

WSR 19-15-082
EXPEDITED RULES
DEPARTMENT OF
SOCIAL AND HEALTH SERVICES
(Economic Services Administration)

[Filed July 18, 2019, 1:01 p.m.]

Title of Rule and Other Identifying Information: The department is amending WAC 388-14A-3323 What happens in a hearing on a notice of support owed served under WAC 388-14A-3311?

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules:

Background: The division of child support (DCS) may serve a notice of support owed under RCW 26.23.110 when a support order provides that a parent is required to pay a portion of certain costs incurred on behalf of a child or children covered by the support order but does not reduce the costs to a fixed dollar amount. The notice of support owed does not modify the underlying support order, but results in an administrative order which establishes the amount owed by the parent as a sum certain, either as a lump sum reimbursement or as a sum certain amount to be paid each month (based on historical costs), or both. DCS uses the notice of support owed process to determine sum certain amounts owed by the non-custodial parent (NCP) for childcare/daycare, and also to determine sum certain amounts owed by either the NCP or the custodial parent (CP) for medical support. This specific rule, WAC 388-14A-3323, deals with administrative hearings on a notice of support owed served on the NCP to establish amounts owed by the NCP to the CP for daycare/child-care expenses.

Once an administrative order requiring ongoing monthly payments is established pursuant to a notice of support owed, RCW 26.23.110 (12)(a) provides that DCS must provide for an "annual review" of that order if one of the parties or DCS requests the review. The annual review may include a reconciliation based on the actual costs incurred over the preceding time period to determine if the amounts established by the administrative order were correctly estimated, or if they have been underpaid or overpaid. The subject rule (WAC 388-14A-3323) deals with administrative hearings concerning either an original notice of support owed or an annual review of an administrative order based on a prior notice of support owed.

Issue: The language of the rule dealing with hearings regarding a notice of support owed (WAC 388-14A-3323) creates issues due to an inadvertent reversal of the terms "less" and "more" in subsections (4) and (5) of that rule. A literal (and, admittedly, correct) reading of these subsections frustrates DCS' ability to provide a meaningful reconciliation if the parties have an administrative hearing in front of an administrative law judge (ALJ) employed by the office of administrative hearings (OAH). The current language in subsections (4) and (5) of WAC 388-14A-3323 provides that:

"(4) If the ALJ determines that the NCP's obligation under a previous notice of support owed is more than his or her actual obligation under the order after actual expenses or income are considered, the ALJ may not set a payment schedule on the support debt.

(5) If the ALJ determines that the NCP's obligation under a previous notice of support owed is less than his or her actual obligation under the order after actual expenses or income are considered, and the parties cannot agree on how the overpayment may be credited or repaid, the ALJ must enter an order providing that any difference may be:

(a) Applied as an offset to any nonassistance child support arrears owed by the NCP to the CP.

(b) In the form of a credit against the NCP's future child support obligation:

(i) Spread equally over a twelve-month period starting the month after the administrative order becomes final; or

(ii) When the future support obligation will end under the terms of the order in less than twelve months, spread equally over the life of the order."

(Emphasis added.)

Under WAC 388-02-0220(1), an ALJ "must first apply the department rules adopted in the Washington Administrative Code." Thus, even if the ALJ can see that the rule as written does not make sense, many ALJs feel compelled to dismiss the notice of support owed. This does not serve the interests of the department or parents.

In a hearing on a notice of support owed associated to an annual review where the ALJ determines the NCP is overcharged or has overpaid, some ALJs feel they must dismiss the notice of support owed because the ALJ can only specify how an overpayment may be credited or repaid if they determine the NCP is underpaid, which is impossible.

Proposed solution: DCS proposes to amend WAC 388-14A-3323 to correct two typographical errors: We propose to amend subsection (4) to replace "more" with "less"; and to amend subsection (5) to replace "less" with "more." We believe that this small change will avoid dismissals entered solely because the ALJ had no means under this WAC section to specify how an overpayment under a previous notice of support owed may be credited or repaid unless the NCP was actually underpaid. DCS is using the expedited rule-making process under RCW 34.05.353 because the proposed amendment corrects a typographical error; it clarifies procedures; it helps prevent unnecessary dismissal of notices; and it is not controversial. If objections are made during the expedited rule-making process, DCS will withdraw the CR-105 and start the permanent rulemaking process under chapter 34.05 RCW.

Reasons Supporting Proposal: DCS has a strong interest in ensuring that a party to a notice of support owed served as part of an annual review has the same remedies available, regardless of whether (1) it becomes an order by operation of law because nobody requests a hearing, (2) the parties and DCS reach a settlement, or (3) an ALJ conducts a hearing based on an objection by one of the parties.

The reversal of "less" and "more" in subparagraphs (4) and (5) was an inadvertent typographical error.

Statutory Authority for Adoption: RCW 26.09.105(20), 26.18.170(21), 26.23.050, 26.23.110(14), 43.20A.550, 74.04.055, 74.04.057, 74.08.090, 74.20A.310.

Statute Being Implemented: RCW 26.23.110.

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

Name of Proponent: Department of social and health services, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Nancy Koptur, P.O. Box 9162, Olympia, WA 98507-9162, 360-664-5065.

This notice meets the following criteria to use the expedited adoption process for these rules:

Corrects typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: The proposed amendment corrects a typographical error; it clarifies procedures; it helps prevent unnecessary dismissal of notices; and it is not controversial.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Rules Coordinator, Department of Social and Health Services, P.O. Box 45850, Olympia, WA 98504, phone 360-664-6097, fax 360-664-6185, email DSHSRPAURulesCoordinator@dshs.wa.gov, AND RECEIVED BY September 23, 2019.

