital held the Plan out to its employees as an ERISA plan and filed documents with the Department of Labor and the IRS acknowledging the Plan's status as an ERISA plan. As the district court pointed out, *these facts alone provide a strong reason to find ERISA coverage.*

*Id.* at 38 (emphasis added). Like *McMahon*, Phillips 66 provides an integrated Disability Plan composed of two benefits, compiled in a single "wrap" document, and which is partially funded by an insurance policy.

Phillips 66 complies with ERISA communication and reporting requirements and files a Form 5500 with the Department of Labor and IRS for its integrated Disability Plan. Therefore, the Phillips 66 Disability Plan is covered by ERISA and excluded under WFCOA.

In contrast, the employer in *Parker v. Cooper Tire and Rubber Co.*, 546 Fed. Appx. 522 (5<sup>th</sup> Cir. 2014) set up separate long term disability and short term disability plans, and only held out its long term disability plan as an ERISA plan. The employer in *Cooper Tire* did not create an integrated plan or include its short term disability plan on the Form 5500. *Id.* at 528 n.6. The Fifth Circuit therefore distinguished the facts in *Cooper Tire* from those present in *McMahon*.

The fact that the Disability Plan is subject to ERISA and partially funded by an insurance contract renders it expressly excluded from the WFCOA's definition of "sick leave or other paid time off" and provides two additional bases to affirm the Department's Determinations of Compliance.

**D. Appellants' argument is illogical because WFCOA was not intended to provide 52 weeks of paid time off each year for family care.**

It is simply illogical to interpret WFCOA as permitting employees the use of 52-weeks per year of paid time off for family care, when the generous benefit Phillips 66 offers is clearly intended for and expressly

limited to leave for an employee's own disability. It is reasonable to allow employees in Washington to use the standard two to three weeks per year of accrued vacation and sick time for paid family leave if they so choose. But there is no indication in the statute or regulations that the legislature intended WFCA to allow employees to take a full year off to care for family members, particularly given its broad coverage of an employee's "child . . . spouse, parent, parent-in-law, or grandparent." *See* RCW 49.12.270(1). Yet this is precisely the Appellants' position. CP 735-745 (Honeycutt Dep. 17:18-20); CP 748-764 (Westergreen Dep. 18:19-23). Rather, the underlying purpose of the WFCA is furthered by the Department's conclusion: when an employer allows the use of paid vacation and personal holidays for sickness and family care, disability plans are not considered "sick leave or other paid time off" under WFCA.

## V. CONCLUSION

Phillips 66 respectfully requests that the Court affirm the Director's Order and the Order of Judge Uhrig, as they are supported by the record and the plain language of the statute. Because Phillips 66 allows employees to use paid vacation and personal holidays for illness and family care, the Orders finding Phillips 66 in compliance with WFCA are not erroneous and should be affirmed.

DATED this 13<sup>th</sup> day of April, 2016.

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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 **Response Brief of Intervenor-Respondent Phillips 66 Company** in the below-described manner:

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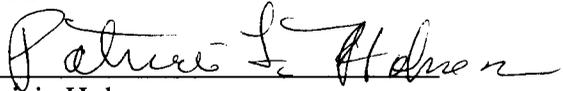
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