

WSR 22-19-059

PROPOSED RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed September 16, 2022, 10:13 a.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-16-008.

Title of Rule and Other Identifying Information: WAC 192-04-145

Brief adjudicative proceedings.

Hearing Location(s): On October 27, 2022, at 9:00 a.m., Microsoft Teams, Meeting ID 285 578 340 328, Passcode EcuvLs, Call-in 564-999-2000, Call-in ID 876 109 274#. Join Teams meeting [https://teams.microsoft.com/l/meetup-join/19%3ameeting_NTcyZTc4Y2YtYmU3MC00MjkzLWFhMmItZDYyNTZmZDgyMjVl%40thread.v2/0?](https://teams.microsoft.com/l/meetup-join/19%3ameeting_NTcyZTc4Y2YtYmU3MC00MjkzLWFhMmItZDYyNTZmZDgyMjVl%40thread.v2/0?context=%7b%22Tid%22%3a%2211d0e217-264e-400a-8ba0-57dcc127d72d%22%2c%22Oid%22%3a%22f5b90483-feb0-49a0-8e23-8b3e55021c0b%22%7d)

context=%7b%22Tid%22%3a%2211d0e217-264e-400a-8ba0-57dcc127d72d%22%2c%22Oid%22%3a%22f5b90483-feb0-49a0-8e23-8b3e55021c0b%22%7d.

Date of Intended Adoption: October 31, 2022.

Submit Written Comments to: Josh Dye, P.O. Box 9046, Olympia, WA 98507-9046, email rules@esd.wa.gov, fax 844-652-7096, by October 13, 2022.

Assistance for Persons with Disabilities: Contact Teresa Eckstein, phone 360-507-9890, fax 360-586-4600, TTY relay 711, email teresa.eckstein@esd.wa.gov, by October 6, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The new proceedings create an accelerated path for claims to be adjudicated that will allow the office of administrative hearings (OAH) to resolve a larger number of cases.

Reasons Supporting Proposal: Due to unprecedented unemployment insurance claims during the COVID-19 pandemic, the department and OAH have a backlog of 40,947 pending appeals as of December 31, 2021. For comparison, there were 27,127 pending appeals at the end of 2020, and 2,470 at the end of 2019. This backlog has led to an average wait time of 167.3 days for appeals closed during December of 2021, compared to an average wait time of 31.58 days during December of 2019. The United States Department of Labor's performance metric calls for 60 percent of appeals to be resolved within 30 days and 80 percent of appeals to be resolved within 45 days. In December 2019, the department closed 71 percent of cases within 30 days and 94 percent of cases within 45 days. In December 2021, only two percent of appeals were resolved within 30 days and four percent of appeals within 45 days.

Currently, the department is referring between 400 and 500 cases per day (2,000 to 2,500 per week) to OAH. This trend is expected to continue through the end of the year with continued unemployment insurance claims processing associated with federal pandemic programs, such as the mixed earner unemployment compensation program.

Using the brief adjudicative proceedings authorized by emergency rule filed in WSR 22-08-045, administrative law judges were able to process between 60 and 75 proceedings each week, up from 24 per week for full hearings. From May 16, 2022, through June 24, 2022, OAH processed 1,656 claims.

Statutory Authority for Adoption: RCW 50.12.010 and 50.12.040 provide general rule-making authority to the employment security department (ESD).

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

Name of Proponent: ESD, OAH, governmental.

Name of Agency Personnel Responsible for Drafting: Josh Dye, Olympia, 360-890-3472; Implementation and Enforcement: Brendon Tukey, Spokane Valley, 509-867-7948.

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 is a procedural rule as defined in RCW 34.05.328 (5)(c)(i)(A) and not a significant legislative rule.

Scope of exemption for rule proposal from Regulatory Fairness Act requirements:

Is not exempt.

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. Brief adjudicative proceedings do not expand benefit eligibility. The new proceedings create an accelerated path for claims to be adjudicated. As such, there are no impacts on employers.

