

WSR 21-06-111

PROPOSED RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed March 3, 2021, 9:48 a.m.]

Supplemental Notice to WSR 21-02-088.

Preproposal statement of inquiry was filed as WSR 20-16-151.

Title of Rule and Other Identifying Information: Amending WAC 192-510-050 How will the department assess the size of new employers?, 192-560-010 Which businesses are eligible for small business assistance grants?, 192-620-020 What information will the department request from an employee when filing for weekly benefits? (amended section title), 192-620-035 When will a weekly benefit amount be prorated? and 192-800-045 Can an appeal be withdrawn? (amended section title); and adding WAC 192-610-090 What is an "illegal act" for the purposes of benefit disqualification?, 192-700-006 What hours are considered "worked" for the purposes of employment restoration?, 192-700-007 Employment restoration requirements for predecessor and successor employers, and 192-800-155 When are proceedings open to the public, and what information from a proceeding before the appeal tribunal or commissioner is publicly disclosable?

Hearing Location(s): On April 7, 2021, at 9:00 a.m., call-in number 360-407-3780, Pin 474082#. Hearing will be held by conference call due to COVID-19.

Date of Intended Adoption: On or after April 14, 2021.

Submit Written Comments to: April Amundson, Employment Security Department (ESD), P.O. Box 9046, Olympia, WA 98507-9046, email rules@esd.wa.gov, by April 7, 2021.

Assistance for Persons with Disabilities: Contact Teresa Eckstein, state EO officer, phone 360-480-5708, TTY 711, email Teckstein@esd.wa.gov, by March 31, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposed amendments and new rules implement a number of changes which include: Technical changes to ensure the rules are consistent with Title 50A RCW and other paid leave rules under Title 192 WAC; technical and grammatical changes for clarification; adding a definition of "illegal act" for the purposes of benefit disqualification under RCW 50A.15.060; clarifying employment restoration requirements for successor and predecessor employers to align with federal requirements; clarifying what hours are considered "worked" for the purposes of employment restoration to align with federal requirements; clarifying requirements for small business assistance grants; adding language for withdrawal of an appeal when a re-determination has been made in the appellant's favor; and adding a requirement that hearings be closed to the public unless an open hearing is agreed upon by all parties.

Reasons Supporting Proposal: The proposed rules are necessary to clarify requirements, make technical corrections, streamline the hearing process, and align language with statute and other paid family and medical leave rules. The proposed rules will provide clear and usable guidance to the public regarding program operations.

A public hearing was held on February 9, 2021, regarding the initial proposed rules published as WSR 21-02-088. Based on comments received on the initial proposed rules, the department made revisions that require an additional public hearing.

Statutory Authority for Adoption: RCW 50A.05.060, 50A.25.030.

Statute Being Implemented: RCW 50A.05.010, 50A.10.030, 50A.15.060, 50A.24.010; chapter 50A.25 RCW; RCW 50A.50.010, 50A.50.030, 50A.50.050, 50A.50.070.

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

Name of Proponent: ESD, paid family and medical leave division, governmental.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: April Amundson, Lacey, Washington, 360-485-2816.

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

A cost-benefit analysis is required under RCW 34.05.328. A preliminary cost-benefit analysis may be obtained by contacting April Amundson, ESD, P.O. Box 9046, Olympia, WA 98507-9046, phone 360-485-2816, email rules@esd.wa.gov. A cost-benefit analysis is required for WAC 192-610-090.

The following rules do not require a cost-benefit analysis: WAC 192-510-050 is exempt under RCW 34.05.328 (5)(b)(iv) and (v) because the rule clarifies language without changing its effect and is explicitly and specifically dictated by statute (RCW 50A.10.030).

WAC 192-560-010 is exempt under RCW 34.05.328 (5)(c)(i)(C) because it is a procedural rule that adopts a policy pertaining to the internal operations of the department. Procedural rules are not significant legislative rules under RCW 34.05.328 (5)(c)(iii) and (a)(i). The rule is also exempt under RCW 34.05.328 (5)(b)(iv) and (v) because the rule clarifies language without changing its effect and is explicitly and specifically dictated by statute (RCW 50A.24.010).

WAC 192-620-020 and 192-620-035 are exempt under RCW 34.05.328 (5)(b)(iv) because the rules clarify language without changing their effect.

WAC 192-700-006 and 192-700-007 are exempt under RCW 34.05.328 (5)(b)(iii) because the rules adopt or incorporate by reference federal regulations without material change.