July 16, 2019
Katherine I. Vasquez
Rules Coordinator

AMENDATORY SECTION (Amending WSR 11-12-006, filed 5/19/11, effective 6/19/11)

WAC 388-14A-3323 What happens in a hearing on a notice of support owed served under WAC 388-14A-3311? (1) A hearing on a notice of support owed served under WAC 388-14A-3311 is subject to WAC 388-14A-3320 and this section.

(2) A hearing on a notice of support owed served under WAC 388-14A-3311 is only for the purpose of determining the amounts owed by the noncustodial parent (NCP) that are not stated as a fixed dollar amount in the underlying support order, either as part of the monthly support obligation or for nonmedical expenses of the children. See WAC 388-14A-3324 for the rules concerning a hearing on a notice of support owed for medical support.

(3) The administrative law judge (ALJ) must determine some or all of the following, depending on what was requested in the notice of support owed:

(a) The amount of monthly support as a fixed dollar amount;

(b) Any accrued arrears;

(c) Any difference between the NCP's obligation under a previous notice of support owed and his or her actual obligation after actual income or expenses are considered; and

(d) The amount of the NCP's share of nonmedical expenses for the children, including:

(i) The amount that the NCP must pay each month as his or her ongoing share of daycare and child care expenses for the children; and

(ii) Whether the custodial parent (CP) has provided sufficient proof of payment of daycare and child care expenses for the children; and

(iii) The amount of NCP's accrued debt for daycare and child care expenses.

(4) If the ALJ determines that the NCP's obligation under a previous notice of support owed is ~~((more))~~ less than his or her actual obligation under the order after actual expenses or income are considered, the ALJ may not set a payment schedule on the support debt.

(5) If the ALJ determines that the NCP's obligation under a previous notice of support owed is ~~((less))~~ more than his or her actual obligation under the order after actual expenses or income are considered, and the parties cannot agree on how the overpayment may be credited or repaid, the ALJ must enter an order providing that any difference may be:

(a) Applied as an offset to any nonassistance child support arrears owed by the NCP to the CP.

(b) In the form of a credit against the NCP's future child support obligation:

(i) Spread equally over a twelve-month period starting the month after the administrative order becomes final; or

(ii) When the future support obligation will end under the terms of the order in less than twelve months, spread equally over the life of the order.

(c) Paid in the form of a direct reimbursement by the CP to the NCP, but only with the consent of the CP, unless support has been assigned to the state.

WSR 19-15-083

EXPEDITED RULES

ENVIRONMENTAL AND LAND USE HEARINGS OFFICE

(Pollution Control Hearings Board)

[Filed July 18, 2019, 2:08 p.m.]

Title of Rule and Other Identifying Information: WAC 371-08-320 Board office hours and contact information, this rule establishes a regular monthly meeting schedule for the pollution control hearings board (board).

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The board is a quasi judicial body whose primary function is to conduct hearings. To facilitate the conduct of its hearings, the board has established rules of practice and procedure for its hearings. Occasionally the board needs to amend or update these rules, and that work is conducted at board meetings. Because this rule-making work is infrequent and irregular in nature, and administrative matters are handed by environmental and land use hearings office (ELUHO), monthly board meetings are unnecessary and not an efficient use of state resources. The board is proposing to eliminate the portion of WAC 371-08-320(1) which establishes a regular monthly meeting

schedule. Elimination of this rigid schedule will allow the board to schedule meetings only as needed.

Reasons Supporting Proposal: The primary work of the board is to conduct hearings. Having one day set aside on the board's calendar for a meeting every month interferes with the board's hearing schedule. The board has limited responsibilities outside of hearing work and rarely needs to meet. If the board is engaged in rule making, or there is some other necessary board work such as the election of the chair, the board can schedule a special meeting.

Statutory Authority for Adoption: RCW 43.21B.170.

Statute Being Implemented: RCW 43.21B.170, 43.21B.-090.

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

Name of Proponent: ELUHO, Pollution Control Hearings Board, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Kay M. Brown, Board Chair, 1111 Israel Road S.W., Suite 301, Tumwater, 98501, 360-664-9174.

This notice meets the following criteria to use the expedited adoption process for these rules:

Relates only to internal governmental operations that are not subject to violation by a person.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: The expedited rule-making process is appropriate because this rule relates only to the internal operations of the board, and is not subject to violation by a member of the public. The board will utilize special meetings when necessary to conduct rule making.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Nancy Coverdell, ELUHO, P.O. Box 40903, Olympia, WA 98503, phone 360-664-9171, fax 360-586-2253, email nancy.coverdell@eluho.wa.gov [nancy.coverdell@eluho.wa.gov], AND RECEIVED BY September 23, 2019.

July 18, 2019

Kay M. Brown, Board Chair
Pollution Control Hearings Board

AMENDATORY SECTION (Amending WSR 15-03-044, filed 1/14/15, effective 2/14/15)

WAC 371-08-320 Board office hours and contact information. (1) The administrative business of the board, except rule making, is performed by the environmental and land use hearings office. ~~((The board holds meetings at 10:00 a.m. on the second Tuesday of each month))~~ To the extent

necessary for rule making or other matters, the board will hold special meetings at the address set forth below.

(2) The information included in this section is current at the time of rule adoption, but may change. Current information is available on the board's internet site at www.eluho.wa.gov.

(a) The board is housed at the Environmental and Land Use Hearings Office, 1111 Israel Road S.W., Tumwater, Washington 98501. The principal hearing room used by the board is located at the same address, although many hearings are held near the site of the dispute at issue.

(b) The mailing address of the board is:

Pollution Control Hearings Board
P.O. Box 40903
Olympia, WA 98504-0903

(c) The telephone number of the board is 360-664-9160. The fax number is 360-586-2253. The board's email address is eluho@eluho.wa.gov.

(3) The office hours of the environmental and land use hearings office are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for legal holidays.

