

WSR 24-14-113
PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed July 2, 2024, 8:55 a.m.]

Original Notice.

Expedited Rule Making—Proposed notice was filed as WSR 24-06-070.

Title of Rule and Other Identifying Information: Prevailing wage: WAC 296-127-010(9) Definitions for chapter 296-127 WAC; WAC 296-127-140 Investigation of complaint, 296-127-160 Appeal of notice of violation, and 296-127-320 Payroll.

Hearing Location(s): On August 15, 2024, at 10:30 a.m., virtual/ telephonic hearing. Join electronically (online) <https://lni-wa-gov.zoom.us/j/88023479907?pwd=fas9AVSEnvezNT0PB2kCBL7RpdXJCM.1>; or join by phone (audio only) 253-215-8782, Meeting ID 880 2347 9907, Passcode *326610851#. The hearing will start at 10:30 a.m. and will continue until all oral/spoken comments are received.

Date of Intended Adoption: September 17, 2024.

Submit Written Comments to: Reasa Pearson, Department of Labor and Industries (L&I), Prevailing Wage Program, P.O. Box 44540, Olympia, WA 98504-4540, email PrevailingWageRules@Lni.wa.gov, beginning July 3, 2024, 8:00 a.m., by August 15, 2024, 5:00 p.m.

Assistance for Persons with Disabilities: Contact Reasa Pearson, phone 360-999-7226, TTY 1-800-833-6388, email Reasa.pearson@Lni.wa.gov, by August 1, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this rule making is to amend three rule sections to bring them into alignment with amendments made to the underlying statutes they help to interpret and enforce, and amend one rule section to align with current L&I practice. The changes reflect requirements in law and do not affect the purpose of the rule sections.

This proposal includes amending the following sections in rule:

WAC 296-127-010 Definitions for chapter 296-127 WAC: Update the "residential construction" definition to align with the definition for "residential construction" in RCW 39.12.017, which was created with the passage of HB 1743.

WAC 296-127-140 Investigation of complaint: Update language related to L&I's acceptance timeline of a complaint concerning the nonpayment of the prevailing rate of wage. Change the acceptance date from 30 to 60 days for public works projects. This change aligns the section with RCW 39.12.065, which was amended with the passage of SB 5088.

WAC 296-127-160 Appeal of notice of violation: Eliminate the need to submit four copies of the request for a hearing. This aligns with current L&I practice and reduces paperwork.

WAC 296-127-320 Payroll: Update language to align with RCW 39.12.120, which requires weekly certified payroll records be filed at least once a month using L&I's online system. RCW 39.12.120 was created with the passage of ESSB 5035.

Reasons Supporting Proposal: HB 1743, chapter 29, Laws of 2019, created a new section in law, RCW 39.12.017, regarding residential construction. WAC 296-127-010 must be updated to adopt the language of the statute.

SB 5088, chapter 88, Laws of 2023, amended RCW 39.12.065 regarding the timeline for a complaint concerning nonpayment of the prevailing rate of wage. WAC 296-127-140 incorporates the statutory language that was amended and must be updated to match the amended language of the statute.

ESSB 5035, chapter 242, Laws of 2019, created a new section in law, RCW 39.12.120, regarding payroll records and recordkeeping obligations. WAC 296-127-320 incorporates the statutory language.

L&I recommends updating WAC 296-127-160 to match current internal government operations, which have reduced waste by eliminating unnecessary copies of the request for hearing documents. The update would also benefit filers.

Statutory Authority for Adoption: Chapter 39.12 RCW.

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

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Reasa Pearson, Tumwater, Washington, 360-999-7226; Implementation and Enforcement: Catherine Kuffner, Tumwater, Washington, 360-902-4550.

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 from preparing a cost-benefit analysis under RCW 34.05.328 (5)(b)(iii) because proposed amendments adopt language without material change a Washington statute, and under RCW 34.05.328 (5)(b)(ii) as an amendment relates only to internal governmental operations that are not subject to violation by a person.

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 relate only to internal governmental operations that are not subject to violation by a nongovernment party; and 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.

Scope of exemption for rule proposal:

Is fully exempt.

