

WSR 23-20-077

PROPOSED RULES

OFFICE OF

FINANCIAL MANAGEMENT

[Filed September 29, 2023, 1:42 p.m.]

Original Notice.

Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).

Title of Rule and Other Identifying Information: WAC 357-04-030

What right does an employee have to return to the classified service from exempt service?, 357-19-195 If a permanent employee in a classified position accepts an appointment to an exempt position, what is the employee's right to return to a position in the classified service?, 357-19-197 What information must a receiving employer verify when a permanent employee exercises their right to return to classified service from an exempt appointment?, and 357-19-200 When must an employee apply to return to classified service from exempt service?

Hearing Location(s): On November 14, 2023, at 9:00 a.m., via Zoom meeting (with call-in option), ID 881 7165 8224, Call in 253-215-8782, Passcode 850872, Zoom link <https://ofm-wa-gov.zoom.us/j/88171658224?pwd=T1R1aUF4K3hEOEtCLzBHZnBaamVnZz09>.

Date of Intended Adoption: November 21, 2023.

Submit Written Comments to: Brandy Chinn, Office of Financial Management (OFM), Raad Building, 128 10th Avenue S.W., P.O. Box 47500, Olympia, WA 98504, email brandy.chinn@ofm.wa.gov, by November 7, 2023.

Assistance for Persons with Disabilities: Contact OFM, TTY 711 or 1-800-833-6384, by November 7, 2023.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: To align Title 357 WAC with the requirements of the new law. The proposed amendments to WAC 357-04-030, 357-19-195, and 357-19-200 are to state that if a permanent employee exercises their right to return to classified service from exempt service, the right of return may not be exercised if the employee is terminated from the exempt position for gross misconduct or malfeasance, or during the pendency of an investigation if the employee has been given written notice that they are the subject of an active workplace investigation which may result in a finding of gross misconduct or malfeasance. The proposed new WAC 357-19-197 is to address what information a receiving employer must verify when a permanent employee exercises their right to return to classified service from an exempt appointment. For purposes of these rules, "written notice" includes notice sent by email to the employee's work email address; and "pendency of an investigation" lasts until the employer has taken final appropriate action based on the finding of the investigation.

Reasons Supporting Proposal: Chapter 148, Laws of 2023 (ESHB 1361) passed during the 2023 legislative session with an effective date of July 23, 2023. Section 3 of this bill amends RCW 41.06.070 Exemptions to chapter—Right of reversion, to add subsection (6) which suspends a person's right to reversion during the pendency of a workplace investigation if the allegations being investigated could result in a finding of gross misconduct or malfeasance.

Statutory Authority for Adoption: RCW 41.06.150.

Statute Being Implemented: RCW 41.06.070.

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

Name of Proponent: OFM, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Brandy Chinn, 128 10th Avenue S.W., Olympia, WA 98501, 360-878-2901.

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. Rules are related to internal government operations and are not subject to violation by a nongovernmental party. See RCW 34.05.328 (5)(b)(ii) for exemption.

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.

Scope of exemption for rule proposal:

Is fully exempt.

September 29, 2023

Nathan Sherrard

Assistant Legal Affairs Counsel

OTS-4860.1

AMENDATORY SECTION (Amending WSR 21-14-042 and 22-01-153, filed 6/30/21 and 12/15/21, effective 7/1/22)

WAC 357-04-030 What right does an employee have to return to the classified service from exempt service? As required by RCW 41.06.070, any employee having permanent status in a classified position who accepts an appointment in an exempt position has the right to return to classified service in accordance with WAC 357-19-195, 357-19-200, and 357-19-205. (~~As long as the employee was not terminated from the exempt position for gross misconduct or malfeasance,~~) The employee has the right to return to the highest class of position in which the employee previously held permanent status or to a position of similar nature and salary. The right of return may not be exercised if the employee is terminated from the exempt position for gross misconduct or malfeasance, or during the pendency of an investigation if the employee has been given written notice that they are the subject of an active workplace investigation which may result in a finding of gross misconduct or malfeasance.

