

WSR 23-20-099
PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed October 3, 2023, 8:52 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-15-087.

Title of Rule and Other Identifying Information: Payout of paid sick leave to certain construction workers following separation. Amending and creating new sections in chapter 296-128 WAC.

Hearing Location(s): On November 7, 2023, at 1:00 p.m., at the Department of Labor and Industries (L&I), Room S117, 7273 Linderson Way S.W., Tumwater, WA 98501-5414; and on November 8, 2023, at 10:00 a.m., virtual/telephonic hearing. Join electronically https://teams.microsoft.com/dl/launcher/launcher.html?url=%2F%23%2F1%2Fmeetup-join%2F19%3Ameeting_NmU4ZjkwM2MtNTMzNS00ZGMwLTk3ZDMtMTM0MjEzZTVjNGJk%40thread.v2%2F0%3Fcontext%3D%257b%2522Tid%2522%253a%252211d0e217-264e-400a-8ba0-57dcc127d72d%2522%252c%25220id%2522%253a%2522e18fd12a-9e7e-4c79-aecl-650ebada958d%2522%257d%26anon%3Dtrue&type=meetup-join&deeplinkId=b7a40e8f-a7f6-43ab-acc5-dd7f61cccf45, Meeting ID 255 978 387 565, Passcode ffh4Sf; or join by phone (audio only) 253-372-2181, 168865313#, Phone Conference ID 168 865 313#. The hearings will begin at the time indicated and will continue until all oral comments are received.

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join%2F19%3Ameeting_NmU4ZjkwM2MtNTMzNS00ZGMwLTk3ZDMtMTM0MjEzZTVjNGJk%40thread.v2%2F0%3Fcontext%3D%257b%2522Tid%2522%253a%252211d0e217-264e-400a-8ba0-57dcc127d72d%2522%252c%25220id%2522%253a%2522e18fd12a-9e7e-4c79-aecl-650ebada958d%2522%257d%26anon%3Dtrue&type=meetup-join&deeplinkId=b7a40e8f-a7f6-43ab-acc5-dd7f61cccf45, Meeting ID 255 978 387 565, Passcode ffh4Sf; or join by phone (audio only)

253-372-2181, 168865313#, Phone Conference ID 168 865 313#. The hearings will begin at the time indicated and will continue until all oral comments are received.

Date of Intended Adoption: November 21, 2023.

Submit Written Comments to: Bridget Osborne, L&I, Fraud Prevention and Labor Standards, Employment Standards, P.O. Box 44510, Olympia, WA 98504-4510, email ESRules@Lni.wa.gov, fax 360-902-5300, by November 9, 2023, by 5:00 p.m.

Assistance for Persons with Disabilities: Contact Bridget Osborne, phone 360-902-5552, email ESRules@Lni.wa.gov, by November 1, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington state legislature passed ESSB 5111, chapter 267, Laws of 2023, which amends RCW 49.46.210 and 49.46.180 to require payment for accrued and unused sick leave for certain construction workers.

The proposed rules are needed to clarify and enforce the new requirements. Additional rules are needed to address existing statutory requirements in RCW 49.46.180, as well as general cleanups of the paid sick leave rules.

This rule making proposes to create new rule sections and amend existing rules.

Reasons Supporting Proposal: Rules are needed to clarify and enforce the new requirements. Additional rules are needed to address existing statutory requirements in RCW 49.46.180, as well as general cleanups of the paid sick leave rules.

Statutory Authority for Adoption: Chapter 49.46 RCW.

Statute Being Implemented: RCW 49.46.210 and 49.46.180.

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

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting and Implementation: Bridget Osborne, Tumwater, Washington, 360-902-5552; Enforcement: Bryan Templeton, Tumwater, Washington, 360-902-5310.

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

A cost-benefit analysis is not required under RCW 34.05.328. This rule making is exempt under RCW 34.05.328 (5)(b)(iii), adopts requirements from RCW 49.46.210 and 49.46.180 without material change; and RCW 34.05.328 (5)(b)(iv), clarifies language without changing the effect.

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

Is exempt under RCW 19.85.025(3) as the rules are adopting or incorporating 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; and rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Explanation of exemptions: The rule making is fully exempt under RCW 34.05.310 (4)(c), adopting statute without material change; and RCW 34.05.310 (4)(d), correcting or clarifying language without changing its effect.

Scope of exemption for rule proposal:
Is fully exempt.

