

WSR 21-11-116
EMERGENCY RULES
DEPARTMENT OF
LABOR AND INDUSTRIES

[Filed May 19, 2021, 11:59 a.m., effective May 19, 2021, 11:59 a.m.]

Effective Date of Rule: Immediately upon filing.

Purpose: In 2019 the legislature passed ESHB 1817, Ensuring a skilled and trained workforce in high hazard facilities, codified under chapter 49.80 RCW, requires owners of petroleum refining or petrochemical manufacturing facilities use a skilled and trained workforce when contracting for construction, alteration, demolition, installation, repair, or maintenance work. A skilled and trained workforce means a workforce where all the workers are either registered apprentices in a Washington state apprenticeship and training council (WSATC) approved apprenticeship program or skilled journeypersons as defined by the statute. The law also requires a percentage of skilled journeypersons be graduates of a WSATC approved apprenticeship program beginning January 1, 2021. The percentage starts at twenty percent in 2021 and increases each year and caps out at sixty percent in 2024.

RCW 49.80.050 requires the department of labor and industries (L&I), in consultation with the WSATC, prioritize consideration of new apprenticeship programs for workers in high hazard facilities and for the WSATC to make a decision within six months of the acceptance of a completed application for consideration of a new state registered apprenticeship program for workers in high hazard facilities. Several employers turned in apprenticeship program applications, which garnered objections. The WSATC made decisions to send each programs receiving objections to the adjudication process through the WSATC or the office of administrative hearings (OAH) for the issuance of initial orders. Initial orders may be reviewed by the WSATC either by its own motion or upon petition from party, with final orders issued by the WSATC. However, there have been delays in the adjudication process due to COVID-19 and no initial orders were issued in 2020, which has delayed the issuance of final orders. Under the current rule, WAC 296-05-008, the approval or disapproval of programs can only occur at regularly scheduled quarterly meetings. Not only does this delay the decision for programs and make it more difficult to comply with the law, but also the WSATC may not have enough time at the regularly scheduled meeting to conduct all needed business and address these adjudicated matters.

In order to address the problem, L&I with approval of the WSATC, is adopting an emergency rule to allow for the special meetings to consider the record and enter a final order following an adjudication process. Specifically, the emergency rule language amends WAC 296-05-008 as follows:

(d) The approval or disapproval of committee programs, plant programs, or amendments to those programs can only occur at regular quarterly meetings unless the council is responding to a court mandate, which can occur at a special meeting. The approval or disapproval of committee programs, plant programs, or amendments to those programs can also occur at a special meeting when the council considers the record and enters a final order following an adjudication conducted under WAC 296-05-008(6).

This emergency rule supersedes and replaces WSR 21-03-076 filed on January 19, 2021. Permanent rule making is currently being stakeholdered under WSR 21-03-077 also filed on January 19, 2021. This

emergency rule is necessary to cover the gap between the original emergency rule filing and the adoption of a permanent rule.

Citation of Rules Affected by this Order: Amending WAC 296-05-008.

Statutory Authority for Adoption: Chapter 49.04 RCW.

Under RCW 34.05.350 the agency for good cause finds that immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Multiple new apprenticeship program application[s] were submitted following the adoption [of] 2019's ESHB 1817. While the legislation had a phased implementation schedule and contemplated there would be new applications for apprenticeship programs for employers with workers in high hazard facilities, the COVID[-19] delays in the adjudication process has impacted the issuance of initial orders for those programs in the adjudication process. The rule limitation on special meeting will cause further delays in the ability to issue final orders. This restriction on when the WSATC can consider the orders and issue final orders creates uncertainty for employers with applications in the adjudication process, their employees, and the refineries that contract with them. This has the potential to result in temporary layoffs for contractors and challenges with scheduling maintenance activities at refineries. In addition, if the WSATC does not have enough time at the regularly scheduled meeting to conduct all needed business, the ability of the WSATC to perform their statutory mandated activities to oversee apprentice programs is impacted. As such, observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest. Special meetings for approval/disapproval of programs will only be used in conjunction with the adjudication process.

The department filed a Preproposal statement of inquiry (CR-101) to initiate permanent rule making.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 1, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: May 19, 2021.

Joel Sacks
Director

OTS-2793.1

AMENDATORY SECTION (Amending WSR 18-17-149, filed 8/21/18, effective 10/10/18)

WAC 296-05-008 Meetings and adjudicative proceedings. (1) Regular meetings: Convened on the third Thursday of January, April, July, and October, held at locations within Washington, and open to the general public. Members of the public cannot be required to register their name, give any information, or fulfill any condition prior to attending council meetings. All council meetings must be conducted according to the provisions of chapter 42.30 RCW, Open Public Meetings Act and chapter 34.05 RCW, Administrative Procedure Act.

(a) Notice of regular meetings: The supervisor must distribute notice not later than thirty calendar days prior to the meeting date to anyone who has requested notice of the regular meetings.

(b) The supervisor must send notices to all WSATC members, including ex officio members, and approved program sponsors.

(c) The following WSATC activities must take place in open public meetings:

(i) All transactions of official business;

(ii) All commitments or promises;

(iii) All collective discussions;

(iv) All collective decisions; and

(v) All council actions.

(d) The approval or disapproval of committee programs, plant programs, or amendments to those programs can only occur at regular quarterly meetings unless the council is responding to a court mandate, which can occur at a special meeting. The approval or disapproval of committee programs, plant programs, or amendments to those programs can also occur at a special meeting when the council considers the record and enters a final order following an adjudication conducted under WAC 296-05-088(6).

