

WSR 22-10-107
PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed May 4, 2022, 11:25 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-02-055.

Title of Rule and Other Identifying Information: Safety and health discrimination protections (ESHB 1097): Chapter 296-360 WAC, Discrimination.

Hearing Location(s): On June 8, 2022, at 9:00 a.m. Join virtually via Zoom <https://lni-wa-gov.zoom.us/j/87608567723?pwd=cXdrQzVyaHdrR2V0alhOTGdPaEt6QT09>; or join by phone 253-215-8782, Meeting ID 876 0856 7723, Passcode 01697458. The hearing will start at 9:00 a.m. and continue until all oral comments are received.

Date of Intended Adoption: July 1, 2022.

Submit Written Comments to: Josefina Magana, Department of Labor and Industries (L&I), Division of Occupational Safety and Health (DOSH), P.O. Box 44620, Olympia, WA 98504-4620, email Josefina.Magana@lni.wa.gov, fax 360-902-5619, by June 15, 2022.

Assistance for Persons with Disabilities: Contact Josefina Magana, phone 360-902-4233, email Josefina.Magana@lni.wa.gov, by June 1, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington Industrial Safety and Health Act (WISHA), under chapter 49.17 RCW, protects workers from discrimination or retaliation for exercising their rights under WISHA to a safety and healthful workplace. 2021's ESHB 1097 made changes to the WISHA discrimination protections under RCW 49.17.160. The changes to RCW 49.17.160 under ESHB 1097 go into effect on July 1, 2022.

Under ESHB 1097, L&I's DOSH has the authority to issue administrative orders when investigations of discrimination complaints find sufficient evidence that an employer violated RCW 49.17.160. The proposed rules update chapter 296-360 WAC, Discrimination, to include a process for issuance of citations and notices of assessments to order relief to the worker and penalties to the employer and a process for employer and employee appeals of the citation and notice of assessment. Other updates under the proposed rule needed to implement ESHB 1097 include changing the time to file a safety and health discrimination complaint from 30 to 90 days and clarifying the definition of discrimination.

The proposed rules also make changes to align with Washington state case law specific to "substantial factor" causation test, where a violation of RCW 49.17.160 occurs when an employee's engagement in protected activity was a substantial factor in the employer's decision for the adverse action. The current rule is based on the Occupational Safety and Health Administration's (OSHA) interpretative rules applying federal case law to discrimination under Section 11(c) of the Occupational Safety and Health Act (OSH Act). The change to apply Washington case law is necessary to ensure DOSH applies the appropriate standard used by Washington courts in its investigations and orders issued under ESHB 1097.

The proposed rule also makes changes to clarify the rule.

Amended Sections:

WAC 296-360-005 Definitions:

- Adds definitions of "department," "director," "employ," "employee," and "person."

WAC 296-360-010 Introduction:

- Streamlines the introduction.

WAC 296-360-020 General requirements of RCW 49.17.160 of WISHA:

- Removes redundant language and clarifies the intent of the chapter.

WAC 296-360-030 Filing a complaint of discrimination:

- Provides clarity on where to submit claims.
- Updates timing for filing complaints to align with RCW 49.17.160.
- Adds example of circumstances that may justify tolling of the time to file a complaint to be consistent with the examples in OSHA's rule under 29 C.F.R. 1977.15.

WAC 296-360-040 Notification of assistant director's determination:

- Changes made to update how L&I will make determinations if discrimination occurred and how employers and complainants will [be] notified of that determination, including the issuance of orders.
- Updates mirror changes made in RCW 49.17.160.

WAC 296-360-050 Withdrawal of complaint:

- Rearranges existing language to provide clarity.

WAC 296-360-060 Arbitration or other agency proceedings

- Minor language changes for clarity purposes.

WAC 296-360-070 Persons prohibited from discriminating:

- Removes court case citation to avoid citing cases that might be challenged or changed in the future. The underlying law from the case still applies.

WAC 296-360-080 - Persons protected by RCW 49.17.160:

- Minor language changes for clarity purposes.
- Removes court case citation to avoid citing cases that might be challenged or changed in the future. The underlying law from the case still applies.