October 3, 2023
Joel Sacks
Director

OTS-4970.2

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-010 Records required. For all employees who are subject to RCW 49.46.020, employers shall be required to keep and preserve payroll or other records containing the following information and data with respect to each and every employee to whom said section of said act applies:

(1) Name in full, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records. This shall be the same name as that used for Social Security record purposes;

(2) Home address;

(3) Occupation in which employed;

(4) Date of birth if under ((eighteen)) 18;

(5) Time of day and day of week on which the employee's workweek begins. If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day

and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees;

(6) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" shall be any consecutive (~~twenty-four~~) 24 hours);

(7) Total daily or weekly straight-time earnings or wages; that is, the total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation;

(8) Total overtime excess compensation for the workweek; that is, the excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked;

(9) Total additions to or deductions from wages paid each pay period. Every employer making additions to or deductions from wages shall also maintain a record of the dates, amounts, and nature of the items which make up the total additions and deductions;

(10) Total wages paid each pay period;

(11) Date of payment and the pay period covered by payment;

(12) Paid sick leave accruals each month, and any unused paid sick leave available for use by an employee;

(13) Paid sick leave reductions each month including, but not limited to: Paid sick leave used by an employee, paid sick leave donated to a co-worker through a shared leave program, or paid sick leave not carried over to the following year ("year" as defined in WAC 296-128-620(6));

(14) Paid sick leave payments to construction workers before usage as provided under RCW 49.46.180, and any remaining leave which remains after payment;

(15) The date of commencement of his or her employment, as defined in WAC 296-128-600(2);

~~((15))~~ (16) Employer may use symbols where names or figures are called for so long as such symbols are uniform and defined;

(17) Paid sick leave paid out to a construction worker following separation from employment; and

(18) Any date(s) of separation from employment, as defined in WAC 296-128-600(14).

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-010, filed 10/17/17, effective 1/1/18; Regulation 294.7.001 (part), filed 12/30/60.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-600 Definitions. (1) "Absences exceeding three days" means absences exceeding three consecutive days an employee is required to work. For example, assume an employee is required to work on Mondays, Wednesdays, and Fridays, and then the employee uses paid sick leave for any portion of those three work days in a row. If the employee uses paid sick leave again on the following Monday, the employee would have absences exceeding three days.

(2) "Commencement of his or her employment" as provided in RCW 49.46.210 (1)(d), means no later than the beginning of the first day on which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace. "Commencement of their employment" has the same meaning.

(3) "Construction worker" is any nonexempt employee covered under the 2022 North American Industry Classification System (NAICS) industry code 23, except for those employees who perform only work described in NAICS 2361, residential building construction. This includes employees who work for an employer who perform construction-related work as described in NAICS 23, but are not directly engaged in the construction work itself, such as nonexempt administrative staff.

(4) "Construction worker covered by a collective bargaining agreement" as provided in RCW 49.46.180, means a nonexempt employee covered by a collective bargaining agreement, provided that the union signatory to the collective bargaining agreement is an approved referral union program authorized under RCW 50.20.010 and in compliance with WAC 192-210-110, the collective bargaining agreement establishes equivalent sick leave provisions, as provided in RCW 49.46.180(2), and the requirements of RCW 49.46.200 through 49.46.830 are expressly waived in the collective bargaining agreement in clear and unambiguous terms or in an addendum to an existing agreement including an agreement that is open for negotiation provided the sick leave portions were previously ratified by the membership. This does not include employees who perform construction as described in NAICS 23, but are not directly engaged in construction work itself, such as nonexempt administrative staff.

(5) "Department" means the department of labor and industries.

~~((4))~~ (6) "Director" means the director of the department of labor and industries, or the director's authorized representative.

~~((5))~~ (7) "Employee" has the same meaning as RCW 49.46.010(3). An employee includes a construction worker or construction worker covered by a collective bargaining agreement unless a more specific provision applies.

~~((6))~~ (8) "Employer" has the same meaning as RCW 49.46.010(4).

~~((7))~~ (9) "Frontloading" means providing an employee with paid sick leave before it has accrued at the rate required by RCW 49.46.210 (1)(a).

~~((8))~~ (10) "Health-related reason," as provided in RCW 49.46.210 (1)(b)(iii), means a serious public health concern that could result in bodily injury or exposure to an infectious agent, biological toxin, or hazardous material. Health-related reason does not include closures for inclement weather.

~~((9))~~ (11) "Hours worked" shall be interpreted in the same manner as WAC 296-126-002(8).

~~((10))~~ (12) "Normal hourly compensation" means the hourly rate that an employee would have earned for the time during which the employee used paid sick leave. For employees who use paid sick leave for hours that would have been overtime hours if worked, employers are not required to apply overtime standards to an employee's normal hourly compensation. Normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates, unless the employer or a collective bargaining agreement allow for such considerations. However, where an employee's normal hourly compensation is a differential rate, meaning a different rate paid for the same work performed under differing conditions (e.g., a night shift), the differential rate is not a premium rate.

