

WSR 21-12-068

PERMANENT RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed May 28, 2021, 8:20 a.m., effective June 28, 2021]

Effective Date of Rule: Thirty-one days after filing.

Purpose: The adoption of amendments corrects the numbering of subsections within WAC 192-170-010, which was amended by WSR 20-11-022 and 20-10-056. It also amends other rules to correct cross-references to subsections of RCW 50.29.021, which was amended in 2020 by the legislature in SHB 2613, section 3, chapter 86, Laws of 2020, and RCW 50.29.025 and 50.29.062, which were amended by the Legislature in 2021 in ESSB 5061, sections 17 and 20, chapter 2, Laws of 2021.

Citation of Rules Affected by this Order: Amending WAC 192-300-220, 192-320-036, 192-350-070, 192-170-010, 192-320-070, 192-320-075, 192-320-080, 192-320-081, 192-320-082, 192-320-083, and 192-320-084.

Statutory Authority for Adoption: RCW 50.12.010 and 50.12.040 provide general rule-making authority to the employment security department; RCW 50.20.010, 50.20.230, 50.20.240, 50.29.021, 50.29.025, 50.29.062.

Adopted under notice filed as WSR 21-07-034 on March 10, 2021.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 11, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.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 28, 2021.

Dan Zeitlin
Employment Security
Policy Director

OTS-2473.1

AMENDATORY SECTION (Amending WSR 20-11-022, filed 5/13/20, effective 7/5/20)

WAC 192-170-010 Availability for work—RCW 50.20.010. (1) In general, the department will consider you available for work if you:

(a) Are willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for your occupation.

(i) You are not required to be available for part-time or temporary work if it would substantially interfere with your return to your regular occupation.

(ii) The requirement to be available for full-time work does not apply under the circumstances described in WAC 192-170-050 (1)(b) or 192-170-070;

(b) Are capable of accepting and reporting for any suitable work within the labor market in which you are seeking work;

(c) Do not impose conditions that substantially reduce or limit your opportunity to return to work at the earliest possible time;

(d) Are available for work during the hours customary for your trade or occupation; and

(e) Are physically present in your normal labor market area, unless you are actively seeking and willing to accept work outside your normal labor market.

(2) ~~((†))~~ You are considered available for work if you are an active registered electrical apprentice in an approved electrical apprenticeship program under chapter 49.04 RCW and chapter 296-05 WAC.

(3) ~~((†))~~ You are not considered available for work if you fail or refuse to seek work as required in a directive issued by the department under WAC 192-180-010.

~~((3))~~ (4) If you are physically located outside of the United States, Puerto Rico, or the U.S. Virgin Islands, the department will consider you available for work if you meet the requirements of subsections (1) and (2) of this section, and:

(a) You are legally authorized to work in the country in which you are physically located;

(b) You are immediately available for work in the United States; or

(c) You are a spouse or domestic partner of a member of the United States Armed Forces and you are legally authorized to work within the foreign military base where your spouse or domestic partner is stationed.

[Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042 and 50.20.010. WSR 20-11-022, § 192-170-010, filed 5/13/20, effective 7/5/20. Statutory Authority: RCW 50.12.010, 50.20.010, 50.20.230, 50.20.240, and 50.12.040. WSR 20-10-056, § 192-170-010, filed 4/30/20, effective 7/5/20. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.20.010. WSR 10-11-046, § 192-170-010, filed 5/12/10, effective 6/12/10.]

Reviser's note: RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules, and deems ineffectual changes not filed by the agency in this manner. The bracketed material in the above section does not appear to conform to the statutory requirement.

OTS-2945.1

AMENDATORY SECTION (Amending WSR 07-23-130, filed 11/21/07, effective 1/1/08)

WAC 192-300-220 What unemployment taxes apply to professional employer organizations and client employers? (1) Effective January 1, 2008, each professional employer organization and each client employer shall be assigned an individual tax rate based on its own experience.

(2)(a) This subsection applies to professional employer organizations and client employers which have a coemployment relationship as of January 1, 2008.

(b) Except as provided in (d) and (e) of this subsection, the tax rate for professional employer organizations and client employers shall be determined on the basis that the client employer transferred from the professional employer organization effective January 1, 2008. A client employer's proportionate experience (benefits charged and taxable payroll) for the entire first quarter beginning January 1, 2008, shall transfer to the client employer. On or after January 1, 2008, experience shall transfer to a client employer regardless of whether the professional employer organization was the base year employer prior to that date.

(c) The client employer's tax rate shall remain unchanged for the remainder of the rate year in which the transfer occurred.