WSR 19-15-085

EXPEDITED RULES

DEPARTMENT OF

SOCIAL AND HEALTH SERVICES

(Aging and Long-Term Support Administration)

[Filed July 19, 2019, 9:22 a.m.]

Title of Rule and Other Identifying Information: WAC 388-105-0005 The daily medicaid payment rates for clients who have been assessed using the CARE tool and reside at an AFH or assisted living facility contracted to provide assisted living, adult residential care, or enhanced adult residential care services.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The department intends to repeal this rule. Providers will still be able to find out their rates from the aging and long-term support administration's web site, their residents' case managers, from their union if they have one, or by contacting the department.

Reasons Supporting Proposal: When the department first implemented this rule, rule making took less time and less information was available online. Amending the rule now takes significant time each year after the end of the legislative session, leading to the rule being incorrect and in "emergency rule" status for a good portion of the year. Additionally, all rates included in this rule are available online, easy to find, and up-to-date at all times. Depending on the time of the year, providers checking the rule for their rates may be getting old information unless they check into filings affecting this rule.

It is also important to consider that when this rule was created, the department's methodology for rate setting was not documented in rule or law so this form of rate publishing was necessary for providers. Adult family homes now participate in collective bargaining, meaning that providers are involved in setting their rate and aware of what the rate will

be ahead of time, while the methodology for assisted living, adult residential care, and enhanced residential care is in RCW.

Statutory Authority for Adoption: RCW 74.39A.030 (3)(a).

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

Name of Proponent: Department of social and health services (DSHS), governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Elizabeth Pashley, 4450 10th Avenue S.E., Lacey, WA 98503, 360-725-2447.

This notice meets the following criteria to use the expedited repeal process for these rules:

The rule is no longer necessary because of changed circumstances.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO DSHS Rules Coordinator, P.O. Box 45850, Olympia, WA 98504, phone 360-664-6097, fax 360-664-6185, DSHSRPAURulesCoordinator@dshs.wa.gov, AND RECEIVED BY September 23, 2019.

July 18, 2019
Katherine I. Vasquez
Rules Coordinator

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 388-105-0005 The daily medicaid payment rates for clients who have been assessed using the CARE tool and reside at an AFH or assisted living facility contracted to provide assisted living, adult residential care, or enhanced adult residential care services.

WSR 19-15-115
EXPEDITED RULES
DEPARTMENT OF REVENUE
[Filed July 23, 2019, 9:09 a.m.]

Title of Rule and Other Identifying Information: WAC 458-20-244 Food and food ingredients.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: WAC 458-20-244

is being amended to incorporate language from EHB 2163 (Part IA) (2017) Eliminating or narrowing tax preferences—Eliminating the sales and use tax exemption for bottled water; and SSB 5581 (Part IV) (2019) Ensuring continuing compliance with the streamlined sales and use tax agreement and addressing potential federal preemption, clarifying the definition of prepared food. WAC 458-20-244 is also being amended to modernize the structure and language of the rule.

Reasons Supporting Proposal: The rule is being updated to amend and incorporate changes resulting from new legislation. EHB 2163 (Part IA) (2017) and SSB 5581 (2019).

Statutory Authority for Adoption: RCW 82.32.300, 82.01.060(2).

Statute Being Implemented: RCW 82.08.0293, 82.12.-0293, 82.08.9994, 82.08.99941, 82.12.9994, and 82.12.-99941.

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

Name of Proponent: Department of revenue, governmental.

Name of Agency Personnel Responsible for Drafting: Katie Koontz, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1529; Implementation and Enforcement: John Ryser, 6400 Linderson Way S.W., Tumwater, WA, 360-534-1603.

This notice meets the following criteria to use the expedited adoption process for these rules:

Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.

Corrects typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: The expedited rule-making process is applicable to these rule updates because the department is incorporating changes resulting from 2017 and 2019 legislation, and to modernize the language and structure of the rule for readability purposes without changing the substance of the rule.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Katie Koontz, Department of Revenue, P.O. Box 47453, Olympia, WA 98504-

7453, phone 360-534-1529, fax 360-534-1606, email katieko@dor.wa.gov, AND RECEIVED BY September 23, 2019.

July 23, 2019
Atif Aziz
Rules Coordinator

AMENDATORY SECTION (Amending WSR 15-01-006, filed 12/4/14, effective 1/4/15)

WAC 458-20-244 Food and food ingredients. (1) Introduction.

~~((a) What is the purpose of this rule?)~~ This rule provides guidelines for determining if food or food ingredients qualify for the retail sales tax and use tax exemptions under RCW 82.08.0293 and 82.12.0293 (collectively referred to in this rule as the "exemptions"). ~~((Effective June 12, 2014, chapter 140, Laws of 2014 (SB 6505), specifically excludes marijuana from the definition of food or food ingredients. Marijuana is any product with a THC concentration greater than .03 percent.))~~

There is no corresponding business and occupation (B&O) tax exemption. Even if a sale of food or food ingredients is exempt from retail sales tax or use tax under the exemptions, gross proceeds from sales of food or food ingredients remain subject to the retailing B&O tax.

~~((b) What)~~ **(2) Other rules ((might)) that may apply((?)).** Rules in the following list may contain additional relevant information:

~~((a))~~ **(a)** WAC 458-20-119((;)) Sales by caterers and food service contractors;

~~((b))~~ **(b)** WAC 458-20-124((;)) Restaurants, cocktail bars, taverns and similar businesses;

~~((c))~~ **(c)** WAC 458-20-12401((;)) Special stadium sales and use tax;

~~((d))~~ **(d)** WAC 458-20-166((;)) Hotels, motels, boarding houses, rooming houses, resorts, ~~((summer camps))~~ hostels, trailer camps, ((ete-)) short-term rentals and similar lodging businesses;

~~((e))~~ **(e)** WAC 458-20-167((; Education)) Educational institutions, school districts, student organizations, and private schools;

~~((f))~~ **(f)** WAC 458-20-168((;)) Hospitals, nursing homes, assisted living facilities, adult family homes and similar health care facilities;

~~((g))~~ **(g)** WAC 458-20-169((;)) Nonprofit organizations;

~~((and~~ **(h)** WAC 458-20-229((;)) Refunds; and

(i) WAC 458-20-243 Litter tax.