WAC 296-360-090 Unprotected activities distinguished:

- Amends the language to align with Washington case law.
- Defines "substantial factor."
- Clarifies that the substantial factor analysis is based on the facts in the particular case.

WAC 296-360-150 Discrimination because of exercise of right afforded by WISHA—Refusal to work in an unsafe condition:

- Minor language changes for clarity purposes.

WAC 296-360-160 Payment of damages to employee discriminated against:

- Minor language changes for clarity purposes.

New Sections:**WAC 296-360-045 Appropriate relief for violations of RCW 49.17.160:**

- Restates what relief can be granted to a complainant when a violation of RCW 49.17.160 which now includes civil penalties.

WAC 296-360-175 Penalties for violations of RCW 49.17.160:

- Establishes civil penalties the L&I may assess if a violation of RCW 49.17.160 occurs.

WAC 296-360-180 Appeals of citations and notices of assessments:

- Restates how an employer and a complainant can appeal a notice of assessment, where a violation is found, and the relief granted to the complainant.

Reasons Supporting Proposal: The Washington state legislature updated RCW 49.17.160 in 2021, changing how L&I handles complaints alleging discrimination, timing for when complaints and appeals must be made, allowing for civil penalties for violations and recognized that discrimination can be alleged when a workplace culture disincentives employees from raising safety and health concerns. The proposal is necessary to align current L&I rules with changes made under ESHB 1097 and ensure employers and complainants know their rights and responsibilities.

The proposed rules also make changes to align with Washington state case law specific to "substantial factor" causation test, where a violation of RCW 49.17.160 occurs when an employee's engagement in protected activity was a substantial factor in the employer's decision for the adverse action. This change is necessary to ensure DOSH applies the appropriate standard used by Washington courts in its investigations and orders issued under ESHB 1097. The current language under WAC 296-360-090 is based on OSHA's discrimination rule under 29 C.F.R. 1977.6 interpreting Section 11(c) of the OSH Act. Currently, WAC 296-360-090 identifies two ways in which a causal connection between protected activity and adverse action could be established: (1) If protected activity was a substantial reason for the adverse action; or (2) if the adverse action would not have taken place "but for" engagement in protected activity. In September 2021, OSHA amended 29 C.F.R. 1977.6 to clarify that the test for showing a nexus between protected activity and adverse action is "but-for" causation only, citing United States Supreme Court cases interpreting discrimination statutes that address adverse actions that occurs "because of" an employee's engagement in a protected activity, 86 F.R. 49472, September 3, 2021. However, the Washington state supreme court has held that the "substantial factor" test is the appropriate test for discrimination cases in Washington. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18, (1991) (discrimination based on filing workers' compensation claim), *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995) (discrimination based on gender.); *Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (discrimination based on age); *Allison v. Housing Authority of Seattle*, 118 Wn.2d 79, 95-96, 821 P.2d 34 (1991) (case of age discrimination in housing.) The discrimination statutes in the Washington supreme court cases references above prohibit discrimination "because of" a protected activity or protected status. As a remedial statute, WISHA and its regulations are liberally construed to carry out its purpose. *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 146, 750 P.2d 1257 (1988).

Statutory Authority for Adoption: RCW 49.17.040 and 49.17.050.

Statute Being Implemented: RCW 49.17.160; section 3, chapter 253, Laws of 2021.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Chris Miller, Tumwater, Washington, 360-902-5516; Implementation and Enforcement: Craig Blackwood, Tumwater, Washington, 360-902-5828.

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. The rule is exempt under RCW 34.05.328 (5)(b)(ii) relates to internal governmental operations, 34.05.328 (5)(b)(iii) by incorporating statutory language without material change, and 34.05.328 (5)(b)(iv) provides housekeeping and clarifying edits. Changes setting forth interpretation of applicable Washington case law to the statute are interpretive rules under RCW 34.05.328 (5)(c)(ii) and not considered significant legislative rules per RCW 34.05.328 (5)(c)(iii).

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; 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.

