

WSR 24-06-081
PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed March 5, 2024, 3:33 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-21-059.

Title of Rule and Other Identifying Information: Safety standards for quotas at warehouse distribution centers. Chapter 296-35 WAC, new chapter under Title 296 WAC, Department of labor and industries (L&I); and chapter 296-360 WAC, Discrimination, pursuant to RCW 49.17.160.

Hearing Location(s): On April 9, 2024, at 9:30 a.m., at the Enduris Training Center, 1610 Technology Boulevard, Suite 100, Spokane, WA 99224. A prehearing overview will begin at 9:00 a.m. The hearing will start at 9:30 a.m. and will continue until all oral comments are received. This public hearing will be held jointly with L&I's division of fraud prevention and labor standards (FPLS);

On April 11, 2024, at 6:00 p.m., virtual and telephonic hearing. Join electronically <https://lni-wa-gov.zoom.us/j/89225681620?pwd=bkh6emF3bGUraHlx bFk5dTJ2TjJMOT09>, Passcode (if prompted) Ware@530; or join by phone (audio only) 253-215-8782, Meeting ID 892 2568 1620, Passcode 12275394. A prehearing overview will begin at 5:30 p.m. The hearing will start at 6:00 p.m. and will continue until all oral comments are received. This public hearing will be held jointly with L&I's FPLS; and

On April 15, 2024, at 1:30 p.m., at L&I, 12806 Gateway Drive South, Tukwila, WA 98168. A prehearing overview will begin at 1:00 p.m. The hearing will start at 1:30 p.m. and will continue until all oral comments are received. This public hearing will be held jointly with L&I's FPLS.

Date of Intended Adoption: May 31, 2024.

Submit Written Comments to: Carmyn Shute, Administrative Regulations Analyst, L&I, Division of Occupational Safety and Health (DOSH), P.O. Box 44620, Olympia, WA 98504-4620, email WarehouseRules@Lni.wa.gov, fax 360-902-5619, by 5:00 p.m., April 22, 2024.

Assistance for Persons with Disabilities: Contact Carmyn Shute, administrative regulations analyst, phone 360-870-4525, fax 360-902-5619, email WarehouseRules@Lni.wa.gov, by April 1, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: L&I's DOSH and FPLS are required to implement and enforce 2SHB 1762, codified as chapter 49.84 RCW, an act related to protecting the health and safety of employees in warehouses. L&I must adopt WAC rules to fully and adequately enforce the law. This act becomes effective July 1, 2024.

WAC 296-360-200 Retaliation protections and enforcement—Warehouse distribution centers, establishes protected activities covered by this chapter and RCW 49.84.062 and 49.84.040.

WAC 296-35-010 Scope, sets scope of the rule.

WAC 296-35-100 Definitions, establishes definitions that apply to this chapter. Definitions are numerated for ease in cross referencing.

WAC 296-35-200 Quota time periods and reasonable travel time, establishes that time periods applied to quotas must include reasonable travel time and time to use the bathroom.

WAC 296-35-250 Employer size determination, establishes how L&I will determine the employer size for purposes of establishing penalties under chapter 49.17 RCW.

WAC 296-35-300 Quota—Violations of WISHA, establishes violations for quotas that expose an employee to occupational health and safety hazards. A nonexhaustive table of examples is provided.

WAC 296-35-350 Employer recordkeeping requirements, establishes the requirement for employers to maintain and preserve all records related to how a quota is determined for three years.

WAC 296-35-400 Protection from adverse action for failure to meet a quota in violation of WISHA, establishes that an employer may not take adverse action against an employee for failing to meet a quota that violates RCW 49.84.032 or this chapter.

WAC 296-35-500 Retaliation protections and enforcement, establishes that employers or their designee may not take adverse action against an employee or former employee for exercising any rights established by this chapter or RCW 49.84.032.

WAC 296-35-600 Severability clause, declares that if any provision of this rule is held invalid, the remainder of the rule is not affected.

Reasons Supporting Proposal: L&I's DOSH must adopt rules under WAC to implement and enforce the requirements related to warehouse worker quotas under chapter 49.84 RCW.

