

WSR 21-11-004  
PROPOSED RULES  
EMPLOYMENT SECURITY DEPARTMENT  
[Filed May 7, 2021, 8:41 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-07-084.

Title of Rule and Other Identifying Information: Hours of availability and suitable work: Adjusting the hours unemployment claimants must be available for work in order to be eligible for unemployment benefits and updating factors used to determine suitable work.

Hearing Location(s): On June 22, 2021, at 9:00 a.m., Zoom, Meeting ID 883 4231 8970, Passcode 938418, Call in 253-215-8782. Join Zoom meeting <https://us02web.zoom.us/j/88342318970?pwd=SXR2eGFRMkh1WlVVbml2Rk02a1BiQT09>.

Date of Intended Adoption: June 25, 2021.

Submit Written Comments to: Joshua Dye, P.O. Box 9046, Olympia, WA 98507-9046, email [rules@esd.wa.gov](mailto:rules@esd.wa.gov), fax 844-652-7096, by June 21, 2021.

Assistance for Persons with Disabilities: Contact Teresa Eckstein, phone 360-507-9890, fax 360-586-4600, TTY relay 711, email [teckstein@es.wa.gov](mailto:teckstein@es.wa.gov), by June 14, 2021.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: Under current rules, unemployment claimants must be available for work during all the usual hours and days of the week customary for their occupation. This requirement can be unobtainable for some claimants who work in 24/7 professions, especially those claimants who have family caregiving responsibilities. Rule making is necessary to set a more obtainable standard.

Additionally, rule making is necessary to include shifts of employment as a factor used to determine suitable work, consistent with Unemployment Insurance Program Letter No. 41-98.

Reasons Supporting Proposal: Current availability requirements force many Washington workers to make difficult choices between providing care necessary for family members and being available for work during unattainable days and hours. Approximately forty percent of industries in Washington are classified as having customary hours of twenty-four hours a day, seven days a week. This forces claimants to be available morning, afternoons, and overnight, even if the claimant had not previously worked shifts during those time frames. Many claimants are unable to accept work different from previous work schedules due to obligations to provide care for a child or vulnerable adult, which precludes the claimant from receiving unemployment insurance (UI) benefits. By removing the requirement that claimants be available for "all of" the customary hours of the industry, claimants are provided flexibility to receive UI benefits while the claimant searches for new suitable employment and still meets obligations for providing care to family members.

Clarifying the definition of suitable work to include previous shifts of employment provides a level of protection for workers. The amended definition of suitable work removes hardships on claimants while protecting charged employers by preventing claimants from imposing undue restrictions on availability.

Statutory Authority for Adoption: RCW 50.12.010 and 50.12.040 provide general rule-making authority to the employment security department (ESD). RCW 50.12.042 provides specific rule-making authority regarding the requirement that unemployment claimants be able to work,

available for work, and actively seek work. RCW 50.20.100 provides rule-making authority to determine what factors are used to determine suitable work.

Statute Being Implemented: RCW 20.12.042 [50.12.042].

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

Name of Proponent: ESD, governmental.

Name of Agency Personnel Responsible for Drafting: Scott Michael, Olympia, 360-890-3448; Implementation and Enforcement: Julie Lord, Olympia, 360-890-3635.

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 Joshua Dye, P.O. Box 9046, Olympia, WA 98507-9046, phone 360-890-3472, email Rules@esd.wa.gov, <https://esd.wa.gov/newsroom/ui-rule-making/>.

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. During a two-year span, the department denied 22,105 claims for claimants who were not available during the work hours and days usual for their type of work. Each claim, on average, represents \$7,285 in charged benefits to an employer. When considering the total denied claims spread across the state-wide employer base, the proposed rule would increase each employers' average charged benefits by \$130.48 per year. An increase of this size is unlikely to increase the tax liability for many employers.