The proposed rule does not impose more-than-minor costs on businesses. Following is a summary of the agency's analysis showing how costs were calculated. The rule applies to all employers in Washington state but does not impose any costs. The rule establishes a penalty for non-compliance but that is only in the event that a violation has been found. Other changes set forth interpretation of applicable Washington case law to the statute interpretive rules under RCW 34.05.328 (5)(c)(ii).

May 4, 2022
Joel Sacks
Director

OTS-3642.3

AMENDATORY SECTION (Amending WSR 94-15-096, filed 7/20/94, effective 9/20/94)

WAC 296-360-005 Definitions. For the purposes of this chapter.

- (1) "Assistant director" ~~((-))~~ means the assistant director for the division of ((consultation and compliance)) occupational safety and health at the department of labor and industries.
- (2) "Department" means the department of labor and industries.
- ~~((2))~~ (3) "Division" ~~((-))~~ or "DOSH" means the division of ((consultation and compliance)) occupational safety and health of the department of labor and industries.
- (4) "Director" means the director of the department of labor and industries.
- (5) "Employ" has the same meaning as in WAC 296-360-080.
- (6) "Employee" has the same meaning as in RCW 49.17.020.
- (7) "Person" has the same meaning as in RCW 49.17.020.
- (8) "Repeat violation" means a violation where the employer has been cited one or more times previously for violation of RCW 49.17.160 and the prior violation has become a final order no more than five years prior to the employer committed the violation being cited.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-005, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-005, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 80-17-015, filed 11/13/80)

WAC 296-360-010 Introduction. ~~((1) Chapter 49.17 RCW, the Washington Industrial Safety and Health Act (WISHA), is designed to regulate employment conditions affecting industrial safety and health and to achieve safer and healthier work places throughout the state. WISHA requires every person who has employees to furnish each of his or her employees employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm, and to comply with industrial safety and health standards promulgated under WISHA.~~

~~(2) Employees and representatives of employees are afforded a wide range of substantive and procedural rights under WISHA. Effective implementation of WISHA and achievement of its goals depend in large part upon the active but orderly participation of employees, individually and through their representatives.~~

~~(3)) This chapter deals ((essentially)) with the rights of employees afforded under RCW 49.17.160 ((. RCW 49.17.160)), which prohibits reprisals, in any form, against employees who exercise rights under WISHA. The purpose of this chapter is to make available in one place interpretations of the various provisions of ((section 16 of WISHA)) RCW 49.17.160 that will guide the assistant director in the performance of ((his or her)) their duties ((thereunder)).~~

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-010, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 80-17-015, filed 11/13/80)

WAC 296-360-020 General requirements of RCW 49.17.160 of WISHA.

~~((RCW 49.17.160 provides that))~~ (1) No person shall discharge or in any manner discriminate against any employee because the employee has:

- (a) Filed any complaint under or related to WISHA((τ));
- (b) Instituted or caused to be instituted any proceeding under or related to WISHA((τ));
- (c) Testified or is about to testify in any proceeding under or related to WISHA((τ)); or
- (d) Exercised on ((his or her)) their own behalf or on behalf of others any right afforded by WISHA.

(2) Any employee who believes ((that he/she has)) they have been discriminated against in violation of ((section 16 of WISHA may, within thirty days after the violation occurs, file a complaint with the assistant director alleging the violation. The division shall investigate the complaint and, if the assistant director determines that section 16 of WISHA has been violated, the division may bring a civil action against the violator in superior court. The suit may ask the court to restrain violations of RCW 49.17.160 and to grant other appropriate relief, including rehiring or reinstating the employee to his or her former position with back pay)) RCW 49.17.160 may file a complaint alleging a violation, within 90 days after such violation.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-020, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 82-13-045, filed 6/11/82)

WAC 296-360-030 Filing a complaint of discrimination. (1) Who may file. A complaint ~~((of RCW 49.17.160))~~ alleging discrimination may be filed by the employee ~~((him or herself)),~~ or by ((a)) the employee's authorized representative ~~((authorized to do so on his or her behalf)).~~

(2) Nature of filing. No particular form of complaint is required.