(d) Client employers that are qualified employers under RCW 50.29.010 or are delinquent under RCW 50.29.025 (~~((+2+))~~) (1)(c)(i) and that joined a professional employment organization after the computation date of July 1, 2007, shall be assigned their own tax rate for 2008 as if they had not joined the professional employer organization. Any experience from July 1, 2007, to December 31, 2007, assigned to the professional employer organization for those client employers shall transfer to the client employer for purposes of setting future rates.

(e) If an employer is registered with the department and has its own tax rate, but is also a client employer for purposes of some of its employees, it shall keep its own tax rate for 2008 and that rate shall apply to all its employees. Any employees of a client employer that is in a coemployment relationship with a professional employer organization shall be considered a branch account under the registered employer.

(f) Beginning on January 1 of the year after the transfer, the client employer's tax rate for each rate year shall be based on a combination of:

(i) The client employer's experience with payrolls and benefits; and

(ii) The experience assigned to the professional employer organization which is attributable to the client employer, based on the percentage of employees transferred as of January 1, 2008, regardless of the date the client employer joined the professional employer organization.

(g)(i) The professional employer organization's tax rate on any payroll retained by the professional employer organization shall remain unchanged for the remainder of the year in which the transfer occurs.

(ii) Beginning on January 1 of the year after the transfer, the professional employer organization's tax rate for each rate year shall be based on its experience with payrolls and benefits as of the regular computation date for that rate year excluding the experience that has been attributed to client employers.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 07-23-130, § 192-300-220, filed 11/21/07, effective 1/1/08.]

OTS-2946.1

AMENDATORY SECTION (Amending WSR 17-14-077, filed 6/29/17, effective 7/30/17)

WAC 192-320-036 How are unemployment insurance tax rates determined for employers who are delinquent on taxes or reports, beginning in rate year 2011? (1) An employer that has not submitted by September 30th all reports, taxes, interest, and penalties required under Title 50 RCW for the period preceding July 1st of any year is not a "qualified employer."

(2) For purposes of this section, the department will disregard unpaid taxes, interest, and penalties if:

(a) The unpaid taxes, interest, and penalties add up to less than either one hundred dollars or one-half of one percent of the employer's total tax reported for the twelve-month period immediately preceding July 1st. These minimum amounts only apply to taxes, interest, and penalties, not failure to submit the required tax and wage reports; or

(b) The unpaid taxes, interest, and penalties were found in a voluntary audit unless the department determines the employer did not make a good faith effort to comply with the law.

(3) (a) Under RCW 50.29.080, the department may redetermine an employer's previously assigned tax rate and retroactively assign delinquent tax rates to prior years if the department discovers an employer did not correctly report its taxes and wages.

(b) In the event an employer does not register with the department, the department may assign the delinquent tax rate beginning the calendar year after the July 1st following the first quarter an employer paid wages.

(4) (a) This section does not apply if the otherwise qualified employer shows to the satisfaction of the department that he or she acted in good faith and that applying the delinquent tax rate would be inequitable. This exception is to be narrowly construed to apply at the sole discretion of the department. The department's decision will be subject to review only under the arbitrary and capricious standard and will be reversed in administrative proceedings only for manifest injustice.

(b) If the department finds the employer knew or should have known its actions or inactions would result in a failure to submit all reports, taxes, penalties and interest by September 30th, then the department will find that an employer did not act in good faith and that application of the delinquent tax rate will not be inequitable.

(c) In determining if an employer acted in good faith and if application of the delinquent tax rate would be inequitable, the department may consider all facts surrounding the delinquent reports, taxes, penalties and interest.

(i) The department will consider the following factors when determining if an employer acted in good faith and if application of the delinquent tax rate will be inequitable. No single factor is conclusive. The factors include, but are not limited to:

(A) Whether there were events beyond the employer's reasonable control;

(B) Whether departmental error led to the delinquency;

(C) Whether the employer made only isolated errors instead of repeated errors;

(D) If the employer was a domestic service employer under RCW 50.04.160;

(E) Whether the employer, upon learning of the delinquency, made a diligent effort to pay overdue taxes, penalties, and interest and file overdue reports within ninety days;

(F) The amount of taxes, penalties and interest an employer failed to pay compared to the amount of taxes an employer reported and paid during the same time period;

(G) The number of employees an employer failed to report compared to the number of employees an employer reported during the same time period;

(H) The additional amount of taxes, penalties, and interest resulting from the application of delinquent tax rates compared to the amount of taxes, penalties, and interest the employer failed to pay originally.