May 7, 2021

Dan Zeitlin

Employment Security

Policy Director

## OTS-1987.1

AMENDATORY SECTION (Amending WSR 16-21-013, filed 10/7/16, effective 11/14/16)

**WAC 192-140-200 What happens if I certify that I am not able to or available for work?** (1) Benefits will be denied or reduced (~~under RCW 50.20.130~~) in accordance with WAC 192-170-020 without requiring additional information or interview if you file a weekly claim that:

(a) States you were not available for work or were not able to work (~~on one or two days of a week or weeks being claimed~~) for at least forty hours during the week during the hours customary for your trade or occupation; and

(b) (~~The day or days to which this condition applies are normal working days in your regular occupation;~~ and

~~(c))~~ The information supplied clearly supports this finding.

~~((This reduction applies only to the day or days for which available information shows you are ineligible for benefits.~~

~~(2) Benefits will be denied under RCW 50.20.010 (1) (c) without requiring additional information or interview if you file a weekly claim that:~~

~~(a) States you were not available for work or were not able to work for three or more days of a week or weeks being claimed; and~~

~~(b) The days to which this condition applies are normal working days in your regular occupation; and~~

~~(c) The information supplied clearly supports this finding.~~

~~This denial applies only to the week or weeks for which you specifically indicate you are ineligible for benefits.~~

~~(3-))~~ (2) Benefits will be denied under RCW 50.20.010 (1)(c) without requiring additional information or interview if you file a weekly claim that indicates you are not able to work or not available for work because of a circumstance that is expected to continue beyond the immediate week or weeks claimed.

This denial will begin with the first week claimed in which the circumstance applies and continue until the circumstance no longer exists.

~~((4-))~~ (3) Any denial of benefits under subsections ~~((2- and 3-))~~ (1) and (2) of this section will be issued without delay. The department will not issue a written decision when benefits are reduced under subsection (1) of this section.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 16-21-013, § 192-140-200, filed 10/7/16, effective 11/14/16. Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042. WSR 05-01-076, § 192-140-200, filed 12/9/04, effective 1/9/05.]

## OTS-1989.1

AMENDATORY SECTION (Amending WSR 10-11-046 [20-11-022], filed 5/12/10 [5/13/20], effective 6/12/10 [7/5/20])

**WAC 192-170-010 Availability for work—RCW 50.20.010.** (1) In general, the department will consider you available for work if you:

(a) Are willing to ~~((work))~~ accept suitable full-time, part-time, and ~~((accept))~~ temporary work during ~~((all of))~~ the usual hours and days of the week customary for your occupation.

(i) You are not required to ~~((be available for))~~ accept part-time or temporary work if it would substantially interfere with your return to your regular occupation.

(ii) The requirement to be ~~((available for))~~ willing to accept full-time work does not apply under the circumstances described in WAC 192-170-050 (1)(b) or 192-170-070;

(b) Are capable of accepting and reporting for any suitable work within the labor market in which you are seeking work;

(c) Do not impose conditions that substantially reduce or limit your opportunity to return to work at the earliest possible time;

(d) Are available for work for at least forty hours during the week during the hours customary for your trade or occupation; and

(e) Are physically present in your normal labor market area, unless you are actively seeking and willing to accept work outside your normal labor market.

(2) You are not considered available for work if you fail or refuse to seek work as required in a directive issued by the department under WAC 192-180-010.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.20.010. WSR 10-11-046, § 192-170-010, filed 5/12/10, effective 6/12/10.]

**Reviser's note:** The bracketed material preceding the section above was supplied by the code reviser's office.

**Reviser's note:** RCW 34.05.395 requires the use of underlining and deletion marks to indicate amendments to existing rules. The rule published above varies from its predecessor in certain respects not indicated by the use of these markings.

#### NEW SECTION

**WAC 192-170-020 Benefit reductions due to only partial availability—RCW 50.20.130(1).** (1) If you are available for at least forty hours during the week during the hours customary for your trade or occupation, benefits will not be reduced under RCW 50.20.130(1).