July 2, 2024
Joel Sacks
Director

OTS-5247.2

AMENDATORY SECTION (Amending WSR 22-24-089, filed 12/6/22, effective 1/6/23)

WAC 296-127-010 Definitions for chapter 296-127 WAC. (1) "Department" means the department of labor and industries.

(2) "Director" means the director of the department or his or her duly authorized deputy or representative.

(3) "Industrial statistician" means the industrial statistician of the department.

(4) "Assistant director" means the assistant director of the fraud prevention and labor standards (FPLS) division or his or her duly authorized deputy or representative.

(5) "Contractor" means:

(a) The prime contractor, and each and every subcontractor, required to be registered under chapter 18.27 RCW and/or licensed under chapter 19.28 RCW, that performs any work on a public works project site, and/or is required to pay industrial insurance premiums as a construction company.

(b) Employers engaged in shipbuilding and ship repair, building service maintenance, and any fabricator or manufacturer that produces nonstandard items specifically for a public works project.

(c) Employers that contract with contractors or subcontractors for the purpose of the production and/or delivery of materials pursuant to the terms of WAC 296-127-018.

(6) The term municipality shall include every city, county, town, district, political subdivision, or other public agency thereof which is authorized by law to require the execution of public work, except drainage districts, diking districts, diking and drainage improvement districts, drainage improvement districts, diking improvement districts, consolidated diking and drainage improvement districts, consolidated drainage improvement districts, consolidated diking improvement districts, irrigation districts, or any such other districts as shall from time to time be authorized by law for the reclamation or development of waste or undeveloped lands.

(7)(a) The term "public work" shall include:

(i) All work, construction, alteration, enlargement, improvement, repair, and/or demolition that is executed by contract, purchase order, or any other legal agreement and that is executed at the cost of the state of Washington or of any municipality. The source of the funding shall not determine the applicability of the statute, and may include, but is not limited to, such sources as those payments made through contracts with insurance companies on behalf of the insured state or municipality;

(ii) All work, construction, alteration, enlargement, improvement, repair, and/or demolition which, by law, constitutes a lien or charge on any property of the state or of a municipality;

(iii) All work, construction, alteration, repair, or improvement, other than ordinary maintenance that the state or a municipality causes to be performed by a private party through a contract to rent, lease, or purchase at least 50 percent of the project by one or more state agencies or municipalities, pursuant to RCW 39.04.260;

(iv) Maintenance, except ordinary maintenance as defined by (b)(ii)(A) and (B) of this subsection, when performed by contract. Maintenance is defined as keeping existing facilities in good usable, operational condition;

(v) Janitorial and building service maintenance as defined by WAC 296-127-023, when performed by contract, on public buildings and/or assets; and

(vi) The fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project as defined by (a) (i) through (v) of this subsection.

(b) The term "public work" shall not include:

(i) Work, construction, alteration, enlargement, improvement, repair, demolition, and/or maintenance for which no wage or salary compensation is paid, consistent with the requirements of RCW 35.21.278; or

(ii) Ordinary maintenance.

(A) Ordinary maintenance is defined as maintenance work performed by the regular employees of the state or any county, municipality, or political subdivision created by its laws.

(B) For housing authorities when contracting with a property management services company for purposes of operating a housing project, as defined in RCW 35.82.030. Rental and other project revenues collected by a property management services company from the housing project's tenants and used to pay administrative operating and ordinary maintenance costs incurred by the company under the terms of the contract with the authority shall be treated as private funds, and any resulting services as executed at the cost of the property management services company and the housing project's tenants, until the net operating revenues are distributed to the authority for its exclusive use and control. For the purposes of this subsection, "ordinary maintenance" only includes: Routine repairs related to unit turnover work; grounds and parking lot upkeep; and repairs and cleaning work needed to keep a property in a clean, safe, sanitary, and rentable condition that are customarily undertaken or administered by residential property management services companies. "Ordinary maintenance" does not include repairs that would be considered replacement capital repairs or scheduled regular maintenance work on plumbing, electrical, or HVAC/R systems or their components.

(8) "Contract" means a contract, purchase order, or any other legal agreement in writing for public work to be performed for a fixed or determinable amount, which is duly awarded after advertisement and competitive bid. A contract that is awarded from a small works roster, or under the emergency provisions of state law, need not be advertised.