~~((2) What qualifies))~~ **(3) Items qualifying for the exemptions((?)).**

(a) In general. The exemptions apply to food and food ingredients. "Food and food ingredients" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

(b) Items not used solely for ingestion or chewing. Items that are commonly ingested or chewed by humans for their taste or nutritional value but which may also be used for other purposes are generally treated as food or food ingredients. For example, pumpkins are presumed to be a food or

food ingredient unless the pumpkin is sold painted or is otherwise clearly for decorative purposes rather than consumption. This is true even though the purchaser may use an undecorated pumpkin for carving and display rather than for eating.

~~((3) What does not qualify))~~ **(4) Items not qualifying for the exemptions((?)).** The exemptions do not apply to the following items, which are not considered "food or food ingredients" or which are otherwise specifically excluded from the exemptions:

(a) Items sold for medical or hygiene purposes. Items commonly used for medical or hygiene purposes, such as cough drops, breath sprays, toothpaste, etc., are not ingested for taste or nutrition and are not considered a food or food ingredient. In contrast, breath mints are commonly ingested for taste and are considered a food or food ingredient.

(b) Bulk sales of ice. Ice sold in bags, containers, or units of greater than ten pounds and blocks of ice of any weight are not considered a food or food ingredient. Ice sold in cubed, shaved, or crushed form in packages or quantities of ten pounds or less is considered a food or food ingredient. Refer to WAC 458-20-120, Sales of ice, for additional guidance on the sale of ice.

(c) Alcoholic beverages. Alcoholic beverages are excluded from the definition of food and food ingredients. "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one percent or more of alcohol by volume.

(d) Tobacco. Tobacco is excluded from the definition of food and food ingredients. "Tobacco" includes cigarettes, cigars, chewing or pipe tobacco, or any other items that contain tobacco.

~~((Candy. Effective June 1, 2010, candy was excluded from the exemptions and retail sales tax was imposed on sales of candy. See chapter 23, Laws of 2010, sp. sess. Sales of candy again became exempt effective December 2, 2010. See chapter 2, Laws of 2011.~~

~~((i) "Candy" means a preparation of sugar, honey, or other natural or artificial sweeteners in combination with chocolate, fruits, nuts, or other ingredients or flavorings in the form of bars, drops, or pieces.~~

~~((ii) "Candy" does not include any preparation containing flour and does not require refrigeration.))~~ **Marijuana.** Marijuana, useable marijuana, marijuana concentrates, or marijuana-infused products, as defined in RCW 69.50.101, are excluded from the definition of food and food ingredients. "Marijuana" means all parts of the plant *Cannabis* with a THC concentration greater than 0.3 percent on a dry weight basis.

~~((f) Bottled water. ((Effective June 1, 2010, bottled water was excluded from the exemptions and retail sales tax was due on sales of bottled water. See chapter 23, Laws of 2010, sp. sess. Sales of bottled water again became exempt effective December 2, 2010. See chapter 2, Laws of 2011.~~

~~((ii))~~ **Bottled water is excluded from the exemptions for food and food ingredients.** "Bottled water" means water that is placed in a sealed container or package for human consumption.

~~((iii))~~ **(i)** Bottled water is calorie free and does not contain sweeteners or other additives except that it may contain:

- (A) Antimicrobial agents;
- (B) Fluoride;
- (C) Carbonation;
- (D) Vitamins, minerals, and electrolytes;
- (E) Oxygen;
- (F) Preservatives; and
- (G) Only those flavors, extracts, or essences derived from a spice or fruit.

~~((iii)) "Bottled water" includes water that is delivered to the buyer in a reusable container that is not sold with the water.~~

~~(iv) See subsection (8) of this rule for limited exceptions to the tax on bottled water.)~~

(ii) Exemptions for tax on bottled water. There are limited sales tax exemptions on bottled water. Sellers must collect the retail sales tax on all sales of bottled water, unless the bottled water is delivered to the buyer as described in (f)(ii)(C) of this subsection. Any buyer that has paid at least twenty-five dollars in state and local taxes on purchases of bottled water subject to the exemptions described in (f)(ii)(A) and (B) of this subsection may apply for a refund of the taxes directly from the department.

(A) Prescription issued bottled water. Bottled water prescribed to patients for use in the cure, mitigation, treatment, or prevention of disease or other medical condition is exempt. The bottled water must be prescribed, through an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission, by a licensed practitioner authorized by Washington law to prescribe.

(B) Potable water not readily available. Bottled water for human use by persons whose primary source of drinking water is unsafe is exempt. A person's primary source of drinking water is unsafe if:

(I) The public water system providing the drinking water has issued a public notification that the drinking water may pose a health risk, and the notification is still in effect on the date that the bottled water was purchased;

(II) Test results on the person's drinking water, which are no more than twelve months old, from a laboratory certified to perform drinking water testing show that the person's drinking water does not meet safe drinking water standards applicable to public water systems; or

(III) The person otherwise establishes, to the department's satisfaction, that the person's drinking water does not meet safe drinking water standards applicable to public water systems.

(C) Bottled water delivered to the buyer in a reusable container not sold with the water. Buyers claiming an exemption listed in (f)(ii)(A) or (B) of this subsection that have the qualifying water delivered in a reusable container that is not sold with the water must complete a retail sales exemption certificate and provide it to the seller. The seller must retain a copy of the certificate.