~~((11))~~ (13) "Regular and normal wage" has the same meaning as normal hourly compensation.

~~((12))~~ (14) "Separation" and "separates from employment" mean the end of the last day an employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace.

~~((13))~~ (15) "Verification" means evidence that establishes or confirms that an employee's use of paid sick leave is for an authorized purpose under RCW 49.46.210 (1)(b) and (c).

~~((14))~~ (16) "Workweek" means a fixed and regularly recurring period of ~~((one hundred sixty-eight))~~ 168 hours, or seven consecutive ~~((twenty-four))~~ 24 hour periods. It may begin on any day of the week and any hour of the day, and need not coincide with a calendar week.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-600, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-630 Paid sick leave usage. (1) An employee is entitled to use paid sick leave for the authorized purposes outlined in RCW 49.46.210 (1)(b) and (c). This right means an employee has the choice about whether or not to use accrued, unused paid sick leave when a qualified purpose occurs and an employer may not require an employee to use accrued, unused paid sick leave if the employee does not choose to request to use paid sick leave.

(2) An employee is entitled to use accrued, unused paid sick leave beginning on the ~~((ninetieth))~~ 90th calendar day after the commencement of his or her employment. Employers may allow employees to use accrued, unused paid sick leave prior to the ~~((ninetieth))~~ 90th calendar day after the commencement of his or her employment.

(3) Beginning on the ~~((ninetieth))~~ 90th calendar day after the commencement of ~~((his or her))~~ their employment, employers must make accrued paid sick leave available to employees for use in a manner consistent with the employer's established payment interval or leave records management system, not to exceed one month after the date of accrual.

(4) Unless a greater increment is approved by a variance as provided by WAC 296-128-640, employers must allow employees to use paid sick leave in increments consistent with the employer's payroll system and practices, not to exceed one hour. For example, if an employer's normal practice is to track increments of work for the purposes of compensation in ~~((fifteen))~~ 15-minute increments, then an employer must allow employees to use paid sick leave in ~~((fifteen))~~ 15-minute increments.

(5) Paid sick leave pay may be paid to construction workers under a collective bargaining agreement before the usage of the leave under the terms of a collective bargaining agreement if an employer meets the requirements of RCW 49.46.180 and any applicable rules.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-630, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-670 Rate of pay for use of paid sick leave. (1) For each hour of paid sick leave used, an employee must be paid the greater of the minimum hourly wage rate established by RCW 49.46.020 or their normal hourly compensation.

(2) For each hour of paid sick leave paid out to a construction worker following separation, the construction worker must be paid the greater of the minimum hourly wage rate established by RCW 49.46.020 or their normal hourly compensation.

(3) An employer must calculate an employee's normal hourly compensation using a reasonable calculation based on the hourly rate that an employee would have earned for the time during which the employee used paid sick leave. Examples of reasonable calculations to determine normal hourly compensation include, but are not limited to:

(a) For an employee paid partially or wholly on a commission basis, dividing the total earnings by the total hours worked in the full pay periods in the prior (~~ninety~~) 90 days of employment;

(b) For an employee paid partially or wholly on a piece rate basis, dividing the total earnings by the total hours worked in the most recent workweek in which the employee performed identical or substantially similar work to the work they would have performed had they not used paid sick leave;

(c) For a nonexempt employee paid a salary, dividing the annual salary by (~~fifty-two~~) 52 to determine the weekly salary, and then dividing the weekly salary by the employee's normal scheduled hours of work;

(d) For an employee whose hourly rate of pay fluctuates:

(i) Where the employer can identify the hourly rates of pay for which the employee was scheduled to work, a calculation equal to the scheduled hourly rates of pay the employee would have earned during the period in which paid sick leave is used;

(ii) Where the employer cannot identify the hourly rates of pay for which the employee would have earned if the employee worked, a calculation based on the employee's average hourly rate of pay in the current or preceding (~~thirty~~) 30 days, whichever yields the higher hourly rate.

(~~3~~) (4) For employees who are scheduled to work a shift of indeterminate length (e.g., a shift that is defined by business needs rather than a specific number of hours), the rate of pay may be calculated by multiplying the employee's normal hourly compensation by the total hours worked by a replacement employee in the same shift, or similarly situated employees who worked that same or similar shift. If there is no replacement employee to compare to, the employer may use the average number of hours the employee using the paid sick leave typically works during a similar shift.

(5) Construction workers under a collective bargaining agreement who are paid before the usage of the leave under the terms of a collective bargaining agreement should be paid their normal hourly compensation. Unless addressed in a collective bargaining agreement, the payment should reflect a reasonable calculation of the normal hourly compensation based on the date of payment.