(3) Place of filing. The complaint should be filed with the division by the following methods:

(a) Department website: <https://lni.wa.gov/workers-rights/workplace-complaints/discrimination-in-the-workplace>.

(b) In person:

Department of Labor and Industries
DOSH-Discrimination Program
7273 Linderson Way S.W.
Tumwater, WA 98501

(c) Mail:

Department of Labor and Industries
DOSH-Discrimination Program
P.O. Box 44600
Olympia, WA 98504-4600; or

(d) Phone: 360-902-6088 or 1-800-423-7233.

(4) Time for filing. (~~(RCW 49.17.160(3) provides that an employee who believes that he or she has been discriminated against in violation of RCW 49.17.160 "may, within thirty days after such violation occurs" file a complaint with the assistant director. A major purpose of the thirty-day period is to allow the assistant director to decline to entertain complaints that have become stale. Accordingly, the division will presume that complaints not filed within thirty days of an alleged violation are untimely. There may be circumstances, however,))~~ The complaint must be filed timely as stated in WAC 296-360-020(2). Circumstances may exist that justify tolling, meaning pause, delay, or extend, the ((thirty-day)) 90-day period on recognized equitable principles or because strongly extenuating circumstances exist, e.g., where the employer has concealed, or misled the employee regarding the grounds for, discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. In the absence of circumstances justifying a tolling of the ((thirty-day)) 90-day period, the division ((shall)) will not accept untimely complaints.

[Statutory Authority: RCW 49.17.040 and 49.17.050. WSR 82-13-045 (Order 82-22), § 296-360-030, filed 6/11/82. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-030, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 94-15-096, filed 7/20/94, effective 9/20/94)

WAC 296-360-040 Discrimination, determination, and notification ((of assistant director's determination)). (1) (~~(RCW 49.17.160(3) provides that))~~ The assistant director ((is to)) must determine if a violation of RCW 49.17.160 has occurred, or whether there was insufficient evidence to determine if a violation occurred.

(2) The assistant director will notify a complainant and their employer of the determination made under subsection (1) of this section within ((ninety)) 90 days of receipt of the complaint ((of his determination whether prohibited discrimination has occurred. This ninety-day provision is directory, not mandatory. Although)). The department may extend the 90-day period by providing advance written notice to the complainant and the employer setting forth good cause for an extension of the period, and specifying the duration of the extension.

(a) Violation occurred. If the assistant director determines that RCW 49.17.160 has been violated, the assistant director will issue a citation and notice of assessment describing the violation to the employer, ordering all appropriate relief as described in WAC 296-360-045, and may assess a civil penalty as described in WAC 296-360-175. Complainants and employers have the right to appeal the citation and notice of assessment in accordance with WAC 296-360-180.

(b) Insufficient evidence. If the assistant director finds there is insufficient evidence to determine that a violation occurred, the assistant director will issue a letter of closure and the employee may institute the action on their own behalf within 30 days of such determination as allowed in RCW 49.17.160.

(i) The complainant may file a written request for review by the director within 15 working days of receipt of the determination. The request for director review must set forth the basis for the request.

The request must be filed by mail to the address in WAC 296-360-030 (3)(c) or in-person to the address in WAC 296-360-030 (3)(b).

(ii) Upon review the director may set aside the assistant director's determination and issue a citation and notice of assessment, remand the matter for further investigation, or affirm the determination of the assistant director.

(3) Every effort will be made to notify complainants of the ((assistant director's determination within ninety days, there may be instances when it is not possible to do so)) determination using a method of mailing that can be tracked or delivery that can be confirmed.

((2) If a complainant receives a determination from the assistant director that prohibited discrimination has not occurred, the complainant may file a written request for review by the director within fifteen working days of receipt of the determination. The request for review must set forth the basis for the request. The request shall be filed by mailing or delivering the request to the Director of Labor and Industries, P.O. Box 44000, Olympia, Washington 98504-4000. Upon review the director may set aside the assistant director's determination, remand the matter for further investigation, or affirm the determination of the assistant director. The director shall notify the complainant of the decision after review.))