WAC 192-800-045 and 192-800-155 are exempt under RCW 34.05.328 (5)(c)(i)(A) because they are procedural rules related to agency hearings. Procedural rules are not significant legislative rules under RCW 34.05.328 (5)(c)(iii) and (a)(i).

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; rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect; rule content is explicitly and specifically dictated by statute; and rules adopt, amend, or repeal a procedure, practice, or requirement relating to

agency hearings; or a filing or related process requirement for applying to an agency for a license or permit.

Explanation of exemptions: WAC 192-510-050 How will the department assess the size of new employers?, the rule is exempt under RCW 34.05.310 (4) (d) and (e) because the rule clarifies language without changing its effect, and the rule is explicitly and specifically dictated by statute.

WAC 192-560-010 Which businesses are eligible for small business assistance grants?, the rule is exempt under RCW 34.05.310 (4) (b), (d), and (e) because the rule is related to the internal operations of the department, clarifies language without changing its effect, and is explicitly and specifically dictated by statute.

WAC 192-620-020 What information will the department request from an employee when filing for weekly benefits?, the rule is exempt under RCW 34.05.310 (4) (d) because the rule clarifies language without changing its effect.

WAC 192-620-035 When will a weekly benefit amount be prorated?, the rule is exempt under RCW 34.05.310 (4) (d) because the rule clarifies language without changing its effect.

WAC 192-700-006 What hours are considered "worked" for the purposes of employment restoration?, the rule is exempt under RCW 34.05.310 (4) (c) because the rule adopts or incorporates by reference federal regulations without material change.

WAC 192-700-007 Employment restoration requirements for predecessor and successor employers, the rule is exempt under RCW 34.05.310 (4) (c) because the rule adopts or incorporates by reference federal regulations without material change.

WAC 192-800-045 Can an appeal be withdrawn?, the rule is exempt under RCW 34.05.310 (4) (g) (i) because the amendment outlines a procedure, practice, or requirement relating to agency hearings.

WAC 192-800-155 When are proceedings open to the public and what information from a proceeding before the appeal tribunal or commissioner is publicly disclosable?, the rule is exempt under RCW 34.05.310 (4) (g) (i) because the amendment outlines a procedure, practice, or requirement relating to agency hearings.

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 following rule does not impact businesses because it pertains to individuals applying for paid family or medical leave benefits: WAC 192-610-090 What is an "illegal act" for the purposes of benefit disqualification?

March 3, 2021
April Amundson
Policy and Rules Manager
Leave and Care Division

OTS-2778.1

AMENDATORY SECTION (Amending WSR 20-01-087, filed 12/12/19, effective 1/12/20)

WAC 192-510-050 How will the department assess the size of new employers? An employer that has not been in business in Washington long enough to report four calendar quarters by September 30th will have its size calculated after the second quarter of reporting is due by averaging the number of employees reported over the quarters for which reporting exists. Premium assessment based on this determination will begin on this reporting date. This size determination remains in effect ~~((until))~~ for the following ~~((September 30th pursuant to))~~ calendar year under RCW 50A.10.030 ~~((+8)(e))~~.

[Statutory Authority: RCW 50A.05.60 [50A.05.060] and 50A.25.030. WSR 20-01-087, § 192-510-050, filed 12/12/19, effective 1/12/20. Statutory Authority: RCW 50A.04.215. WSR 18-12-032, § 192-510-050, filed 5/29/18, effective 6/29/18.]

OTS-2779.3

AMENDATORY SECTION (Amending WSR 19-23-090, filed 11/19/19, effective 12/20/19)

WAC 192-560-010 Which businesses are eligible for small business assistance grants? (1) An employer ~~((s))~~ determined to have one hundred fifty or fewer employees in the state that ~~((are))~~ is assessed the employer share of the premiums ~~((are))~~ is eligible to apply for small business assistance grants.

(2) An employer ~~((s))~~ determined to have fewer than fifty employees ~~((are))~~ is only eligible for a small business assistance grant if ~~((those))~~ the employer ~~((s))~~ opts to pay the employer share of the premiums. ~~((Such))~~

(a) The employer ~~((s))~~ will be assessed the employer share of the premiums for a minimum of ~~((three years))~~ twelve consecutive calendar quarters beginning with the first calendar quarter after ~~((any))~~ the most recent grant is ~~((received))~~ approved. ~~((An))~~

(b) The employer may provide notice ~~((for opting out after the three-year period))~~ at any time after the approval of the grant to opt out of paying the employer share of the premiums.