(ii) The department will not consider the following factors when determining if an employer acted in good faith and if application of the delinquent tax rate would be inequitable:

(A) An employer's lack of available funds to pay taxes, penalties, and interest;

(B) Delay by the employer or its representative in opening mail or receiving other notices from the department relating to tax filing and payment.

(5) (a) An employer that is not a "qualified employer" because of failure to pay contributions when due will be assigned the array calculation factor rate it would otherwise have had if it had not been delinquent, plus an additional one percent. If the employer fails to pay contributions when due for a second or more consecutive year, it will be assigned the array calculation factor rate it would otherwise have had if it had not been delinquent, plus an additional two percent.

(b) If the employer fails to provide quarterly tax reports and the department cannot otherwise calculate what tax rate the employer would otherwise have had if it had not been delinquent, the department will use the higher of the rate calculated under RCW 50.29.025 (~~((+2-))~~) (1)(d) (NAICS rate with one percent minimum) or the last annual rate assigned to the employer.

(c) The higher rate for an employer in (a) of this subsection will not apply if the employer enters a deferred payment contract approved by the agency by September 30th of the previous rate year.

(d) If, after September 30th of the previous rate year and within thirty days after the date the department sent its first subsequent tax rate notice to the employer, an employer in (a) of this subsection pays all amounts owed or enters a deferred payment contract approved by the department, the additional rate will be one-half percent less than it would otherwise have been in (a) of this subsection. "First subsequent tax rate notice to the employer" means the first notice to the employer assigning that specific delinquent tax rate, regardless of whether the notice is part of the department's annual tax rate run.

(e) If an employer with an approved deferred payment contract fails to make any one of the payments or fails to submit any tax report and payment in a timely manner, the employer's tax rate will immediately revert to the rate in (a) of this subsection.

(6) An employer that is not a "qualified employer" because of failure to pay contributions when due will be assigned a social cost factor rate in rate class 40. The tax rate caps for "qualified employers" in RCW 50.29.025 will not apply either to the calculation of the

social cost factor rate in rate class 40 or to the sum of the array calculation factor rate and the graduated social cost factor rate for employers that are not "qualified employers."

(7) An employer that is not a "qualified employer" because it is a successor and its predecessor was not a "qualified employer" will be assigned rates based on its successor status.

(8) Assignment of the rate for delinquent taxes is not considered a penalty that is subject to waiver under WAC 192-310-030.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 17-14-077, § 192-320-036, filed 6/29/17, effective 7/30/17; WSR 10-23-065, § 192-320-036, filed 11/12/10, effective 12/13/10.]

OTS-2493.1

AMENDATORY SECTION (Amending WSR 10-23-064, filed 11/12/10, effective 12/13/10)

WAC 192-320-070 What conditions apply for relief of benefit charges due to a voluntary quit? (RCW 50.29.021.) (1) A contribution-paying base year employer, who has not been granted relief of charges under RCW 50.29.021(~~((3))~~) (2), may request relief of charges for a voluntary quit not attributable to the employer under RCW 50.29.021(~~((4))~~) (3) and WAC 192-320-065. This section does not apply to local governments.

(2) **Reasons for a voluntary quit not attributable to the employer.** A claimant may have been denied unemployment benefits for voluntarily quitting work without good cause, but subsequently requalify for unemployment benefits through work and earnings. Even if the claimant has requalified for benefits, the following reasons for leaving work will be considered reasons not attributable to the employer:

(a) The claimant's illness or disability or the illness, disability or death of a member(s) of the claimant's immediate family;

(b) The claimant's domestic responsibilities;

(c) Accepting a job with another employer;

(d) Relocating for a spouse's or domestic partner's employment;

(e) Starting or resuming school or training;

(f) Being in jail;

(g) The distance to the job site when the job was accepted and the distance at the time of the quit remained the same; or the job location may have changed but the distance traveled or difficulty of travel was not increased;

(h) Being dissatisfied with wages, hours or other working conditions generally known when the job was accepted; and the working conditions are determined suitable for the occupation in the claimant's labor market; and

(i) Separation necessary to protect the claimant or any member of the claimant's immediate family from domestic violence or stalking; and

(j) Entry into an apprenticeship program approved by the Washington state apprenticeship training council.