For purposes of this section:

(1) "Written notice" includes notice sent by email to the employee's work email address; and

(2) "Pendency of an investigation" lasts until the employer has taken final appropriate action based on the finding of the investigation.

[Statutory Authority: Chapter 41.06 RCW and RCW 41.06.070. WSR 21-14-042 and 22-01-153, § 357-04-030, filed 6/30/21 and 12/15/21, effective 7/1/22. Statutory Authority: Chapter 41.06 RCW. WSR 06-15-067, § 357-04-030, filed 7/13/06, effective 8/14/06; WSR 05-01-203, § 357-04-030, filed 12/21/04, effective 7/1/05.]

OTS-4861.1

AMENDATORY SECTION (Amending WSR 05-01-206, filed 12/21/04, effective 7/1/05)

WAC 357-19-195 **If a permanent employee in a classified position accepts an appointment to an exempt position, what is the employee's right to return to a position in the classified service?** A permanent employee who accepts an appointment to an exempt position has the right to return to classified service at any time (~~as long as the employee was not~~). However, the right of return may not be exercised if the employee is terminated from an exempt position for gross misconduct or malfeasance, or during the pendency of an investigation if the employee has been given written notice that they are the subject of an active workplace investigation which may result in a finding of gross misconduct or malfeasance.

The employee's right is to a position in the highest class in which the employee previously held permanent status or to a position of similar nature and salary. The return right is to the most recent employer with which permanent status in the highest class was held. A position in the highest class does not necessarily mean return to the most recent employer.

If upon an employee being returned to a classified position there are fewer positions than there are employees entitled to such positions, the employer's layoff procedure applies.

For purposes of this section:

(1) "Written notice" includes notice sent by email to the employee's work email address; and

(2) "Pendency of an investigation" lasts until the employer has taken final appropriate action based on the finding of the investigation.

[Statutory Authority: Chapter 41.06 RCW. WSR 05-01-206, § 357-19-195, filed 12/21/04, effective 7/1/05.]

NEW SECTION

WAC 357-19-197 **What information must a receiving employer verify when a permanent employee exercises their right to return to classified service from an exempt appointment?** (1) When a permanent employee exercises their right to return to classified service from an exempt appointment in accordance with RCW 41.06.070, the receiving employer must verify:

(a) The employee is not the subject of an active pending workplace investigation of which the employee was given written notice, and which may result in a finding of gross misconduct or malfeasance or was not terminated from the exempt position for gross misconduct or malfeasance; and

(b) The employee was not terminated from the exempt position for gross misconduct or malfeasance.

(2) For purposes of this section:

(a) "Written notice" includes notice sent by email to the employee's work email address; and

(b) "Pendency of an investigation" lasts until the employer has taken final appropriate action based on the finding of the investigation.

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AMENDATORY SECTION (Amending WSR 05-01-206, filed 12/21/04, effective 7/1/05)

WAC 357-19-200 When must an employee apply to return to classified service from exempt service? Employees exercising return rights should provide as much advance notice as is practicable to the receiving employer. The employee must apply to return to classified service within (~~(thirty)~~) 30 calendar days of:

- Separation from employment in the exempt position, or
- Separation from employment in any subsequent exempt position if there is no break in state service of more than (~~(thirty)~~) 30 calendar days between initial and subsequent exempt appointments.

Employees who apply for return to classified service within (~~(thirty)~~) 30 calendar days must be returned to a position at the time of separation from the exempt appointment or the time of application, whichever is later.

The right of return may not be exercised if the employee is terminated from the exempt position for gross misconduct or malfeasance, or during the pendency of an investigation if the employee has been given written notice that they are the subject of an active workplace investigation which may result in a finding of gross misconduct or malfeasance.

For purposes of this section:

(1) "Written notice" includes notice sent by email to the employee's work email address; and

(2) "Pendency of an investigation" lasts until the employer has taken final appropriate action based on the finding of the investigation.

[Statutory Authority: Chapter 41.06 RCW. WSR 05-01-206, § 357-19-200, filed 12/21/04, effective 7/1/05.]