(~~4~~) (6) An employer must apply a consistent methodology when calculating the normal hourly compensation of similarly situated employees.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-670, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-680 Payment of paid sick leave. (1) Unless verification for absences exceeding three days is required by an employer, the employer must pay paid sick leave to an employee no later than the payday for the pay period in which the paid sick leave was used by the employee. If verification is required by the employer, paid sick leave must be paid to the employee no later than the payday for the pay period during which verification is provided to the employer by the employee.

(2) The employer must pay the balance of accrued and unused paid sick leave to a construction worker under RCW 49.46.210 (1)(1) (effective January 1, 2024), at the end of the established pay period, pursuant to RCW 49.48.010(2), following the construction worker's separation.

(3) Payment of paid sick leave at the normal hourly compensation to construction workers under a collective bargaining agreement may occur before usage, as authorized by RCW 49.46.180 and applicable rules.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-680, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-690 Separation and reinstatement of accrued paid sick leave upon rehire. Except as provided for construction workers by RCW 49.46.210 (1)(1) (effective January 1, 2024) and applicable rules, and provided for construction workers under collective bargaining agreements by RCW 49.46.180 and applicable rules:

(1) When an employee separates from employment and is rehired within (~~twelve~~) 12 months of separation by the same employer, whether at the same or a different business location of the employer, the employer must comply with the provisions of RCW 49.46.210 (1)(k). If an employee separates from employment, the employer is not required to provide financial or other reimbursement to the employee for accrued, unused paid sick leave at the time of separation.

(2) An employer may choose to reimburse an employee for any portion of their accrued, unused paid sick leave at the time the employee separates from employment.

(a) If an employer chooses to reimburse an employee for any portion of their accrued, unused paid sick leave at the time the employee separates from employment, any such terms for reimbursement must be mutually agreed upon in writing by both the employer and the employee, unless the right to such reimbursement is set forth elsewhere in state law or through a collective bargaining agreement.

(b) If an employee is rehired by the same employer, whether at the same or a different business location of the employer, within ~~((twelve))~~ 12 months after the date the employee separates from employment, the employer must reinstate the employee's previously accrued, unused paid sick leave. An employer need not reinstate any hours of paid sick leave previously provided to the employee through financial or other reimbursement at the time of separation, as long as the value of the paid sick leave was established and paid at a rate that was at least equal to the employee's normal hourly compensation.

(3) When an employee separates from employment and the employee is rehired within ~~((twelve))~~ 12 months of separation by the same employer, whether at the same or a different business location of the employer, an employee who reached the ~~((ninetieth))~~ 90th calendar day of employment prior to separation shall have their previously accrued, unused paid sick leave balance available for use upon rehire. If the employee did not reach the ~~((ninetieth))~~ 90th calendar day of employment prior to separation, the previous period of employment must be counted for purposes of determining the date upon which the employee is entitled to use paid sick leave.

(4) Upon rehire, an employer must provide notification to the employee of the amount of accrued, unused paid sick leave available for use by the employee.

(5) If the period of time an employee separates from employment extends into the following year ("year" as defined at WAC 296-128-620(6)), the employer is not required to reinstate more than ~~((forty))~~ 40 hours of the employee's accrued, unused paid sick leave.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-690, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-700 Paid time off (PTO) programs. (1) A PTO program is a program that combines more than one type of leave, including all paid sick leave, into one bank of leave (i.e., a program that combines vacation leave, or other discretionary forms of leave, and paid sick leave into one bank). Paid time off (PTO) provided to employees by an employer's PTO program ~~((e.g., a program that combines vacation leave, sick leave, or other forms of leave into one pool), created by a written policy or a collective bargaining agreement,))~~ satisfies the requirement to provide paid sick leave if:

(a) The PTO program meets or exceeds the provisions of RCW 49.46.200 and 49.46.210, and all applicable rules((r)) including, but not limited to:

~~((a))~~ (i) Accrual of PTO leave at a rate of not less than one hour for every ~~((forty))~~ 40 hours worked as an employee;

~~((b))~~ (ii) Payment for PTO leave at the ~~((employee's))~~ greater of the minimum hourly wage rate established by RCW 49.46.020 or the normal hourly compensation;

~~((c))~~ (iii) Carryover of at least ~~((forty))~~ 40 hours of accrued, unused PTO leave to the following year ("year" as defined at WAC 296-128-620(6));

~~((d))~~ (iv) Access to ((use)) all PTO leave in the bank on the same terms for all the purposes authorized under RCW 49.46.210 (1)(b) and (c) except as provided in subsection (2) of this section; ((and (e) Employer notification and) (v) Recordkeeping requirements set forth in WAC 296-128-010 and ((296-128-760)) 296-128-755; and (b) The employer notifies the employee of their intention to utilize the PTO program in order to meet paid sick leave requirements under RCW 49.46.210.