(iii) For information regarding exemption certificates and refund requests, visit dor.wa.gov.

(g) **Soft drinks.** Soft drinks are excluded from the exemptions for food and food ingredients. "Soft drinks" means any nonalcoholic beverage that contains natural or artificial sweeteners, except beverages that contain:

- (*) (i) Milk or milk products;

- (*) (ii) Soy, rice, or similar milk substitutes; or
- (*) (iii) More than fifty percent by volume of vegetable or fruit juice.

For example, sweetened sports beverages are considered "soft drinks," but a sweetened soy beverage is a food or food ingredient.

Beverage mixes that are not sold in liquid form are not soft drinks even though they are intended to be made into a beverage by the customer. Examples include powdered fruit drinks, powdered tea or coffee drinks, and frozen concentrates. These items are (a) food or food ingredients and are not subject to retail sales tax.

(h) **Dietary supplements.** Dietary supplements are excluded from the exemptions for food and food ingredients. "Dietary supplement" means any product intended to supplement the diet, other than tobacco, which meets all of the following requirements:

(*) (i) Contains a vitamin; mineral; herb or other botanical; amino acid; a substance for use by humans to increase total dietary intake; or a concentrate, metabolite, constituent, extract; or combination of any of them;

(*) (ii) Is intended for ingestion in tablet, capsule, powder, soft gel, gelcap, or liquid form, or if not intended for ingestion in such a form, is not represented as conventional food and is not represented for use as a sole item of a meal or of the diet; and

(*) (iii) Is required to be labeled with a Food and Drug Administration "supplement facts" box. If a product is otherwise considered a food or food ingredient and labeled with both a "supplement facts" box and "nutrition facts" box, the product is treated as a food or food ingredient.

Nutrition products formulated to provide balanced nutrition as a sole source of a meal or of the diet are considered a food or food ingredient and not a dietary supplement. Refer to RCW 82.08.925 for information on the sales tax exemption applicable to dietary supplements dispensed under a prescription.

(i) **Prepared food.** Prepared food is excluded from the exemptions for food and food ingredients. Prepared food generally means heated foods, combined foods, or foods sold with utensils provided by the seller, as described in more detail in subsection ((4)) (5) of this rule. (~~"Prepared food" does not include food sold by a seller whose proper primary North American industry classification system (NAICS) classification is manufacturing in sector 311, except subsector 3118 (bakeries), unless the food is sold with utensils provided by the seller (see subsection (4)(e) of this rule).~~

~~(4) What is "prepared food"?)~~

(5) **Items designated as prepared foods.** Food or food ingredients are "prepared foods" if any one of the following is true:

(a) **Heated foods.** Food or food ingredients are "prepared foods" if sold in a heated state or are heated by the seller, except bakery items. "Bakery items" include bread, rolls, buns, biscuits, bagels, croissants, pastries, donuts, Danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas. Food is sold in a heated state or is heated by the seller when the seller provides the food to the customer at a temperature that is higher than the air temperature of the seller's establishment. Food is not sold in a heated state or heated by

the seller if the customer, rather than the seller, heats the food in a microwave provided by the seller.

(b) **Combined foods.** Food or food ingredients are "prepared foods" if the item sold consists of two or more foods or food ingredients mixed or combined by the seller for sale as a single item, unless the food or food ingredients are any of the following:

(*) (i) Bakery items (defined in (a) of this subsection);

(*) (ii) Items that the seller only cuts, repackages, or pasteurizes;

(*) (iii) Items that contain eggs, fish, meat, or poultry, in a raw or undercooked state requiring cooking as recommended by the federal Food and Drug Administration in chapter 3, part 401.11 of *The Food Code*, published by the Food and Drug Administration, as amended or renumbered as of January 1, 2003, so as to prevent foodborne illness; or

(*) (iv) Items sold in an unheated state as a single item at a price that varies based on weight or volume.

(c) **Food sold with utensils provided by the seller.** Food or food ingredients are "prepared foods" if sold with utensils provided by the seller. Utensils include plates, knives, forks, spoons, glasses, cups, napkins, and straws. A plate does not include a container or packaging used to transport the food.

(i) **Utensils are customarily provided by the seller.** A food or food ingredient is "sold with utensils provided by the seller" if the seller's customary practice for that item is to physically deliver or hand a utensil to the customer with the food or food ingredient as part of the sales transaction. If the food or food ingredient is prepackaged with a utensil, the seller is considered to have physically delivered a utensil to the customer unless the food and utensil are prepackaged together by a food manufacturer classified under sector 311 of the NAICS. Examples of utensils provided by such manufacturers include juice boxes that are packaged with drinking straws, and yogurt or ice cream cups that are packaged with wooden or plastic spoons.

(ii) **Utensils are necessary to receive the food.** Individual food or food ingredient items are "sold with utensils provided by the seller" if a plate, glass, cup, or bowl is necessary to receive the food or food ingredient and the seller makes those utensils available to its customers. For example, items obtained from a self-serve salad bar are sold with utensils provided by the seller, because the customer must use a bowl or plate provided by the seller in order to receive the items.

(iii) **More than seventy-five percent prepared food sales with utensils available.** All food and food ingredients sold at an establishment, including foods prepackaged with a utensil by a manufacturer classified under sector 311 of the NAICS, are "sold with utensils provided by the seller" if the seller makes utensils available to its customers and the seller's gross retail sales of prepared food under (a), (b), and (c)(ii) of this subsection equal more than seventy-five percent of the seller's gross retail sales of all food and food ingredients, including prepared food, soft drinks, bottled water, and dietary supplements.