Statutory Authority for Adoption: RCW 49.84.060, 49.17.010, 49.17.040, 49.17.050, and 49.17.060.

Statute Being Implemented: Chapters 49.17 and 49.84 RCW.

Rule is not necessitated by federal law, federal or state court decision.

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Tracy West, Tumwater, Washington, 509-237-2372; Implementation and Enforcement: Craig Blackwood, Tumwater, Washington, 360-902-5828.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting Carmyn Shute, Administrative Regulations Analyst, L&I, DOSH, P.O. Box 44620, Olympia, WA 98504-4620, phone 360-870-4525, fax 360-902-5619, email WarehouseRules@Lni.wa.gov.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(4).

Explanation of exemptions: Under RCW 49.84.010 (9)(a), the proposed rule only applies to employers with 100 [or] more employees at a single warehouse distribution center in the state or 1,000 or more employees at one or more warehouse distribution centers in the state.

Scope of exemption for rule proposal:

Is fully exempt.

March 5, 2024
Joel Sacks
Director

OTS-5213.4

Chapter 296-35 WAC
SAFETY STANDARDS FOR QUOTAS FOR WAREHOUSE DISTRIBUTION CENTERS

NEW SECTION

WAC 296-35-010 Scope. This chapter applies to employers as defined in this chapter at warehouse distribution centers.

NEW SECTION

WAC 296-35-100 Definitions. (1) **Adverse action.** Any action taken or threatened by an employer against an employee for their exercise of chapter 49.84 RCW rights, which may include, but is not limited to:

- (a) Terminating, suspending, demoting, or denying a promotion;
- (b) Changing the number of work hours for which the employee is scheduled;
- (c) Altering the employee's preexisting work schedule;
- (d) Reducing the employee's rate of pay;
- (e) Threatening to take, or taking action, based upon the immigration status of an employee, former employee, or an employee or former employee's family member; and
- (f) Preventing future job opportunities whether for the employer or elsewhere.

(2) **Affiliate.** A person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. For purposes of this subsection, "control" means the possession, directly or indirectly, of more than 50 percent of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(3) **Defined time period.** Any unit of time measurement equal to or less than the duration of an employee's shift, and includes hours, minutes, and seconds and any fraction thereof.

(4) **Department.** The department of labor and industries.

(5) **Director.** The director of the department of labor and industries or the director's designee.

(6) **Employee.** An employee who is not exempt under RCW 49.46.010 (3)(c) and works at a warehouse distribution center.

(7) **Employer.** A person who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary services, or staffing agency, independent contractor, or any similar entity, at any time, employs or exercises control over the wages, hours, or working conditions of 100 or more employees at one or more warehouse distribution centers in the state.

(a) For the purposes of determining the number of employees employed at a single warehouse distribution center or at one or more warehouse distribution centers, all employees employed directly or indirectly, or through an agency or any other person, and all employees employed by an employer and its affiliates, must be counted.

(b) For the purposes of determining responsible employers, all agents or other persons, and affiliates must be deemed employers and

are jointly and severally responsible for compliance with this chapter.

(8) **Establishment.** A single physical location where business is conducted or where services or industrial operations are performed. Normally, one business location has only one establishment.

When distinct and separate economic activities are performed at a single physical location each would be considered separate establishments provided:

(a) No one industry description in the North American Industrial Classification System applies to the joint activities of the establishments;

(b) Separate reports are routinely prepared for each establishment on the number of employees, their wages and salaries, sales or receipts, and other business information; and

(c) Employment and output are significant for both activities.

(9) **Occupational safety and health standards.** For purposes of this chapter, means potential sources of harm or adverse health effects for workers including, but not limited to, physical safety hazards, chemical hazards, biological hazards, physical safety hazards, and ergonomic risk factors. See table of examples in WAC 296-35-300.

(10) **Person.** An individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

(11) **Quota.** A work performance standard, whether required or recommended, where:

(a) An employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard; or

(b) An employee's actions are categorized between time performing tasks and not performing tasks, if the employee may suffer an adverse employment action if they fail to meet the performance standard.