(2) An employer may include more generous PTO (leave in excess of the accrual requirements) that is not subject to RCW 49.46.200 and 49.46.210, and all applicable rules, in the same leave bank as state paid sick leave compliant with RCW 49.46.200 and 49.46.210, and all applicable rules if:

(a) The compliant sick leave meets all the requirements of subsection (1) of this section independently of any more generous leave provided under an employer policy or CBA;

(b) The compliant paid sick leave is tracked separately;

(c) There is no requirement for the employee to use their protected leave for more generous purposes (purposes not authorized under RCW 49.46.210 (1)(b) and (c), such as vacation leave) before accessing the more generous PTO leave for more generous purposes; and

(d) If there is no policy that encourages the employee to use their protected leave for more generous purposes (purposes not authorized under RCW 49.46.210 (1)(b) and (c), such as vacation leave) before accessing the more generous PTO leave for more generous purposes.

(3) If an employee chooses to use their PTO leave for purposes other than those authorized under RCW 49.46.210 (1)(b) and (c), and the need for use of paid sick leave later arises when no additional PTO leave is available, the employer is not required to provide any additional PTO leave to the employee as long as the employer's PTO program meets or exceeds the provisions of RCW 49.46.200 and 49.46.210, and all applicable rules.

(4) If an employer utilizes a PTO program to meet or exceed the provisions of RCW 49.46.200 and 49.46.210 for construction workers, the balance of the PTO must be paid out to any qualifying workers covered under RCW 49.46.210 (1)(1) (effective January 1, 2024), following separation.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-700, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-730 Frontloading. (1) An employer may, but is not required to, frontload paid sick leave to an employee in advance of accrual. An employer that allows an employee to go into "negative balances" of paid sick leave (i.e., where paid sick leave has not accrued and the employer allows its use on the condition the employee will work additional hours to make up the difference) is frontloading paid sick leave to the employee.

(2) If an employer frontloads paid sick leave, the employer must ensure that such frontloaded paid sick leave complies with the provisions of RCW 49.46.180, 49.46.200, and 49.46.210, and all applicable rules.

(3) If an employer frontloads paid sick leave, the employer must do so by using a reasonable calculation, consistent with the accrual requirement set forth under RCW 49.46.210 (1)(a), to determine the amount of paid sick leave the employee would be projected to accrue during the period of time for which paid sick leave is being frontloaded.

(a) If the employer calculates and frontloads, and an employee subsequently uses, an amount of paid sick leave which exceeds the paid sick leave the employee would have otherwise accrued absent frontloading, the employer shall not seek reimbursement from the employee for such paid sick leave used during the course of ongoing employment.

(b) If an employer frontloads paid sick leave to an employee, but such frontloaded paid sick leave is less than the amount the employee was entitled to accrue under RCW 49.46.210 (1)(a), the employer must make such additional amounts of paid sick leave available for use by the employee as soon as practicable, but no later than (~~thirty~~) 30 days after identifying the discrepancy.

(4) The employer must have a written policy or a collective bargaining agreement which addresses the requirements for use of frontloaded paid sick leave. An employer must notify employees of such policy or agreement prior to frontloading an employee paid sick leave, and must make this information readily available to all employees.

(5) An employer may not make a deduction from an employee's final wages for frontloaded paid sick leave used prior to the accrual rate required by RCW 49.46.210 (1)(a), unless there is a specific agreement in place with the employee allowing for such a deduction. Such deductions must also meet the requirements set forth in RCW 49.48.010 and WAC 296-126-025.

(6) If an employer frontloads paid sick leave to a construction worker under RCW 49.46.210 (1)(1) (effective January 1, 2024) and the construction worker separates from employment, the employer must pay the balance of frontloaded leave in the construction worker's bank unless the employer can determine the amount of unused paid sick leave the employee accrued during the period of time for which paid sick leave was frontloaded using a reasonable calculation consistent with the accrual requirement set forth under RCW 49.46.210 (1)(a).

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-730, filed 10/17/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-740 Third-party administrators. (1) Employers may contract with a third-party administrator in order to administer the paid sick leave requirements under RCW 49.46.180, 49.46.200, and 49.46.210, and all applicable rules.

(2) Employers are not relieved of their obligations under RCW 49.46.200 and 49.46.210, and all applicable rules, if they elect to contract with a third-party administrator to administer paid sick leave requirements. With the consent of employers, third-party administrators may pool an employee's accrued, unused paid sick leave from multiple employers as long as the accrual rate is at least equal to one hour of paid sick leave for every (~~forty~~) 40 hours worked as an employee. For example, if a group of employers have employees who per-

form work for various employers at different times, the employers may choose to contract with a third-party administrator to track the hours worked and rate of accrual for paid sick leave for each employee, and pool such accrued, unused paid sick leave for use by the employee when the employee is working for any employers in the same third-party administrator network.