(3) **Reasons for a voluntary quit considered attributable to employer** are those work-related factors of such a compelling nature as

to cause a reasonably prudent person to leave employment. The work factors must have been reported to the employer if the employer has reasons not to be aware of the conditions, and the employer failed to improve the factors within a reasonable period of time. The reason for quitting may or may not have been determined good cause for voluntarily leaving work under RCW 50.20.050. For benefit charging purposes, however, such work-related factors may include, but are not limited to:

- (a) Change in work location which causes an increase in distance and/or difficulty of travel, but only if it is clearly greater than is customary for workers in the individual's classification and labor market;
- (b) Deterioration of work site safety provided the employee has reported such safety deterioration to the employer and the employer has failed to correct the hazards within a reasonable period of time;
- (c) Employee skills no longer required for the job;
- (d) Unreasonable hardship on the health or morals of the employee;
- (e) Reductions in hours;
- (f) Reduction in pay;
- (g) Notification of impending layoff; and
- (h) Other work-related factors the commissioner considers pertinent.

[Statutory Authority: RCW 50.12.010, 50.12.040. WSR 10-23-064, § 192-320-070, filed 11/12/10, effective 12/13/10; WSR 07-23-127, § 192-320-070, filed 11/21/07, effective 1/1/08. Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042. WSR 04-23-058, § 192-320-070, filed 11/15/04, effective 12/16/04. Statutory Authority: RCW 50.12.010, 50.12.040. WSR 00-05-069, § 192-320-070, filed 2/15/00, effective 3/17/00.]

AMENDATORY SECTION (Amending WSR 04-23-058, filed 11/15/04, effective 12/16/04)

WAC 192-320-075 Charges to the separating employer—RCW

50.29.021 (~~((2))~~) (1) (c). (1) If a claimant voluntarily quits work to accept a job with a new employer, one hundred percent of benefits paid on the claim will be charged to the new employer when this new employer is the claimant's last employer, a base period employer, and a contribution-paying employer.

(2) If a claimant quits work because of the working conditions listed in this subsection, the employer from whom the separation occurred will be charged for one hundred percent of benefits paid on the claim if the employer is the claimant's last employer, a base period employer, and a contribution-paying employer. These working conditions include:

- (a) A reduction in the individual's usual compensation of twenty-five percent or more under WAC 192-150-115;
- (b) A reduction in the individual's usual hours of twenty-five percent or more under WAC 192-150-120;
- (c) A change in the work location which caused a substantial increase in distance or difficulty of travel under WAC 192-150-125;

(d) A deterioration in the individual's worksite safety under WAC 192-150-130;

(e) Illegal activities in the individual's worksite under WAC 192-150-135; or

(f) The individual's usual work was changed to work that violates the individual's religious convictions or sincere moral beliefs under WAC 192-150-140.

(3) Benefits based on wages paid by the following entities will **not** be charged to the experience-rating account of the separating employer as described in subsections (1) and (2) if they were earned:

(a) In another state;

(b) From a local government employer;

(c) From the federal government; or

(d) From any branch of the United States military.

[Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042. WSR 04-23-058, § 192-320-075, filed 11/15/04, effective 12/16/04.]

AMENDATORY SECTION (Amending WSR 16-21-013, filed 10/7/16, effective 11/14/16)

WAC 192-320-080 Overpayments caused by incorrect reporting of wages and hours—RCW 50.12.070 (2) (b) and 50.29.021 (~~((3)(a))~~) (4).

(1) When an employer incorrectly reports an individual's wages or hours, and the claim becomes invalid due to a later correction in wages or hours, the department will charge that employer one hundred percent of benefits paid to that individual, except as provided in subsection (3) of this section.

(2) When an employer incorrectly reports an individual's wages and a claimant's weekly benefit amount or maximum benefits payable is reduced due to a later correction in wages, the department will charge that employer for the benefits that should not have been paid, but nonetheless were paid as a result of the employer's incorrect reports, except as provided in subsection (3) of this section.

(3) This section does not apply to the entities listed below. The department will charge only for the percentage of benefits that represent their percentage of base period wages. These include wages earned:

(a) In another state;

(b) From a local government employer;

(c) From the federal government; or

(d) From any branch of the United States military.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 16-21-013, § 192-320-080, filed 10/7/16, effective 11/14/16. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.20.010. WSR 07-23-128, § 192-320-080, filed 11/21/07, effective 1/1/08.]

AMENDATORY SECTION (Amending WSR 13-24-108, filed 12/3/13, effective 1/3/14)

WAC 192-320-081 What constitutes an "event" for the purpose of determining if there is a pattern of failing to respond timely or adequately?—RCW 50.29.021(~~(-6)~~) (5). (1) An event occurs if a benefit overpayment is created and the employer or the employer's agent significantly contributed to the overpayment by failing to respond timely or adequately without good cause to the department's written request for information relating to a claim.