(2) Special meetings: Called at the request of the chair or by a majority of the WSATC members, and open to the general public.

(a) Procedure for special meetings: To call a special meeting, the calling members must:

(i) Mail a written notice with the date, time, and location of the meeting that specifies the business to be transacted at the meeting, either personally or by mail, at least seven calendar days before the specified date of the meeting, to each member of the WSATC, all approved program sponsors, and those who have requested prior notice of special meetings.

(ii) Waiver: The notice requirements to WSATC members may be waived in writing at or prior to the meeting, but all members must agree to waive notice and file the waiver with the supervisor.

(b) Content of special meetings: The subject matter of the special meeting must not exceed the scope of the written notice. If the WSATC takes action on a matter exceeding the scope of the written notice, the action is not final even if the members waive notice.

(c) Special meetings for rule changes: To call a special meeting to consider rule changes, the WSATC must:

(i) Mail a written notice with the date, time, and location of the meeting that specifies the rules to be changed at the meeting, either personally or by mail, at least twenty calendar days before the meeting.

(ii) Waiver: The notice requirements may not be waived for special meetings when rule changes are contemplated.

(3) Registered apprenticeship standards actions: When a party requests specific action from the WSATC related to apprenticeship standards, such request must:

(a) Be in writing; and

(b) Signed by the committee's elected chair and secretary, or by an authorized signer approved by the petitioning sponsor;

(c) Sent to the apprenticeship supervisor at least forty-five days prior to the date of the regular quarterly meeting.

Requests that are untimely are deferred to the next quarterly meeting.

(4) Other actions: When a party requests specific action or consideration from the WSATC on other issues, such requests must:

(a) Be in writing; and

(b) Sent to the apprenticeship supervisor at least fifteen business days prior to the date of the regular quarterly meeting.

Requests that are untimely are deferred to the next quarterly meeting unless waived by the supervisor.

(5) Voting: All council members, except ex officio members, appointed by the director of the department of labor and industries are voting members of the council.

(a) A quorum is two-thirds of the WSATC members entitled to vote.

(b) The chair shall establish a standing tie-breaker committee comprised of three WSATC members entitled to vote:

(i) An employer representative;

(ii) An employee representative; and

(iii) A public member.

(c) The apprenticeship supervisor or designee shall act as secretary to the tie-breaker committee and furnish all information necessary for a decision.

(d) In case of a tie vote on any proposed standards brought before the WSATC, the tie-breaker committee shall meet or confer, review the record, and render a decision within thirty calendar days.

(6) Adjudicative proceedings: All hearings and adjudication, under chapter 49.04 RCW and these rules, shall be conducted according to chapters 34.05 RCW and 10-08 WAC. The chair (or designee) is the presiding officer for adjudicative proceedings held before the WSATC. The WSATC may either adjudicate matter(s) itself, or refer matter(s) to the office of administrative hearings for initial adjudication.

If the initial adjudication is before the WSATC, the WSATC will enter a final order. If the initial adjudication is held at the office of administrative hearings, the administrative hearings judge shall issue an initial order. The WSATC, upon review of the initial order shall enter the final order. An initial order shall become final without further WSATC action five business days after the next regular quarterly meeting unless:

(a) The WSATC upon its own motion determines that the initial order should be reviewed; or

(b) A party to the proceedings files a petition for review of the initial order.

(7) Final WSATC orders or decisions affecting registration and oversight of apprenticeship programs and agreements for federal purposes may be appealed within thirty calendar days to the director of the department pursuant to the following:

(a) An appellant must file with the director an original and four copies of the notice of appeal.

(i) The notice of appeal must specify findings and conclusions at issue in the appeal;

(ii) The director or designee shall serve notice of receipt of the appeal, including copies of the appeal on all parties within five business days from date of receipt;

(iii) The respondent parties may file with the director or designee written arguments within thirty calendar days after the date the notice of receipt of appeal was served upon them.

(b) The director or designee shall review the record in accordance with the Administrative Procedure Act, chapter 34.05 RCW. The director or designee shall issue a final decision affirming, modifying, or reversing the WSATC final order or decision or may remand the matter to the WSATC for further proceedings.

(c) With respect to cancellation of programs only, any aggrieved party may appeal, for federal purposes, a final decision by the director (or director's designee) by following the procedures in 29 C.F.R. 29.8 (b) (5).

(d) Any aggrieved party may appeal the final decision to superior court pursuant to chapter 34.05 RCW. If no party appeals within the period set by RCW 34.05.542, the director's decision is final and binding on all parties.

(8) Limitations: Nothing in this part or in any apprenticeship agreement will operate to invalidate:

(a) Any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(b) Any special provision for veterans, minority person, or women in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, executive order, or authorized regulation.

(9) Retroactivity: The WSATC may make any action or decision which it takes retroactive to the date of the previous business session.

[Statutory Authority: RCW 49.04.010 and 19.285.040. WSR 18-17-149, § 296-05-008, filed 8/21/18, effective 10/10/18. Statutory Authority: Chapter 49.04 RCW and RCW 19.285.040. WSR 11-11-002, § 296-05-008, filed 5/4/11, effective 7/25/11. Statutory Authority: RCW 49.04.010. WSR 04-10-032, § 296-05-008, filed 4/28/04, effective 6/1/04.]