(3) A collective bargaining agreement may outline the provisions for an employer to use a third-party administrator as long as such provisions meet all paid sick leave requirements under RCW 49.46.180, 49.46.200, and 49.46.210, and all applicable rules.

(4) An employer may utilize a third-party administrator in order to meet separation payout requirements under RCW 49.46.210 (1)(1) (effective January 1, 2024) and applicable rules.

(5) Under the terms of a collective bargaining agreement, an employer may meet its obligation to meet separation payout requirements under RCW 49.46.210 (1)(1) (effective January 1, 2024) and applicable rules by providing the third-party administrator a payment of any accrued unused leave, including regular payments meant to satisfy paid sick leave payment requirements. The third-party administrator may maintain a leave balance the employee may access after the separation of employment subject to the terms of the collective bargaining agreement.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-740, filed 10/17/17, effective 1/1/18.]

NEW SECTION

WAC 296-128-755 Employer notification and reporting to employees. (1) Employers must notify each employee of their entitlement to paid sick leave, the rate at which the employee will accrue paid sick leave, the authorized purposes under which paid sick leave may be used, the employer's intention to use a PTO program to meet requirements under RCW 49.46.210 (if applicable), and that retaliation by the employer for the employee's lawful use of paid sick leave and other rights provided under chapter 49.46 RCW, and all applicable rules, is prohibited.

(a) Employers must provide such notification in written or electronic form, and must make this information readily available to all employees.

(b) For employees hired on or after January 1, 2018, employers must notify each employee of such rights no later than the commencement of their employment. For existing employees as of January 1, 2018, the employer must notify each employee no later than March 1, 2018.

(c) The department shall, in consultation with employee and employer representatives, develop sample notification policies that meet the department's standard for compliance with these rules. The department shall make such sample notification policies available on the department's website.

(2) Not less than monthly, employers must provide each employee with written or electronic notification detailing the amount of paid sick leave accrued, the amount of paid sick leave paid before usage to construction workers under a collective bargaining agreement as permissible under RCW 49.46.180, the paid sick leave reductions since the

last notification, and any unused paid sick leave available for use by the employee. Employers may satisfy the notification requirements by providing this information in regular payroll statements.

(a) Employers are not required to provide monthly notification to an employee if the employee has no hours worked since the last notification.

(b) If an employer chooses to frontload paid sick leave to an employee in advance of accrual:

(i) The employer must make written or electronic notification to an employee no later than the end of the period for which the frontloaded paid sick leave was intended to cover, establishing that the amount of paid sick leave frontloaded to the employee was at least equal to the accrual rate under RCW 49.46.210 (1)(a); and

(ii) The employer is not relieved of their obligation to provide notification, not less than monthly, of the paid sick leave available for use by the employee.

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AMENDATORY SECTION (Amending WSR 17-21-092, filed 10/17/17, effective 1/1/18)

WAC 296-128-760 (~~Employer notification and reporting to employees~~) Construction workers under a collective bargaining agreement under RCW 49.46.180. (~~(1) Employers must notify each employee of their entitlement to paid sick leave, the rate at which the employee will accrue paid sick leave, the authorized purposes under which paid sick leave may be used, and that retaliation by the employer for the employee's lawful use of paid sick leave and other rights provided under chapter 49.46 RCW, and all applicable rules, is prohibited.~~

~~(a) Employers must provide such notification in written or electronic form, and must make this information readily available to all employees.~~

~~(b) For employees hired on or after January 1, 2018, employers must notify each employee of such rights no later than the commencement of his or her employment. For existing employees as of January 1, 2018, the employer must notify each employee no later than March 1, 2018.~~

~~(c) The department shall, in consultation with employee and employer representatives, develop sample notification policies which meet the department's standard for compliance with these rules. The department shall make such sample notification policies available on the department's website.~~

~~(2) Not less than monthly, employers must provide each employee with written or electronic notification detailing the amount of paid sick leave accrued and the paid sick leave reductions since the last notification, and any unused paid sick leave available for use by the employee. Employers may satisfy the notification requirements by providing this information in regular payroll statements.~~

~~(a) Employers are not required to provide monthly notification to an employee if the employee has no hours worked since the last notification.~~

~~(b) If an employer chooses to frontload paid sick leave to an employee in advance of accrual:~~

~~(i) The employer must make written or electronic notification to an employee no later than the end of the period for which the frontloaded paid sick leave was intended to cover, establishing that the amount of paid sick leave frontloaded to the employee was at least equal to the accrual rate under RCW 49.46.210 (1)(a); and~~