(2) If you are available for at least thirty-five but less than forty hours during the week during the hours customary for your trade or occupation, your weekly benefit amount will be reduced by one-seventh.

(3) If you are available for at least thirty but less than thirty-five hours during the week during the hours customary for your trade or occupation, your weekly benefit amount will be reduced by two-sevenths.

(4) If you are not available for at least thirty hours during the week during the hours customary for your trade or occupation, benefits will be denied under RCW 50.20.010 (1)(c).

[ ]

AMENDATORY SECTION (Amending WSR 02-08-072, filed 4/2/02, effective 5/3/02)

**WAC 192-170-050 Suitable work factors—RCW 50.20.100 and 50.20.110.** (1) **Physical fitness.** In determining whether work is suitable as defined by RCW 50.20.100 and 50.20.110, the department will consider whether you have a disability that prevents you from performing the essential functions of the job without a substantial risk to your health or safety.

(a) For purposes of this section, the term "disability" means a sensory, mental, or physical condition that:

(i) Is medically recognizable or diagnosable;

(ii) Exists as a record or history; and

(iii) Substantially limits the proper performance of your job.

(b) The department may determine in individual circumstances that less than full-time work is suitable if:

(i) The disability prevents you from working the number of hours that are customary to the occupation;

(ii) You are actively seeking work for the occupation and hours you have the ability to perform; and

(iii) The restriction on the number of hours you can work, the essential functions you can perform, and the occupations you are seeking does not substantially limit your employment prospects within your general area.

(c) To be considered available for suitable work, you must be available for employment in an occupation in keeping with your prior work experience, shifts of employment, education, or training. If such employment is not available in your general area, you must be willing to accept any employment which you have the physical or mental ability to perform.

(d) Disabilities resulting from pregnancy will be treated the same as other disabilities, except that the department will also consider the risk to your pregnancy when deciding whether work is suitable.

(e) The department will require verification from a physician of your disability, including:

(i) The restrictions on the tasks or work-related functions you can perform;

(ii) The restrictions on the number of hours you can work, if any;

(iii) The expected duration of the disability and resulting work restrictions; and

(iv) The types of tasks or work-related functions you are able to perform with this disability, if known by the physician.

(2) **Definitions.** For the purposes of this chapter:

(a) "General area" means an individual's labor market area and includes the geographic area within which an individual would customarily seek work in a given occupation.

(b) "Physician" means a person licensed to practice one or more of the following professions: Medicine and surgery (including, but not limited to, psychiatry); osteopathic medicine and surgery; chiropractic; naturopathic medicine; podiatry.

[Statutory Authority: RCW 50.12.010, 50.12.040, 50.20.010. WSR 02-08-072, § 192-170-050, filed 4/2/02, effective 5/3/02.]

AMENDATORY SECTION (Amending WSR 05-19-018, filed 9/9/05, effective 10/10/05)

**WAC 192-170-070 What are the availability requirements for part-time eligible workers?—RCW 50.20.119.** ~~((+1+))~~ If you are a part-time eligible worker as defined in RCW 50.20.119 ~~((, you may limit your availability for work to))~~:

(1) You must be willing to accept work of 17 or fewer hours per week. You may refuse any job of 18 or more hours per week.

(2) You must be available for work at least 17 hours per week during the usual hours and days of the week customary for your occupation. For example, if your occupation normally requires both day and evening hours of work, you must be available for work both day and evening hours.

~~(3) You must ((be available for work all days of the week that are usual for your occupation, even if you have not worked those days in the past. If you are not available for work on any day that is a usual day of work for your occupation, we will reduce your benefits~~

~~under RCW 50.20.130. For example, if your occupation usually works Monday through Friday, you must be available for work Monday through Friday, even if you have only worked weekends in the past)) not impose conditions on your availability that substantially reduce or limit your opportunity to return to work at the earliest possible time.~~

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.12.042. WSR 05-19-018, § 192-170-070, filed 9/9/05, effective 10/10/05.]