(2) When deciding if an event has occurred, there must be a decision made by the department resulting in a benefit overpayment.

(3) An event may occur even if the employer is not in the base year of the claim.

(4) The department must examine past events which contributed to benefit overpayments when deciding if a pattern exists.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 13-24-108, § 192-320-081, filed 12/3/13, effective 1/3/14.]

AMENDATORY SECTION (Amending WSR 13-24-108, filed 12/3/13, effective 1/3/14)

WAC 192-320-082 How will the department determine good cause exists for failing to respond timely or adequately?—RCW 50.29.021(~~(-6)~~) (5). (1) The department may find that good cause exists in certain situations when the employer fails to respond due to an unforeseen event outside of the employer's or employer's agent's control, such as:

(a) The death or serious illness of the employer;

(b) Destruction of the employer's place of business or business records not caused by, or at the direction of, the employer or the employer's agent;

(c) Fraud or theft against the employer.

(2) The employer is responsible to provide all pertinent facts and evidence or documentation for the department to determine good cause.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 13-24-108, § 192-320-082, filed 12/3/13, effective 1/3/14.]

AMENDATORY SECTION (Amending WSR 13-24-108, filed 12/3/13, effective 1/3/14)

WAC 192-320-083 What is a written request for information?—RCW 50.29.021(~~(-6)~~) (5). For the purposes of this chapter, a written request for information relating to a claim is a paper or electronic transmission by the department requesting information from an employer or an employer's agent.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 13-24-108, § 192-320-083, filed 12/3/13, effective 1/3/14.]

AMENDATORY SECTION (Amending WSR 13-24-108, filed 12/3/13, effective 1/3/14)

WAC 192-320-084 What is an employer's agent?—RCW

50.29.021(~~(+6)~~) (5). For the purposes of this chapter, the employer's agent is the employer's designated representative responsible for providing information to the department.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 13-24-108, § 192-320-084, filed 12/3/13, effective 1/3/14.]

OTS-2947.2

AMENDATORY SECTION (Amending WSR 10-23-064, filed 11/12/10, effective 12/13/10)

WAC 192-350-070 What effect does a predecessor-successor relationship have on tax rates? (1) Under RCW 50.29.062(1), if the successor is an employer at the time of the transfer of a business, the successor's tax rate shall remain unchanged for the rest of the calendar year. Beginning on January 1 of the year after the transfer and until the successor qualifies for its own rate, the successor's tax rate for each rate year shall combine the successor's experience with the experience of the predecessor or the relevant portions of the partial predecessor.

(2) (a) Under RCW 50.29.062 (2) (b), if the successor is not an employer at the time of the transfer of a business and if the transfer occurs after January 1, 2005, the successor's tax rate for the rest of the calendar year shall be the same as the predecessor employer at the time of the transfer. Any experience attributable to the predecessor shall be transferred to the successor.

(b) Under RCW 50.29.062 (2) (b) (ii), if there is a substantial continuity of ownership, control, or management by the successor, beginning on January 1 after the transfer, the successor's tax rate shall be based on a combination of the successor's experience and the transferred experience from the predecessor.

(c) Under RCW 50.29.062 (2) (b) (i), if there is not a substantial continuity of ownership, control, or management by the successor, beginning on January 1 after the transfer, the successor's tax rate shall be assigned under RCW 50.29.062 (2) (b) (i) (B). However, if the predecessor terminates business on December 31st of any year and the successor begins business on January 1st of the next year, the department will calculate tax rates as if the transfer occurred on January 1st. Therefore, the department will assign a tax rate to the predecessor for January 1st and that rate will transfer to the successor.

(3) If the successor simultaneously acquires businesses from two or more employers with different tax rates, the successor's tax rate shall be assigned under RCW 50.29.062 (2) (b) (iii).

(4) The tax rate on any payroll retained by a predecessor employer shall remain unchanged for the rest of the rate year in which the transfer occurs. Beginning on January 1 after the transfer, the prede-

cessor's tax rate shall be assigned under RCW 50.29.062 (~~(3)(b)~~)
(2)(c)(ii).

(5) Changes in rate class for a predecessor or successor are effective only for the rate year the information was provided and for subsequent rate years.

(6) This section does not apply to a transfer of less than one percent of a business.

(7) This section does not apply if there is "SUTA dumping" under RCW 50.29.063.

[Statutory Authority: RCW 50.12.010, 50.12.040. WSR 10-23-064, § 192-350-070, filed 11/12/10, effective 12/13/10. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-070, filed 11/21/07, effective 1/1/08.]