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-040, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040 and 49.17.050. WSR 85-10-004 (Order 85-09), § 296-360-040, filed 4/19/85. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-040, filed 11/13/80.]

NEW SECTION

WAC 296-360-045 Appropriate relief for violations of RCW

49.17.160. (1) A citation and notice of assessment issued for a violation of RCW 49.17.160 as required by WAC 296-360-040, must include appropriate relief which may include, but is not limited to, the following:

(a) Restoring the complainant to the position of employment held by the complainant when the discrimination occurred, or restoring the complainant to an equivalent position with equivalent employment hours, work schedule, benefits, pay, and other terms and conditions of employment; and

(b) Ordering the employer to make payable to the complainant earnings that the complainant did not receive due to the employer's discriminatory action, including interest of one percent per month on all earnings owed. The earnings and interest owed will be calculated from the first date earnings were owed to the employee.

(2) A civil penalty may be issued in accordance with WAC 296-360-175, Penalties for violations of RCW 49.17.160.

[]

AMENDATORY SECTION (Amending WSR 94-15-096, filed 7/20/94, effective 9/20/94)

WAC 296-360-050 Withdrawal of complaint. Enforcing the provisions of RCW 49.17.160 is not only a matter of protecting rights of individual employees, but also of protecting the public interest. Attempts by an employee to withdraw a filed complaint will not necessarily result in termination of the division's investigation. A voluntary and uncoerced request from a complainant to withdraw a complaint will be given careful consideration; however, the division's jurisdiction cannot be foreclosed as a matter of law by unilateral action of the employee. (~~However, a voluntary and uncoerced request from a complainant to withdraw his/her complaint shall generally be accepted.~~)

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-050, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-050, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 80-17-015, filed 11/13/80)

WAC 296-360-060 Arbitration or other agency proceedings. (1) General.

(a) An employee who files a complaint under RCW 49.17.160 may pursue remedies under grievance arbitration proceedings in collective bargaining agreements, and may also resort to other agencies, such as the National Labor Relations Board, for relief. The division's jurisdiction to entertain RCW 49.17.160 complaints, to investigate, and to determine whether discrimination has occurred, is independent of the jurisdiction of other agencies or bodies. The division may file an action in superior court regardless of the pendency of other proceedings.

(b) (~~Where it is possible, however,~~) The division favors voluntary resolution, where possible, of disputes under procedures in collective bargaining agreements. (~~Also,~~) The division should defer to the jurisdiction of other forums established to resolve disputes that may also be related to RCW 49.17.160 complaints. Thus, where a complainant is pursuing remedies other than those provided by RCW 49.17.160 it may be proper to postpone the assistant director's determination whether discrimination has occurred, and defer to the results of such proceedings.

(2) Postponement of determination. Postponement of determination is justified where the rights asserted in other proceedings are substantially the same as rights under RCW 49.17.160 and those proceedings are not likely to violate the rights guaranteed by RCW 49.17.160. The factual issues in the (~~such~~) proceedings must be substantially the same as those raised by the RCW 49.17.160 complaint, and the forum hearing the matter must have the power to determine the ultimate issue of discrimination.

(3) Deferral to outcome of other proceedings. Determinations to defer to the outcome of another proceeding (~~begun~~) initiated by a complainant must be made after careful scrutiny. It must be clear that the proceeding dealt adequately with all factual issues, that it was fair, regular, and free of procedural infirmities, and that its outcome did not violate the purpose and policy of WISHA. If another ac-

tion (~~begun~~) initiated by a complainant is dismissed without an adjudicatory hearing on the merits, the division will not necessarily regard the dismissal as determinative of the merits of the RCW 49.17.160 complaint.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-060, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 80-17-015, filed 11/13/80)

WAC 296-360-070 Persons prohibited from discriminating. RCW 49.17.160 specifically states that "no person shall discharge or in any manner discriminate against any employee" because the employee has exercised rights under WISHA. RCW 49.17.020(5), defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." Consequently, the prohibitions of RCW 49.17.160 are not limited to actions taken by employers against their own employees. A person may be charged with discriminating against an employee of another person. RCW 49.17.160 extends to such entities as organizations representing employees in collective bargaining, employment agencies, or any other person in a position to discriminate against an employee. ((See *Meek v. United States*, 136 F.2d 679 (6th Cir., 1943); *Bowe v. Judson C. Burns*, 137 F.2d 37 (3rd Cir., 1943).))