September 16, 2022

Dan Zeitlin

Employment System Policy Director

OTS-3641.1

NEW SECTION

WAC 192-04-145 Brief adjudicative proceedings. (1) **Adoption of brief adjudicative proceedings.** Pursuant to RCW 34.05.410 (1)(a), the department hereby adopts the use of brief adjudicative proceedings for use in appeals.

(a) RCW 34.05.488 and 34.05.491 shall not apply to brief adjudicative proceedings under this rule.

(b) Brief adjudicative proceedings will only be used if:

(i) The appeal involves a claim for benefits;

(ii) The appeal is filed by a claimant;

(iii) No employer is an interested party pursuant to WAC 192-04-040; and

(iv) The presiding administrative law judge, in their sole discretion, determines a brief adjudicating proceeding is warranted.

(2) **Procedure for brief adjudicative proceedings.** The following procedural rules will apply to brief adjudicative proceedings:

(a) An administrative law judge with the office of administrative hearings will conduct the brief adjudicative proceeding.

(b) Not less than seven days before the date of the hearing, the office of administrative hearings shall serve notice on the claimant pursuant to WAC 10-08-040 that a brief adjudicative proceeding will occur. The notice of hearing will contain the following:

(i) Notice that the claimant may submit additional relevant documentary evidence and sworn oral statements, if desired, along with a date by which these submissions must be made and instructions for doing so;

(ii) Instructions for how the department or claimant may request that the brief adjudicative proceeding may be converted to a regular

proceeding pursuant to subsection (4) of this section and the date by which such request must be submitted; and

(iii) The date of the brief adjudicative proceeding.

(c) The administrative law judge, in their sole discretion, may send a written request for additional evidence from the claimant or the department. The request will contain instructions for how to submit the additional evidence and the date by which additional evidence must be submitted.

(d) The administrative law judge's review will be limited to the record defined in subsection (3) of this section.

(e) If the claimant fails to provide any additional relevant documentary evidence or sworn oral statements, the administrative law judge will affirm the department's determination unless the evidence provided by the department is sufficient to resolve the matter in the claimant's favor.

(f) The administrative law judge shall issue a written decision consistent with WAC 192-04-150.

(3) **Record for brief adjudicative proceeding.** The record with respect to brief adjudicative proceedings will consist of the following:

(a) The department's determination letter;

(b) The claimant's appeal of the determination letter;

(c) All records relied upon by the department in support of its determination letter;

(d) Any additional records submitted by the department;

(e) Any additional records or sworn oral statements submitted by the claimant; and

(f) Any additional evidence submitted by the parties at the written request of the administrative law judge.

(4) **Conversion of brief adjudicative proceeding to regular proceeding.**

(a) A brief adjudicative proceeding will be converted to a regular proceeding if:

(i) The claimant files a conversion request by the deadline listed in the notice of the brief adjudicative proceeding. Such a request shall be automatically granted by the administrative law judge; or

(ii) The department files a conversion request by the deadline listed in the notice of the brief adjudicative proceeding. Such a request shall be automatically granted by the administrative law judge; or

(iii) The administrative law judge, at any time prior to issuing a written decision, determines the brief adjudicative proceeding shall be converted to a regular proceeding. Reasons the administrative law judge may convert the brief adjudicative proceeding to a regular proceeding may include, but are not limited to:

(A) The use of the brief adjudicative proceeding procedures violates any provision of law;

(B) The protection of the public interest requires that notice and an opportunity to be heard be given to persons other than the claimant and the department;

(C) A regular proceeding is required to adequately develop the record and decide the issues in the appeal; or

(D) The issues and interests involved otherwise warrant the use of the procedures in a regular proceeding.

(b) When a brief adjudicative proceeding is converted to a regular proceeding, the office of administrative hearings shall issue a new notice of hearing.

(5) **Right to petition for review.** A party aggrieved by a decision issued by an administrative law judge pursuant to a brief adjudicative proceeding shall have the same right to petition for review as contained in WAC 192-04-060. In conducting this review of the brief adjudicative proceeding, prior to rendering a decision, the commissioner shall order the taking of additional evidence by the office of administrative hearings to be made a part of the record in the case.

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