(12) **Reasonable travel time.** The employee must have enough time to access bathroom locations considering the architecture and geography of the facility and the location within the facility that the employee is located at the time a bathroom is required.

(13) **Warehouse distribution center.** An establishment engaged in activities as defined by any of the following North American Industry Classification System codes, however such establishment is denominated:

(a) 493 for warehousing and storage, but does not include 493130 for farm product warehousing and storage;

(b) 423 for merchant wholesalers, durable goods;

(c) 424 for merchant wholesalers, nondurable goods; or

(d) 454110 for electronic shopping and mail-order houses.

NEW SECTION

WAC 296-35-200 Quota time periods and reasonable travel time.

(1) The time period considered in a quota, including designated as

productive time or time on task must include time to use the bathroom, including reasonable travel time; and

(2) The time period considered in a quota, including designated as productive time or time on task must include time to take any actions necessary for the employee to exercise the employee's right to a safe and healthful workplace pursuant to chapter 49.17 RCW including, but not limited to, time to access tools or safety equipment necessary to perform the employee's duties.

NEW SECTION

WAC 296-35-250 Employer size determination. Employer size, for the purposes of this chapter, is determined based on the number of employees on the day of the alleged violation or the average number of employees over the previous 12 months, whichever is greater, except for the purposes of establishing penalties under chapter 49.17 RCW and associated rules. For the purposes of setting penalties under chapter 49.17 RCW and associated rules, the size of business will be measured on the maximum number of employees at all workplaces nationwide, in the previous 12 months. For businesses operating for less than one year, the size will be based on the maximum number of employees since the company has been in business.

NEW SECTION

WAC 296-35-300 Quota—Violations of WISHA. (1) A quota violates chapter 49.17 RCW if the quota:

- (a) Does not provide sufficient time as required under WAC 296-35-200;
- (b) Prevents the performance of any activity related to occupational safety and health required by the employer for the employee to do the work subject to any quota; or
- (c) Exposes an employee to occupational safety and health hazards in violation of chapter 49.17 RCW and the applicable rules or regulations. A quota that substantially contributes to a hazard or the exposure to a hazard is a violation of this subsection.

(2) An employee is not required to meet a quota that violates this section.

(3) The following table is a nonexhaustive list of examples of activities or equipment for use in understanding this section and how to determine what may contribute to a quota being found in violation of chapter 49.84 RCW or this chapter.

Examples	WAC Reference (Where applicable)
Examples of tools and equipment necessary to perform the employee's duties in WAC 296-35-200 including, but not limited to:	
Carts and hand trucks.	WAC 296-800-11030 Prohibit employees from using tools and equipment that are not safe.
Step stools and ladders.	Chapter 296-876 WAC, Ladders, portable and fixed.
Dock plates.	WAC 296-24-75006 Dockboards (bridge plates).
Safety shoes.	WAC 296-800-160600 Make sure your employees use appropriate foot protection.

Examples	WAC Reference (Where applicable)
High visibility vests.	WAC 296-800-16015 Select appropriate PPE for your employees.
Examples of safety or health related activities mentioned in WAC 296-35-300 (1)(b).	
Cleaning up spills or moving obstructions from aisles.	WAC 296-24-73505, walking working surfaces general requirements.
Inspecting powered industrial vehicle before use.	Chapter 296-863 WAC, Forklifts and other powered industrial trucks.
Setting up ladders properly.	Chapter 296-876 WAC, Ladders, portable and fixed.
Waiting for help with team lifting.	WAC 296-800-11035 Establish, supervise, and enforce rules that lead to a safe and healthy work environment that are effective in practice.
Examples of where the quota exposes employees to an occupational safety and health hazards under WAC 296-35-300 (1)(c).	
Heat stress.	WAC 296-800-11005 Provide a workplace free from recognized hazards. WAC 296-62-09013 Temperature, radiant heat, or temperature-humidity combinations.
Unsafe floor conditions, rushing (slip/trip/fall).	WAC 296-24-73505, walking working surfaces general requirements.
Manual material handling.	WAC 296-800-11005 Provide a workplace free from recognized hazards.
Powered industrial vehicle operations.	Chapter 296-863 WAC, Forklifts and other powered industrial trucks.
Safe material storage.	WAC 296-800-22035 Store things safely.
Machine safety.	Chapter 296-806 WAC, Safety standards for machine safety.
Lockout/tagout.	Chapter 296-803 WAC, Lockout/tagout (control of hazardous energy).
Recognized ergonomic hazards.	WAC 296-800-11005 Provide a workplace free from recognized hazards.