(i) If the twelfth consecutive quarter following approval of the grant has ended, the opt-out will become effective on the first day of the following quarter.

(ii) If the twelfth consecutive quarter following approval of the grant has not ended, the opt-out will become effective on the first day of the thirteenth quarter following approval of the grant.

(3) An employer is not eligible for a small business assistance grant if, at the time of application, the employer has outstanding and delinquent reports, outstanding and delinquent payments, or due and owing penalties or interest under Title 50A RCW.

(4) An employer may request only one grant per year for each employee who takes paid family or medical leave under this title. Submissions under (a) and (b) of this subsection do not qualify as grant

applications and therefore do not count against the employer's limit of ten applications per year.

(a) An employer that qualifies for a grant under RCW 50A.24.010 (~~((3)(b))~~) for an amount that is less than one thousand dollars may submit documentation of significant additional wage-related costs incurred after filing the initial grant application in an attempt to qualify for additional grant funds.

(b) An employer may submit a revised application for a grant under RCW 50A.24.010 (~~((3)(e))~~) in an attempt to qualify for additional grant funds.

(5) An employer must apply for (~~(the)~~) any grant no later than four months following the last day of the employee's paid family or medical leave.

[Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-560-010, filed 11/19/19, effective 12/20/19; WSR 18-22-080, § 192-560-010, filed 11/2/18, effective 12/3/18.]

OTS-2780.3

NEW SECTION

WAC 192-610-090 What is an illegal act for the purposes of benefit disqualification? (1) Under RCW 50A.15.060, an employee is not entitled to paid family or medical leave benefits for any absence resulting from any injury or illness sustained in the perpetration by the employee of an illegal act.

(2) For purposes of benefit disqualification the following definitions apply:

(a) An "illegal act" is any unlawful action punishable as a felony or gross misdemeanor of which the individual has been convicted or has admitted committing to a competent authority.

(b) A "competent authority" is:

(i) A court (including magistrate or court commissioner), prosecuting attorney, or law enforcement agency; or

(ii) An administrative law judge; or

(iii) A regulatory agency or professional association charged by law with maintaining professional standards or codes of conduct; or

(iv) Any other person or body, other than your employer, with authority to administer disciplinary action against you.

(3) An admission to your employer or to an employee of the department that you have committed a criminal act is not considered an admission to a competent authority for the purposes of RCW 50A.15.060.

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OTS-2781.3

AMENDATORY SECTION (Amending WSR 19-13-001, filed 6/5/19, effective 7/6/19)

WAC 192-620-020 What information will the department request from an employee((s)) when filing for weekly benefits? (1) The department must determine if an employee qualifies for benefits when the employee files a weekly claim for the payment of benefits. For the week that the employee is claiming, the department will ask if the employee:

(a) Worked for wages during the week, and for the hours associated with that work;

(b) Received any paid leave such as vacation leave, sick leave, or other paid time off that was not considered a supplemental benefit payment provided by the employer, and the hours associated with that leave;

(c) Received any benefit that may disqualify the employee for paid family or medical leave, such as unemployment insurance; and

(d) Experienced a change in the qualifying event that affects the eligibility for, or duration of, paid family or medical leave benefits.

(2) The employee may be asked to provide additional information.

[Statutory Authority: RCW 50A.04.215. WSR 19-13-001, § 192-620-020, filed 6/5/19, effective 7/6/19.]

AMENDATORY SECTION (Amending WSR 20-20-073, filed 10/2/20, effective 11/2/20)

WAC 192-620-035 When will a weekly benefit amount be prorated?

(1) For an employee on paid family or medical leave, a weekly benefit amount is prorated when:

(a) The employee reports hours worked for wages;

(b) The employee reports hours for paid sick leave, paid vacation leave, or other paid time off that is not considered a supplemental benefit payment as defined in WAC 192-500-180; or

(c) The employee files a weekly application for benefits that contains a day or days for which the employee did not claim paid family or medical leave.

(2) If an employee reports hours under subsection (1)(a) or (b) of this section, proration will be calculated as specified by RCW 50A.15.020(2).

(3) If an employee claims part of a week under subsection (1)(c) of this section, proration will be calculated by dividing the employee's typical workweek hours and weekly benefit amount for that week by sevenths, then multiplying by the number of days for which the employee claimed paid family or medical leave for that week. The remainder of the week will be calculated as specified by RCW 50A.15.020(2) and subsection (1)(a) and (b) of this section.