(A) **Exception for four or more servings.** Even if a seller has more than seventy-five percent prepared food sales, four servings or more of food or food ingredients packaged for sale as a single item and sold for a single price are not

"sold with utensils provided by the seller" unless the seller's customary practice for the package is to physically hand or otherwise deliver a utensil to the customer as part of the sales transaction. Whenever available, the number of servings included in a package of food or food ingredients is to be determined based on the manufacturer's product label. If no label is available, the seller must reasonably determine the number of servings.

(B) **Determining total sales of prepared foods.** The seller must determine a single prepared food sales percentage annually for all the seller's establishments in the state based on the prior year of sales. The seller may elect to determine its prepared food sales percentage based either on the prior calendar year or on the prior fiscal year. A seller may not change its elected method for determining its prepared food percentage without the written consent of the department of revenue. The seller must determine its annual prepared food sales percentage as soon as possible after accounting records are available, but in no event later than ninety days after the beginning of the seller's calendar or fiscal year. A seller may make a good faith estimate of its first annual prepared food sales percentage if the seller's records for the prior year are not sufficient to allow the seller to calculate the prepared food sales percentage. The seller must adjust its good faith estimate prospectively if its relative sales of prepared foods in the first ninety days of operation materially depart from the seller's estimate.

(d) **Examples.** The following examples identify a number of facts and then state a conclusion. These examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(i) **Example 1.** Fast Cafe sells hot and cold coffee and mixed coffee and mixed milk beverages, cold soft drinks, milk and juice in single-serving containers, sandwiches, whole fruits, cold pasta salad, cookies and other pastries. Fast Cafe prepares the pasta salad on-site. It orders the pastries from a local bakery, including specialty cakes which it sells both as whole cakes and by the slice. It purchases its sandwiches from a local caterer. The sandwiches are delivered by the caterer prewrapped in plastic with condiments and a plastic knife. Fast Cafe makes straws, napkins and cup lids available for all customers by placing them on a self-service stand. In its first full year of operation, Fast Cafe's annual gross retail sales of all food and food ingredients, including prepared food, soft drinks, bottled water, and dietary supplements is \$100,000. Of this gross retail sales total, \$80,000 is from the sale of hot coffee and hot and cold mixed coffee and milk beverages, all sold in disposable paper or plastic cups with the Fast Cafe logo.

Because more than seventy-five percent of Fast Cafe's total retail sales of food and food ingredients, including prepared food, soft drinks, bottled water, and dietary supplements are sales of food or food ingredients that are heated or combined by the seller or sold with a utensil (cups) necessary to receive the food, Fast Cafe has more than seventy-five percent prepared food sales. Because Fast Cafe makes utensils available for its customers, all food and food ingredients sold by Fast Cafe are considered "prepared food," including the cold milk beverages, cookies and pastries, pasta salad, sand-

wiches and whole fruits. The only exception is the sale of whole specialty cakes. Because a whole cake contains four or more servings, it is not subject to retail sales tax unless Fast Cafe customarily hands a utensil to the customer as part of the sale transaction.

(ii) **Example 2.** Assume the same facts as in Example 1, but that only \$60,000 of Fast Cafe's Year 1 gross retail sales were sales of hot coffee and hot and cold mixed coffee and milk beverages. The remainder of its retail sales were sales of sandwiches, whole fruits, cookies and other pastries. Under these facts, Fast Cafe does not have more than seventy-five percent prepared food sales. Thus, the items sold by Fast Cafe are taxed as follows:

((*) (A) Hot coffee and milk beverages are heated by the seller and are also sold by Fast Cafe with a utensil (a paper cup) necessary to receive the food. The hot coffee and milk beverages are "prepared food" for either reason and are subject to retail sales tax.

((*) (B) Cold mixed milk beverages are a combination of two or more foods or food ingredients and are also sold by Fast Cafe with a utensil (a paper or plastic cup) necessary to receive the food. The cold milk beverages are "prepared food" for either reason and are subject to retail sales tax.

((*) (C) Cold soft drinks are not exempt and are subject to retail sales tax.

((*) (D) Sandwiches prepared by the caterer are subject to retail sales tax. Even though the caterer, rather than the seller, combines the ingredients and includes a utensil, Fast Cafe is considered to have provided the utensil because the caterer is not a food manufacturer classified under sector 311 of the NAICS.

((*) (E) Pasta salad is combined by the seller and is subject to retail sales tax. Note that if the pasta salad was sold by the pound, rather than by servings, it would not be subject to retail sales tax.

((*) (F) Milk and juice in single serving containers, whole fruit, cookies, pastries, slices of cake, and whole cakes are not subject to retail sales tax unless the seller's customary practice is to hand a utensil to the customer as part of the sales transaction. None of these items are heated by the seller, combined by the seller, or require a plate, glass, cup, or bowl in order to receive the item. Even if Fast Cafe heats the pastries for its customers, the pastries are not subject to retail sales tax.

(iii) **Example 3.** A pizza restaurant sells whole hot pizzas, hot pizza by the slice, and unheated ready-to-bake pizzas. The whole hot pizzas and hot pizza sold by the slice, including delivered pizzas, are "prepared food" because these items are sold in a heated state. If the unheated ready-to-bake pizzas are prepared by the seller, they are "prepared food" because the seller has mixed or combined two or more food ingredients. This is true even though some ingredients in the unheated pizzas are raw or uncooked, because those ingredients do not require cooking to prevent foodborne illness. If the unheated ready-to-bake pizzas are prepared by a manufacturer other than the seller, they will be taxable as "prepared food" only if sold with utensils provided by the seller.

~~((5) How are combined sales of taxable and exempt items taxed?~~

~~((a))~~ **(6) Combined sales of taxable and exempt items.**

Where two or more distinct and identifiable items of tangible personal property, at least one of which is a food or food ingredient, are sold for one nonitemized price that does not vary based on the selection by the purchaser of items included in the transaction:

((*) (a) The entire transaction is taxable if the seller's purchase price or sales price of the taxable items is greater than fifty percent of the combined purchase price or sales price; and

((*) (b) The entire transaction is exempt from retail sales tax if the seller's purchase price or sales price of the taxable items is fifty percent or less of the combined purchase price or sales price.