AMENDATORY SECTION (Amending WSR 10-11-046, filed 5/12/10, effective 6/12/10)

**WAC 192-170-090 Incarceration.** (1) If you were previously warned that your continued employment was in jeopardy because of poor attendance, and you engage in illegal activities where you are aware there is a clear possibility of arrest and detention, misconduct may be established under RCW 50.04.294 (2)(d) or (e).

(2) If you are jailed but later released without having been charged with or convicted of a crime, the separation is not considered misconduct except as provided in subsection (3) of this section.

(3) If your employer discharges you for absenteeism or job abandonment because you failed without good cause to notify the employer of your incarceration or anticipated release date, such failure may be considered misconduct.

~~((4) You will be considered unavailable for work during any days in which you are incarcerated unless those days are not part of your regular work week based on your occupation. Example: You are sentenced to a specific time in custody but allowed to serve your time on weekends. If weekends are not part of your regular work week, you will be considered available for work.))~~

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.20.010. WSR 10-11-046, § 192-170-090, filed 5/12/10, effective 6/12/10.]

## OTS-1988.1

AMENDATORY SECTION (Amending WSR 10-11-046, filed 5/12/10, effective 6/12/10)

### **WAC 192-200-005 Disqualification of students—RCW 50.20.095.**

(1) **General rule.** If you are registered in a course of study that provides scholastic instruction of twelve or more credit hours per week, you are disqualified from receiving benefits or credit for your waiting week.

(2) **Period of disqualification.** The disqualification starts with the week the instruction begins or the week you left employment to return to school, whichever is earlier. The disqualification ends at midnight on Saturday of the week prior to the first full week in which you are no longer registered for twelve or more hours of instruction. You must certify to the department that you are not currently regis-

tered for twelve or more credit hours and will not be registered for twelve or more credit hours for at least sixty days. If you begin classes within sixty days, all benefits paid since the date of your certification will be considered an overpayment. This overpayment is subject to recovery under RCW 50.20.190. If you are registered for classes that begin more than sixty days in the future, you will not be disqualified under this subsection.

(3) **Disqualification not applicable.** The disqualification does not apply if you:

(a) Are in approved training under RCW 50.20.043;

(b) Are in an approved self-employment assistance program under RCW 50.20.250; or

(c) Show by a preponderance of the evidence that ~~((your student status does not significantly interfere with your actual availability for work when you apply))~~ you meet the availability requirements in chapter 192-170 WAC.

(4) **Definitions.** As used in this section:

(a) "School" includes primary schools, secondary schools, and institutions of higher education as defined in RCW 50.44.037;

(b) "Scholastic instruction" includes all teaching or opportunity for learning subjects other than those of a strictly vocational nature. Subjects of a vocational nature are those embraced in the definition of "training" contained in WAC 192-200-010.

(c) "Twelve or more hours per week" means 12 or more credit hours per week or its equivalent.

(5) **Students.** Students who claim benefits are subject to all of the provisions of Title 50 RCW including:

(a) RCW 50.20.050 dealing with those who leave work voluntarily without good cause;

(b) RCW 50.20.010 (1)(c) requiring claimants to be able and available for and actively seeking work; and

(c) RCW 50.20.240 requiring claimants to provide evidence of their job search activities as requested by the department.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.20.010. WSR 10-11-046, § 192-200-005, filed 5/12/10, effective 6/12/10. Statutory Authority: RCW 50.12.010, 50.12.040, 50.20.010, 50.20.250(7) and 50.20.012. WSR 07-23-129, § 192-200-005, filed 11/21/07, effective 1/1/08. Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042. WSR 05-01-076, § 192-200-005, filed 12/9/04, effective 1/9/05.]