NEW SECTION

WAC 296-35-350 Employer recordkeeping requirements. (1) An employer must maintain and preserve all records required under WAC 296-136-060.

(2) Records on how the time periods required under RCW 49.84.025 or WAC 296-35-200 were considered in determining any quota must be preserved for three years.

(3) Nothing in this section requires an employer to collect or keep such records if the employer does not use quotas or monitor work speed data.

(4) The records must be made available to the department or director upon request. An employer who fails to allow adequate inspection of records in an inspection by the department within a reasonable time period may not use such records in any appeal to challenge the correctness of any citation and notice issued by the department.

NEW SECTION

WAC 296-35-400 Protection from adverse action for failure to meet a quota in violation of WISHA. (1) An employer may not take ad-

verse action against an employee in whole or in part for failing to meet a quota that violates RCW 49.84.032 or this chapter. A quota that violates the law may not be a factor leading to an adverse action by the employer.

(2) A person who has adverse action taken against them in whole or in part for failure to meet a quota that violates RCW 49.84.032 or this chapter may file a complaint within 90 days of the adverse action with the department in accordance with WAC 296-360-030.

(3) Complaints under this section will be investigated according to chapter 296-360 WAC, including appropriate relief, payment of damages, penalties, and appeal of citations of notices of assessment.

NEW SECTION

WAC 296-35-500 Retaliation protections and enforcement. (1) A person including, but not limited to, an employer, their agent, a person acting as or on behalf of a hiring entity, or the officer or agent of any entity, business, corporation, partnership, or limited liability company, may not discharge or in any way retaliate, discriminate, or take adverse action against an employee or former employee for exercising any rights established in this chapter including, but not limited to:

(a) The right to make a complaint to the employer, the director, or any local, state, or federal governmental agency or official, related to a quota that is allegedly in violation of chapter 49.17 RCW, RCW 49.84.032, or this chapter;

(b) The right to participate in any proceeding related to a quota that is allegedly in violation of chapter 49.17 RCW, RCW 49.84.032, or this chapter; and

(c) The right to testify in any proceeding related to a quota that is allegedly in violation of chapter 49.17 RCW, RCW 49.84.032, or this chapter, including any statements given in the course of judicial, quasi-judicial, and administrative proceedings, including inspections, investigations, administrative adjudications, and rules hearings.

(2) (a) If a person takes adverse action against an employee or former employee within 90 days of the employee engaging or attempting to engage in activities protected by this chapter, there is a rebuttable presumption that the adverse action is a retaliatory action in violation of this chapter.

(b) The presumption may be rebutted by a preponderance of the evidence that:

(i) The action was taken for other permissible reasons; and

(ii) Engagement or attempted engagement in activities protected by this chapter was not a motivating factor in the adverse action.

(3) An employee or former employee who believes that they were subject to retaliation under this section may file a complaint with the department in accordance with WAC 296-360-030.

(4) Complaints under this section will be investigated according to chapter 296-360 WAC, including appropriate relief, payment of damages, penalties, and appeal of citations of notices of assessment, except the presumption in subsection (3) of this section applies.

NEW SECTION

WAC 296-35-600 Severability clause. If any provision of the rules in this chapter, or their application to any person or circumstances is held invalid, the remainder of these rules or their application of the provision to other persons or circumstances is not affected.

OTS-5214.1NEW SECTION

WAC 296-360-200 Retaliation protections and enforcement—Warehouse distribution centers. This chapter applies to protected activities established in RCW 49.84.032, 49.84.040, and associated rules under chapter 296-35 WAC. WAC 296-35-400 establishes protected activities covered by this chapter, and includes a rebuttable presumption on when an adverse action has taken place.