

WSR 23-04-079

PERMANENT RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed January 31, 2023, 8:37 a.m., effective March 3, 2023]

Effective Date of Rule: Thirty-one days after filing.

Purpose: In May of 2022, the employment security department (ESD) received a petition requesting that ESD amend WAC 192-170-080 to eliminate WAC 192-170-080 (1)(a), which states, "If you are on a leave of absence, you are not unemployed and thus not eligible for benefits."

WAC 192-170-080 (1)(a), which states that someone on a leave of absence is not "unemployed," was determined to be "invalid" by the commissioner of ESD in 2011 under *In re Ausburn*, Empl. Sec. Comm'r Dec.2d 971 (2011). In 2021, the United States Department of Labor issued guidance stating an individual should be considered "unemployed" when the individual incurs a reduction in work hours and their wages are less than their weekly benefit amount. Unemployment Insurance Program Letter No. 3-22 (Nov. 22, 2021).

Citation of Rules Affected by this Order: Amending WAC 192-170-080.

Statutory Authority for Adoption: RCW 50.12.010 and 50.12.040 provide general rule-making authority to ESD. RCW 50.04.310 defines when an individual is "unemployed" and "not unemployed."

Adopted under notice filed as WSR 22-23-065 on November 9, 2022.

A final cost-benefit analysis is available by contacting Josh Dye, P.O. Box 9046, Olympia, WA 98507-9046, phone 360-890-3472, fax 844-652-7096, TTY relay 771, email rules@esd.wa.gov, website <https://www.esd.wa.gov/newsroom/ui-rulemaking/standard-occupational-code-reporting>.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 1, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: January 31, 2022.

Dan Zeitlin
Employment System Policy Director

OTS-4059.2

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

WAC 192-170-080 Leave of absence. (1) A leave of absence is an absence from work mutually and voluntarily agreed upon by you and your

employer or a collective bargaining agent, or leave to which you are entitled under federal or state law, where the employer-employee relationship is continued and you will be reinstated in the same or similar job when the leave expires.

(a) If you are on a leave of absence, you are (~~not unemployed and thus not eligible for benefits~~) eligible for unemployment insurance benefits as long as you meet:

(i) The definition of "unemployed" per RCW 50.04.310; and

(ii) All other eligibility requirements provided per RCW 50.20.010.

(b) If you choose not to return to work when the leave of absence ends, the separation is treated as a voluntary quit. The separation date will be the first working day after the leave expires.

(c) If no job is available with the employer when the leave of absence ends, the separation is treated as a layoff due to a lack of work.

(d) If you have been on medical leave and are released for work by your medical provider, but your employer refuses to permit you to return to work, you are considered to be laid off due to a lack of work and potentially eligible for benefits.

(2) A leave of absence does not exist if the employer offers you only a preference for rehire or a promise of a job if work exists at the end of the leave. An employee-initiated leave that only provides fringe benefits during the leave or preferential status for reemployment is not a leave of absence but a voluntary quit.

(3) A temporary or indefinite disciplinary suspension from work by the employer is not a leave of absence. The department will treat this as a suspension.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.20.010. WSR 10-11-046, § 192-170-080, filed 5/12/10, effective 6/12/10.]