The seller may make the determination based on either purchase price or sales price, but may not use a combination of the purchase price and sales price.

~~((b))~~ **Example.** A combination wine and cheese picnic basket contains four items packaged together: A bottle of wine, a wine opener, single-serving cheeses, and the picnic basket holding these items. The seller's purchase price for the wine, wine-opener, and picnic basket totals ten dollars. The seller's purchase price for the cheeses is two dollars. The seller must collect retail sales taxes on the entire package, because the seller's purchase price for the taxable items (ten dollars) is greater than fifty percent of the combined purchase price (twelve dollars).

(c) **Incidental packaging.** "Distinct and identifiable items" does not include packaging which is immaterial or incidental to the sale of another item or items. For example, a decorative bag sold filled with candy is not the sale of "distinct and identifiable" items where the bag is merely ornamental packaging immaterial in the sale of the candy.

(d) **Free items.** "Distinct and identifiable items" does not include items provided free of charge. An item is only provided free of charge if the seller's sales price does not vary depending on whether the item is included in the sale.

~~((6) What are the)~~ **(7) Seller's accounting requirements((?)).** All sales of food and food ingredients at an establishment will be treated as taxable unless the seller separately accounts for sales of exempt and nonexempt food and food ingredients. It is sufficient separation for accounting purposes if cash registers or the like are programmed to identify items that are not tax exempt and to calculate and assess the proper sales tax accordingly.

~~((7) Are there any)~~ **(8) Other retail sales tax exemptions that may apply((?)).**

(a) **Meals served to certain persons.** The exemptions apply to food and food ingredients furnished, prepared, or served as meals:

(i) Under a state-administered nutrition program for the aged as provided for in the Older Americans Act (Public Law 95-478 Title III) and RCW 74.38.040;

(ii) ~~((That are))~~ Provided to senior citizens, individuals with disabilities, or low-income persons by a not-for-profit organization organized under chapter 24.03 or 24.12 RCW; or

(iii) ~~((Effective August 1, 2009, RCW 82.08.0293 provides))~~ Provided to residents, sixty-two years of age or older, of a qualified low-income senior housing facility by the les-

sor or operator of the facility. The sale of a meal that is billed to both spouses of a marital community or both domestic partners of a domestic partnership meets the age requirement in this subsection (a)(iii) if at least one of the spouses or domestic partners is at least sixty-two years of age. For purposes of this subsection, "qualified low-income senior housing facility" means a facility:

(A) That meets the definition of a qualified low-income housing project under Title 26 U.S.C. Sec. 42 of the federal Internal Revenue Code, as existing on August 1, 2009;

(B) That has been partially funded under Title 42 U.S.C. Sec. 1485 of the federal Internal Revenue Code; and

(C) For which the lessor or operator has at any time been entitled to claim a federal income tax credit under Title 26 U.S.C. Sec. 42 of the federal Internal Revenue Code.

(b) **Foods exempt under the Supplemental Nutrition Assistance Program (SNAP).** Under RCW 82.08.0297, eligible foods purchased with food benefits under the SNAP or a successor program are exempt from the retail sales tax. This is a separate and broader exemption than the retail sales tax exemption for food and food ingredients under RCW 82.08.0293. For example, bottled water, soft drinks, garden seeds, and plants which produce food for the household to eat are "eligible foods" but are not "food or food ingredients." If such items are purchased with food benefits under SNAP or a successor program, they are exempt from the retail sales tax under RCW 82.08.0297, even though the items do not qualify for the exemption under RCW 82.08.0293.

(i) **Use of food benefits combined with other means of payment.** When both food benefits and other means of payment are used in the same sales transaction, for purposes of collecting retail sales taxes, the other means of payment shall be applied first to items which are food and food ingredients exempt under RCW 82.08.0293. The intent is to apply the benefits and other means of payment in such a way as to provide the greatest possible exemption from retail sales tax.

(ii) **Example.** A customer purchases the following at a grocery store: Meat for three dollars, cereal for three dollars, canned soft drinks for five dollars, and soap for two dollars for a total of thirteen dollars. The customer pays with seven dollars in benefits and six dollars in cash. The cash is applied first to the soap because the soap is neither exempt under RCW 82.08.0293 nor an eligible food under SNAP. The remaining cash (four dollars) is applied first to the meat and the cereal. The food benefits are applied to the balance of the meat and cereal (two dollars) and to the soft drinks (five dollars). Retail sales tax is due only on the soap.

~~((8) **Exceptions to tax on bottled water.** Effective June 1, 2010, two exemptions to the retail sales and use taxes on bottled water were as described in (a) and (b) of this subsection. Effective December 2, 2010, the retail sales and use taxes on bottled water were repealed. The exemptions are no longer applicable effective December 2, 2010.~~

~~(a) **Prescription issued bottled water.** Bottled water prescribed to patients for use in the cure, mitigation, treatment, or prevention of disease or other medical condition and delivered to the buyer in a reusable container that is not sold with the water is exempt provided the buyer provides the seller with a completed buyer's retail sales tax exemption certificate or a streamlined sales tax exemption certificate. A~~

~~seller must retain a copy of the certificate for their files. Tax will be collected on all other sales of prescribed bottled water. Any buyer that has paid at least twenty-five dollars in state and local sales taxes on purchases of bottled water subject to this exemption may apply for a refund of the collected taxes directly from the department. No refund may be made for tax paid more than four years after the end of the calendar year in which the tax was paid to a seller.~~