~~(ii) The employer is not relieved of their obligation to provide notification, not less than monthly, of the paid sick leave available for use by the employee.)~~

(1) RCW 49.46.180 allows a construction worker covered by a collective bargaining agreement to receive payment for paid sick leave before usage under the terms of a collective bargaining agreement if:

(a) The leave itself becomes available for protected use by at least the 90th calendar day of employment as established in RCW 49.46.210 (1)(d);

(b) The union signatory to the collective bargaining agreement is an approved referral union program authorized under RCW 50.20.010 and WAC 192-210-110;

(c) The collective bargaining agreement provides equivalent sick leave provisions that meet the requirements of RCW 49.46.200 through 49.46.830, and all applicable rules; and

(d) The requirements of RCW 49.46.200 through 49.46.830 are expressly waived in the collective bargaining agreement in clear and unambiguous terms or in an addendum to an existing agreement including an agreement that is open for negotiation provided the sick leave portions were previously ratified by the membership.

(2) An employer may not make a deduction from paid sick leave payment to a construction worker covered by a collective bargaining agreement before usage or upon separation, unless such deduction meets the requirements set forth in RCW 49.48.010 and WAC 296-126-025.

(3) If a construction worker covered by a collective bargaining agreement is rehired within 12 months after separation from employment by the same employer, whether at the same or a different business location, and was paid their paid sick leave before usage under RCW 49.46.180, and still had protected accrued, unused sick leave available for use, the accrued, unused sick leave must be reinstated for use upon rehire but does not have to be paid when used.

(4) When a construction worker covered by a collective bargaining agreement separates from employment, is rehired within 12 months of separation, whether at the same or a different business location of the employer, and has reached the 90th calendar day of employment prior to separation, the previously accrued, unused sick leave balance must be made available for use upon rehire. If the construction worker covered by a collective bargaining agreement did not reach the 90th calendar day of employment prior to separation, the previous period of employment must be counted for purposes of determining the date upon which the employee is entitled to use sick leave.

(5) Upon rehire, an employer must provide notification to the construction worker covered by a collective bargaining agreement of the amount of accrued, unused paid sick leave available for use by the employee, including sick leave paid before usage.

[Statutory Authority: RCW 49.46.810. WSR 17-21-092, § 296-128-760, filed 10/17/17, effective 1/1/18.]

NEW SECTION

WAC 296-128-765 Construction workers under RCW 49.46.210 (1) (1) (effective January 1, 2024). (1) Following separation, employers must pay the balance of accrued and unused paid sick leave to construction workers classified under NAICS code 23, except for construction workers who perform work limited to work only under NAICS code 236100, who have not reached the 90th calendar day of employment.

(2) When a construction worker is rehired within 12 months of separation, whether at the same or a different business location of the employer, the previous period of employment must be counted for purposes of determining the date upon which the employee is entitled to use paid sick leave.

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AMENDATORY SECTION (Amending WSR 18-01-111, filed 12/19/17, effective 1/1/18)

WAC 296-128-810 Enforcement—Paid sick leave. (1) If an employee files a complaint with the department alleging that the employer failed to provide the employee with paid sick leave as provided in RCW 49.46.180, 49.46.200, and 49.46.210, the department will investigate the complaint as an alleged violation of a wage payment requirement, as defined by RCW 49.48.082(12).

(2) When the department's investigation results in a finding that the employer failed to provide the employee with paid sick leave accrual, use, or carryover during an ongoing employment relationship, the employee may elect to:

(a) Receive full access to the balance of accrued paid sick leave hours unlawfully withheld by the employer, based on a calculation of at least one hour of paid sick leave for every (~~forty~~) 40 hours worked as an employee during the period of noncompliance; or

(b) Receive payment from the employer at their normal hourly compensation for each hour of paid sick leave that the employee would have used or been reasonably expected to use, whichever is greater, during the period of noncompliance, not to exceed an amount the employee would have otherwise accrued. The employee will receive full access to the balance of accrued paid sick leave hours unlawfully withheld by the employer, less the number of paid sick leave hours paid out to the employee pursuant to this subsection.

(3) When the department's investigation results in a finding that the employer failed to provide the employee with paid sick leave accrual, use, or carryover, and the employee is no longer employed by the same employer, the employee may elect to receive payment at their normal hourly compensation, receive reinstatement of the balance of paid sick leave hours, or receive a combination of payment and reinstatement from the employer for all hours of paid sick leave that would have accrued during the period of noncompliance. Such hours must be based on a calculation of at least one hour of paid sick leave for every (~~forty~~) 40 hours worked as an employee.