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-070, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 94-15-096, filed 7/20/94, effective 9/20/94)

WAC 296-360-080 Persons protected by RCW 49.17.160. (1) All employees are afforded the full protection of RCW 49.17.160. WISHA defines an employee as "an employee of an employer who is employed in a business of (~~his/her~~) their employer which affects commerce." RCW 49.17.020(4). WISHA does not define "employ"; however, the broad remedial nature of WISHA demonstrates a clear intent that the existence of an employment relationship, for purposes of RCW 49.17.160, is to be based upon economic realities rather than upon common law doctrines and concepts. ((See *U.S. v. Silk*, 331 U.S. 704 (1947); *Rutherford Food Corporation v. McComb*, 331 U.S. 722 (1947).))

(2) For purposes of RCW 49.17.160, an applicant for employment could be considered an employee. ((See *NLRB v. Lamar Creamery*, 246 F.2d 8 (5th Cir., 1957).))

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-080, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-080, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 94-15-096, filed 7/20/94, effective 9/20/94)

WAC 296-360-090 Unprotected activities distinguished. (~~(1) An employer or others may base actions that adversely affect an employee upon nondiscriminatory grounds. An employee's engagement in activities protected by WISHA does not automatically render him/her immune from discharge or discipline for legitimate reasons, or from adverse action dictated by nonprohibited considerations. See NLRB v. Dixie Motor Coach Corp. 128 F.2d 201 (5th Cir., 1942).~~

~~(2) To establish a violation of RCW 49.17.160, the employee's engagement in protected activity need not be the sole consideration behind discharge or other adverse action. If protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" the employee's engagement in protected activity, RCW 49.17.160 has been violated.)~~ If the employee's engagement in protected activities was a substantial factor in bringing about the employer's decision, RCW 49.17.160 has been violated. "Substantial factor" means a significant motivating factor in bringing about the employer's decision. "Substantial factor" does not mean the only factor or the main factor in the challenged act or decision. Ultimately, the issue as to whether an employee's engagement in protected activities was a substantial factor for the discharge or other adverse action is determined on the basis of the facts in the particular case.

[Statutory Authority: Chapter 49.17 RCW. WSR 94-15-096 (Order 94-07), § 296-360-090, filed 7/20/94, effective 9/20/94. Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-090, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 80-17-015, filed 11/13/80)

WAC 296-360-150 Discrimination because of exercise of right afforded by WISHA—Refusal to work in an unsafe condition. (1) Review of WISHA and examination of the legislative history discloses that, as a general matter, WISHA grants no specific right to employees to walk off the job because of potential unsafe conditions at the work place. A hazardous condition that may violate WISHA will ordinarily be corrected by the employer, once brought to its attention. If the employer does not correct a hazard, or if there is a dispute about the existence of a hazard, the employee normally can ask the division to inspect the work place pursuant to RCW 49.17.110, or can seek help from other public agencies that have responsibility for safety and health. Under such circumstances, an employer would not violate RCW 49.17.160 by disciplining an employee who refuses to work because of an alleged safety or health hazard.

(2) Occasions arise, however, when an employee is confronted with a choice between not performing assigned tasks or subjecting him- or herself to serious injury or death arising from a hazard at the work place. If the employee, with no reasonable alternative, refuses in good faith to expose him- or herself to the dangerous condition, he or she is protected against subsequent discrimination.