~~(b) **Potable water not readily available.** Bottled water for human use to persons who do not otherwise have a readily available source of potable water and delivered to the buyer in a reusable container that is not sold with the water is exempt provided the buyer provides the seller with a completed buyer's retail sales tax exemption certificate or a streamlined sales tax exemption certificate. A seller must retain a copy of the certificate for their files. Tax will be collected on all other sales of bottled water. Any buyer that has paid at least twenty-five dollars in state and local sales taxes on purchases of bottled water subject to this exemption may apply for a refund of the collected taxes directly from the department. No refund may be made for tax paid more than four years after the end of the calendar year in which the tax was paid to a seller.~~

~~(c) **Forms and additional information are available.** Forms and additional information can be obtained from the department's internet site at <http://dor.wa.gov/> or by contacting the department at:~~

~~Taxpayer Services
Department of Revenue
P.O. Box 47478
Olympia, WA 98504-7478
1-800-647-7706))~~

(9) **Vending machine sales.** The exemptions do not apply to sales of food and food ingredients dispensed from vending machines. There are special requirements for reporting sales tax collected on vending machine sales, discussed in (a) of this subsection. "Honor box" sales (sales of snacks or other items from open display trays) are not considered vending machine sales.

(a) **Calculating and reporting retail sales tax collected on vending machine sales.** Vending machine owners do not need to state the retail sales tax amount separately from the selling price. See RCW 82.08.050 and 82.08.0293. Instead, vending machine owners must determine the amount of retail sales tax collected on the sale of food or food ingredients by using one of the following methods:

(i) **Food or food ingredients dispensed in a heated state ~~((and)), soft drinks, and bottled water.~~** For food or food ingredients dispensed from vending machines in a heated state (e.g., hot coffee, soups, tea, and hot chocolate) and vending machine sales of soft drinks and bottled water, a vending machine owner must calculate the amount of retail sales tax that has been collected ("tax in gross") based on the gross vending machine proceeds. The "tax in gross" is a deduction against the gross amount of both retailing B&O and retail sales. The formula is:

$$((\text{gross machine proceeds} - (\text{gross machine proceeds}) \times \text{tax in gross} \\ (1 + \text{sales tax rate}))$$

$$\frac{\text{gross machine proceeds} - [(\text{gross machine proceeds}) / (1 + \text{sales tax rate})]}{=} = \text{tax in gross}$$

(ii) **All other food or food ingredients.** For all other food and food ingredients dispensed from vending machines, a vending machine owner must calculate the amount of retail sales tax that has been collected ("tax in gross") based on fifty-seven percent of the gross vending machine proceeds. The "tax in gross" is a deduction against the gross amount of both retailing B&O and retail sales. The formula is:

$$(\text{gross machine proceeds} \times .57) \times \text{sales tax rate} = \text{tax in gross}$$

The remaining 43% of the gross vending machine proceeds, less the "tax in gross" amount, is reported as an exempt food sales deduction against retail sales proceeds only calculated as follows:

$$(\text{gross machine proceeds} \times .43) - \text{tax in gross} = \text{exempt food deduction}$$

(b) **Example.** Jane owns a vending machine business with machines in Spokane and Seattle. In each location, she has a vending machine selling candy (~~and water~~) and a second vending machine selling hot cocoa and coffee drinks. Her annual sales for the vending machines and the combined retail sales tax rates for Seattle and Spokane are as follows:

	Coffee Machine (cocoa & coffee)	Candy Machine (candy & water)	Combined Retail Sales Tax Rate
Seattle	\$2,500	\$10,000	(.088) .101
Spokane	\$3,000	\$6,000	(.086) .089

To determine the amount of retail sales tax she collected on the sale of cocoa and coffee (food dispensed in a heated state, subject to retail sales tax), Jane calculates the "tax in gross" deduction amount as follows:

$$\frac{(\text{gross machine proceeds} - (\text{gross machine proceeds} / (1 + \text{sales tax rate}))}{=} = \text{tax in gross}$$

$$\frac{\text{gross machine proceeds} - [(\text{gross machine proceeds}) / (1 + \text{sales tax rate})]}{=} = \text{tax in gross}$$

\$2,500 -	=	((\$202.21))	(Seattle coffee machine)
$(\$2,500 / (1 + .088)) \times .101$		<u>\$229.34</u>	
\$3,000 -	=	((\$237.57))	(Spokane coffee machine)
$(\$3,000 / (1 + .086)) \times .089$		<u>\$245.18</u>	
		((\$439.78))	
		<u>\$474.52</u>	

Thus, for both retailing B&O and retail sales, Jane must report her total gross coffee machine proceeds of \$5,500 with a "tax in gross" deduction of ~~\$(439.78)~~ 474.52.

To determine the amount of retail sales tax she collected on the sale of candy (~~and water~~), Jane calculates the "tax in gross" deduction amount as follows:

(gross machine proceeds x .57) x sales tax rate = tax in gross			
\$10,000 x .57 x (.088)	=	((\$501.60))	(Seattle candy machine)
<u>.101</u>		<u>\$575.70</u>	

\$6,000 x .57 x (.086)	=	((\$294.12))	(Spokane candy machine)
<u>.089</u>		<u>\$304.38</u>	
		((\$795.72))	
		<u>\$880.08</u>	

Thus, for both retailing B&O and retail sales, Jane must report her total gross candy machine proceeds of \$16,000 with a "tax in gross" deduction of ~~\$(795.72)~~ 880.08.

Jane must also report an exempt food sales deduction representing the remaining 43% of the gross candy machine proceeds.

$$(43\% \times \text{gross machine proceeds}) - \text{tax in gross} = \text{exempt food deduction}$$

$$(.43 \times \$16,000) - \$(795.72) = \$(6,084.28) \times .5999.92$$

Jane reports the exempt food sales deduction only against the gross amount of her retail sales. The deduction does not apply to retailing B&O.