(9) "Residential construction" means construction, alteration, repair, improvement, or maintenance of single family dwellings, duplexes, apartments, condominiums, and other residential structures not to exceed four stories in height, including basement, ~~((when used solely as permanent residences. It))~~ in the following categories:

(a) Affordable housing, including permanent supportive housing and transitional housing, which may include common spaces, community rooms, recreational spaces, a management office, or offices for the purposes of service delivery;

(b) Weatherization and home rehabilitation programs for low-income households; and

(c) Homeless shelters and domestic violence shelters.

"Residential construction" does not include the utilities construction (such as water and sewer lines), or work on streets, or work on other structures ((e.g., for recreation and business.)) unrelated to the housing.

AMENDATORY SECTION (Amending WSR 86-03-063, filed 1/17/86)

WAC 296-127-140 Investigation of complaint. (1) The department shall investigate a complaint filed by an interested party unless the complaint was filed more than (~~thirty~~) 60 days after the date the public agency accepted the public work that gave rise to the complaint. The department may, in its sole discretion, investigate a complaint filed more than (~~thirty~~) 60 days after the acceptance date. However, the department may not charge a contractor with a violation of RCW 39.12.065 if the complaint is filed after the (~~thirty~~) 60-day limit.

The department's investigation shall determine whether a violation of RCW 39.12.065 or 39.12.050, or both, or of any other provision of chapter 39.12 RCW, occurred.

(2) If the department's investigation substantiates a complaint that alleges that a contractor has violated RCW 39.12.065, the department is required to attempt to collect unpaid wages for the contractor's employees. During the investigation, the department should be able to identify the affected employees. The department shall direct to the affected employees the best notice practicable under the circumstances, including individual notice to all employees who can be identified through reasonable effort. The notice shall inform the employee that (a) the department's final order, whether favorable or not, will apply to all employees; (b) any employee may, if he or she desires, move to intervene as a party in any hearing held as a result of the investigation; and (c) that the employee may have a private right of action to collect unpaid prevailing wages.

AMENDATORY SECTION (Amending WSR 86-03-063, filed 1/17/86)

WAC 296-127-160 Appeal of notice of violation. The violator or any of its sureties who are interested in the matter may request a hearing on a notice of violation. (~~One original and four copies of~~) The request for hearing must be filed with the director within (~~thirty~~) 30 days after the date the department issued the notice. The party requesting the hearing must also serve a copy of the notice on all interested sureties and, if the requestor is a surety, on the violator.

The request for hearing must be in writing and must specify:

- (1) The name and address of the party requesting the hearing;
- (2) The notice of violation that is being appealed;
- (3) The items of the notice of violation that the requestor believes are erroneous; and
- (4) The reasons the notice of violation is erroneous.

AMENDATORY SECTION (Amending WSR 92-01-104, filed 12/18/91, effective 1/31/92)

WAC 296-127-320 Payroll. (1) Each contractor, subcontractor, or employer shall keep accurate payroll records for three years from the date of acceptance of the public works project by the contract awarding agency, showing the employee's full name, address, Social Security number, trade or occupation, classification, straight (~~time~~) and

overtime rates, hourly rate of usual benefits ((as defined by WAC 296-127-014(1))), and ((overtime)) hours worked each day and week, including any employee authorizations executed pursuant to ((WAC 296-127-022)) RCW 49.28.065, and the actual ((rate of)) gross wages, itemized deductions, withholdings, and net wages paid, for each laborer, worker, and mechanic employed by the contractor for work performed on a public works project.

(2) A contractor ((shall, within ten days after it receives a written request, from the department or from any interested party as defined by RCW 39.12.010(4), file a certified copy of the payroll records with the agency that awarded the public works contract and with the department)), subcontractor, or employer shall file a copy of its certified payroll records using the department of labor and industries' online system at least once per month. If the department of labor and industries' online system is not used, a contractor, subcontractor, or employer shall file a copy of its certified payroll records directly with the department of labor and industries in a format approved by the department of labor and industries at least once per month.

(3) A ((contractor's)) contractor, subcontractor, or employer's noncompliance with this section shall constitute a violation of RCW 39.12.050.