Example 1: An employee has already served a waiting period in the claim year and files a claim for a week of paid medical leave. The employee typically works forty hours a week at eight hours per day. In the week for which the employee is claiming, the employee claimed one day of paid medical leave and worked the other four days. This employee's weekly benefit is usually eight hundred dollars. The weekly benefit would then be prorated by the hours on paid medical leave (eight

hours) relative to the typical workweek hours (forty hours). Eight hours is twenty percent of forty hours. The employee's weekly benefit would be prorated to twenty percent for a total of one hundred sixty dollars.

Example 2: An employee files a claim for eight hours of paid family ((and)) or medical leave and takes sick leave from the employer for the same day. The employer does not offer the sick leave as a supplemental benefit payment. The sick leave is considered hours worked by the employee. The employee is being paid for the same hours claimed on paid family ((and)) or medical leave. This employee is not eligible for benefits for this week.

Example 3: The employee's typical workweek hours are forty hours per week, and the weekly benefit amount is one thousand dollars. The employee files a claim for leave that starts on a Tuesday. Because the employee's claim did not include Sunday or Monday of that week, the employee's typical workweek hours and weekly benefit amount for that week will be prorated by two-sevenths, or two days of the seven days in the week. For that week only, the employee's typical workweek hours will be twenty-eight (five-sevenths of forty, rounded down to the nearest hour) and the weekly benefit amount will be seven hundred fourteen dollars (five-sevenths of one thousand dollars, rounded down to the nearest dollar).

[Statutory Authority: RCW 50A.05.060. WSR 20-20-073, § 192-620-035, filed 10/2/20, effective 11/2/20. Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-620-035, filed 11/19/19, effective 12/20/19.]

OTS-2782.3

NEW SECTION

WAC 192-700-006 What hours are considered worked for the purposes of an employee's eligibility for employment restoration? For the purposes of employment restoration under Title 50A RCW, the number of hours worked is determined in accordance with 29 C.F.R. Sec. 825.110(c) and any subsequent amendments to that regulation.

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NEW SECTION

WAC 192-700-007 Employment restoration requirements for predecessor and successor employers. For the purposes of employment restoration under Title 50A RCW, hours worked for a predecessor employer will be considered worked for the successor employer as described in 29 C.F.R. Sec. 825.107 and any subsequent amendments to that regulation.

Example: An employee works at a florist called ABC Flower Shop. The business is sold to another entity and is renamed XYZ Flower Shop. The new owner applies for a new universal business identifier and is considered a new employer. The employee is retained and continues to

work in a similar job function for the new employer. According to 29 C.F.R. Sec. 825.107 of the federal Family and Medical Leave Act, XYZ Flower Shop is considered a "successor in interest" of ABC Flower Shop. As such, the hours worked by the employee for ABC Flower Shop should be included when considering whether or not employment restoration rights apply to a period of leave taken from XYZ Flower Shop.

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OTS-2783.2

AMENDATORY SECTION (Amending WSR 20-20-073, filed 10/2/20, effective 11/2/20)

WAC 192-800-045 ((When)) Can an appeal be withdrawn? (1) An aggrieved party may withdraw their appeal or petition for review upon approval by the office of administrative hearings or the commissioner's review office, respectively, at any time prior to the decision (~~in which case~~). When an appeal or petition for review is withdrawn, the determination, redetermination, order and notice of assessment of premiums or penalties, or other decision that was appealed, (~~shall be~~) is final in accordance with the provisions of Title 50A RCW.

(2) If an appeal is filed and a determination or redetermination of the decision has been made in the aggrieved party's favor, the appeal will be considered withdrawn unless the aggrieved party contests the withdrawal of the appeal in writing within thirty days of the date of redetermination.

[Statutory Authority: RCW 50A.05.060. WSR 20-20-073, § 192-800-045, filed 10/2/20, effective 11/2/20. Statutory Authority: RCW 50A.04.215. WSR 19-23-090, § 192-800-045, filed 11/19/19, effective 12/20/19.]

NEW SECTION

WAC 192-800-155 When are proceedings open to the public, and what information from a proceeding before the appeal tribunal or commissioner is publicly disclosable? To maintain confidentiality of records under chapter 50A.25 RCW:

(1) All proceedings will be closed to the public unless otherwise agreed upon by all parties appearing for hearing;

(2) All proceeding records will be sealed for hearings closed to the public and are not publicly disclosable; and

(3) All personal identifying information concerning an individual or employer will be redacted from the record if the hearing is open to the public.

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