(3) An employee's refusal to work is protected if he or she meets the following requirements:

(a) The refusal to work must be in good faith, and must not be a disguised attempt to harass the employer or disrupt the employer's business;

(b) The hazard causing the employee's apprehension of death or injury must be such that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury; and

(c) There must be insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

(4) As indicated in subsection (3) of this section, an employee's refusal to work is not protected unless it is a good faith response to a hazardous condition. To determine whether an employee has acted in good faith, the division will consider, among other factors, whether the employee:

(a) Asked the employer to correct the hazard;

(b) Asked for other work;

(c) Remained on the job until ordered to leave by the employer;

or

(d) Informed the employer that, if the hazard was not corrected, the employee would refuse to work.

The lack of one or more of these factors (~~(shall)~~) must not necessarily preclude a finding of good faith if other factors do establish good faith. The division will also consider whether the employer knew that the hazard could cause serious injury or death, or that the hazard was prescribed by a specific safety standard promulgated under WISHA or any other law that relates to the safety and health of a place of employment.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-150, filed 11/13/80.]

AMENDATORY SECTION (Amending WSR 80-17-015, filed 11/13/80)

WAC 296-360-160 Payment of damages to employee discriminated against. (1) If an employer discriminates against an employee such that the employee earns less than he or she would have earned absent the discrimination, the employer (~~(shall)~~) must pay the employee the difference between the wages that the employee would have earned absent the discrimination and the wages the employee actually earned after the discrimination.

(2) If an employer discriminates against an employee for a refusal to work that is protected under WAC 296-360-150, the employer need not pay the employee's wages for the time spent fixing the hazard, or that would have been spent fixing the hazard, if the employer (a) had to or would have had to shut down the job to make the repair and (b) had not other work the employee could have done.

[Statutory Authority: RCW 49.17.040, 49.17.050, 49.17.240, chapters 43.22 and 42.30 RCW. WSR 80-17-015 (Order 80-21), § 296-360-160, filed 11/13/80.]

NEW SECTION

WAC 296-360-175 Penalties for violations of RCW 49.17.160.

(1) (a) Penalties for violations of RCW 49.17.160 are as follows:

Employer Size	Penalty Amount Per Violation
1 - 25	\$5,000
26 - 100	\$7,000
101 - 250	\$10,000
251+	\$14,000

(b) Employer size is determined by the maximum number of workers employed in the 12-month period since the alleged violation occurred.

(2) Repeat violations. Penalty amounts will increase for repeat violations. The number of repeated violations will be calculated based on the number of violations found within the last five years.

(a) The first repeat violation the base penalty amount under subsection (1) (b) of this section will be multiplied by three.

(b) Any violation above a single reoccurrence the base penalty under subsection (1) (b) of this section will be multiplied by five.

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NEW SECTION

WAC 296-360-180 Appeals of citations and notices of assessments.

(1) WAC 296-900-17005 and 296-900-17010 apply to appeals described in this section. The remainder of the section outlines the timelines for notifying the department about appeals of the citation and notice of assessment issued by the department.

(2) Citation and notice of assessment appeal. Both the employer and the complainant have a right to appeal determinations made under WAC 296-360-040.

(a) Notification to the department.

(i) An employer has 30 calendar days of receipt of the citation and notice of assessment to notify the department that the employer wishes to appeal the citation or notice of assessment; and

(ii) The complainant has 15 working days from receipt of the citation and notice of assessment to notify the department that the complainant wishes to appeal the order of appropriate relief stated in the notice of assessment.

(b) The citation and notice of assessment will become a final order of the department, not subject to review by any court or agency, if the department does not receive notification of appeal from the employer or complainant as stated in (a) of this subsection.

(3) The department may reassume jurisdiction according to the timeline, process for hearing, and issuance of corrective notices of redetermination under RCW 49.17.140(4) upon receiving notice of appeal from the employer, employee, or both.

(a) The redetermination will become the final order subject to direct appeal by an employer or complainant to the board of industrial insurance appeals within 15 working days of such redetermination with service of notice of appeal upon the director.

(b) In the event that the department does not reassume jurisdiction, the department must notify the state board of industrial insurance appeals of all notifications of intention to appeal the citation and notice of assessment and certify a full copy of the record in such appeal matters to the board.

(4) A notice of appeal filed under this section will stay the effectiveness of any citation or notice of assessment except orders of reinstatement pending review by the board of industrial appeals.

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