(4) The department's notice of assessment, pursuant to RCW 49.48.083, may order the employer to provide the employee any combination of reinstatement and payment of accrued, unused paid sick leave

hours assessed pursuant to subsection (2) or (3) of this section. When the department's investigation results in a finding that the employer failed to pay the balance of paid sick leave to a construction worker at separation, as required under RCW 49.46.210 (1)(1) (effective January 1, 2024), the department's notice of assessment may order the employer the remainder of any accrued and unused paid sick leave that was not paid out at the time of separation.

(5) For purposes of this section, an employer found to be in non-compliance cannot cap the employee's carryover of paid sick leave at (~~forty~~) 40 hours to the following year for each year of noncompliance ("year" as defined in WAC 296-128-620(6)).

[Statutory Authority: RCW 49.46.810, 49.46.005, 49.46.020, 49.46.090, 49.46.100, 49.46.120, 49.46.200, 49.46.210, 49.46.810, 49.46.820, and 49.46.830. WSR 18-01-111, § 296-128-810, filed 12/19/17, effective 1/1/18.]

AMENDATORY SECTION (Amending WSR 18-01-111, filed 12/19/17, effective 1/1/18)

WAC 296-128-830 Enforcement—Complaints alleging a violation of other rights under chapter 49.46 RCW—Duty of department to investigate—Citations—Civil penalties. (1) If an employee files a complaint with the department alleging a violation of the employee's rights under chapter 49.46 RCW, and all applicable rules, that are not otherwise enforced by the department pursuant to WAC 296-128-780 through 296-128-820, or the Wage Payment Act, RCW 49.48.082 through 49.48.087, the department will investigate the complaint under this section. Alleged violations include, but are not limited to, failure of an employer to comply with: The recordkeeping requirements set forth in WAC 296-128-010; the requirements to maintain written policies or collective bargaining agreements, as outlined in WAC 296-128-650(3), 296-128-660(2), 296-128-710(1), and 296-128-730(4); and notification and reporting requirements set forth in WAC 296-128-755 and 296-128-760(5).

(a) The department may not investigate any such alleged violation of rights that occurred more than three years before the date that the employee filed the complaint.

(b) If an employee files a timely complaint with the department, the department will investigate the complaint and issue either a citation assessing a civil penalty or a closure letter within (~~sixty~~) 60 days after the date on which the department received the complaint, unless the complaint is otherwise resolved. The department may extend the period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the period, and specifying the duration of the extension.

(c) The department will send notice of a citation assessing a civil penalty or the closure letter to both the employer and the employee by service of process or using a method by which the mailing can be tracked or the delivery can be confirmed to their last known addresses.

(2) If the department's investigation finds that the employee's allegation cannot be substantiated, the department will issue a closure letter to the employee and the employer detailing such finding.

(3) If the department determines that the violation of rights under chapter 49.46 RCW, and all applicable rules, that are not enforced by the department pursuant to WAC 296-128-780 through 296-128-820, or the Wage Payment Act, RCW 49.48.082 through 49.48.087, was a willful violation, and the employer fails to take corrective action, the department may order the employer to pay the department a civil penalty as specified in (a) of this subsection.

(a) A citation assessing a civil penalty for a willful violation of such rights will be (~~one thousand dollars~~) \$1,000 for each willful violation. For a repeat willful violator, the citation assessing a civil penalty will not be less than (~~two thousand dollars~~) \$2,000 for each repeat willful violation, but no greater than (~~twenty thousand dollars~~) \$20,000 for each repeat willful violation.

(b) The department may not issue a citation assessing a civil penalty if the employer reasonably relied on:

(i) A written order, ruling, approval, opinion, advice, determination, or interpretation of the director; or

(ii) An interpretive or administrative policy issued by the department and filed with the office of the code reviser. In accordance with the department's retention schedule obligations under chapter 40.14 RCW, the department will maintain a complete and accurate record of all written orders, rulings, approvals, opinions, advice, determinations, and interpretations for purposes of determining whether an employer is immune from civil penalties under (b) of this subsection.

(c) The department may, at any time, waive or reduce a civil penalty assessed under this section if the director determines that the employer has taken corrective action to resolve the violation.

(d) The department will deposit civil penalties paid under this section in the supplemental pension fund established under RCW 51.44.033.

(4) For purposes of this section, the following definitions apply:

(a) "Repeat willful violator" means any employer that has been the subject of a final and binding citation for a willful violation of one or more rights under chapter 49.46 RCW, and all applicable rules, within three years of the date of issuance of the most recent citation for a willful violation of one or more such rights.

(b) "Willful" means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute.

[Statutory Authority: RCW 49.46.810, 49.46.005, 49.46.020, 49.46.090, 49.46.100, 49.46.120, 49.46.200, 49.46.210, 49.46.810, 49.46.820, and 49.46.830. WSR 18-01-111, § 296-128-830, filed 12/19/17, effective 1/1/18.]