

WSR 24-06-080
PROPOSED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed March 5, 2024, 3:31 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-21-058.

Title of Rule and Other Identifying Information: Chapter 296-136 WAC, Labor standards for quotas at warehouse distribution centers. New chapter under Title 296 WAC, Department of labor and industries (L&I).

Hearing Location(s): On April 9, 2024, at 9:30 a.m., at the Spokane Enduris Training Center, 1610 South Technology Boulevard, Spokane, WA 99224. A prehearing overview will begin at 9:00 a.m. The hearing will start at 9:30 a.m. and will continue until all oral comments are received. This public hearing will be held jointly with L&I's division of occupational safety and health (DOSH);

On April 11, 2024, at 6:00 p.m., virtual/telephonic hearing. Join electronically <https://lni-wa-gov.zoom.us/j/89225681620?pwd=bkh6emF3bGUraHlxbFk5dTJ2TjJMOT09>, Passcode Ware@530; or join by phone (audio only) US 253-215-8782, Meeting ID 892 2568 1620, Passcode 12275394. A prehearing overview will begin at 5:30 p.m. The hearing will start at 6:00 p.m. and will continue until all oral comments are received. This public hearing will be held jointly with L&I's DOSH; and

On April 15, 2024, at 1:30 p.m., at L&I, 12806 Gateway Drive South, Tukwila, WA 98168. A prehearing overview will begin at 1:00 p.m. The hearing will start at 1:30 p.m. and will continue until all oral comments are received. This public hearing will be held jointly with L&I's DOSH.

Date of Intended Adoption: May 31, 2024.

Submit Written Comments to: Reed Simock, L&I, Fraud Prevention and Labor Standards (FPLS), Employment Standards, P.O. Box 44510, Olympia, WA 98504-4510, email WarehouseRules@Lni.wa.gov, fax 360-902-5300, by April 22, 2024, by 5:00 p.m.

Assistance for Persons with Disabilities: Contact Reed Simock, phone 360-480-3237, fax 360-902-5300. email WarehouseRules@Lni.wa.gov, by April 1, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington state legislature passed 2SHB 1762, chapter 306, Laws of 2023, during the 2023 legislative session. 2SHB 1762, codified under chapter 49.84 RCW, establishes protections for employees at certain warehouse distribution centers who are subject to quotas. L&I's FPLS division enforces the following labor standards under chapter 49.84 RCW:

- Provide quota descriptions to employees.
- Ensure quotas account for:
 - o Rest breaks.
 - o Time to travel to break locations.
 - o Time to perform an activity required by the employer to complete the work subject to a quota.
- Prohibit retaliation.

FPLS is adopting rules to clarify and implement the requirements of 2SHB 1762. The proposed rules also describe FPLS's enforcement mechanisms, including the complaint, investigation, citation, and ap-

peals processes. The proposed rules also provide for remedies and penalties for violations of the rules.

Other requirements related to quotas for workers at certain warehouse distribution centers under chapter 49.84 RCW are enforced by L&I's DOSH. DOSH is conducting simultaneous rule making for the provisions of chapter 49.84 RCW enforced by the division in chapter 296-35 WAC.

Reasons Supporting Proposal: Rules are needed to clarify and enforce the new requirements of 2SHB 1762, codified in chapter 49.84 RCW.

Statutory Authority for Adoption: RCW 49.84.060.

Statute Being Implemented: RCW 49.84.020, 49.84.030, 49.84.035, 49.84.037, 49.84.040, 49.84.045, 49.84.050.

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

Name of Proponent: L&I, governmental.

Name of Agency Personnel Responsible for Drafting: Reed Simock, Tumwater, Washington, 360-480-3237; Implementation and Enforcement: Bryan Templeton, Tumwater, Washington, 360-902-5310.

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 Reed Simock, L&I, FPLS, Employment Standards, P.O. Box 44510, Olympia, WA 98504-4510, phone 360-480-3237, fax 360-902-5300, email Warehouse-Rules@Lni.wa.gov.

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(4).

Explanation of exemptions: Under RCW 49.84.010 (9)(a), the proposed rule only applies to employers with 100 [or] more employees at a single warehouse distribution center in the state or 1,000 or more employees at one or more warehouse distribution centers in the state.

Scope of exemption for rule proposal:

Is fully exempt.

March 5, 2024
Joel Sacks
Director

OTS-5225.3

**Chapter 296-136 WAC
LABOR STANDARDS FOR QUOTAS AT WAREHOUSE DISTRIBUTION CENTERS**

NEW SECTION

WAC 296-136-010 Definitions. (1) "Adverse action" means any action taken or threatened by an employer against an employee for their

exercise of chapter 49.84 RCW rights, which may include, but is not limited to:

- (a) Terminating, suspending, demoting, or denying a promotion;
- (b) Changing the number of work hours for which the employee is scheduled;
- (c) Altering the employee's preexisting work schedule;
- (d) Reducing the employee's rate of pay;
- (e) Threatening to take, or taking action, based upon the immigration status of an employee, former employee, or an employee or former employee's family member; and
- (f) Preventing future job opportunities whether for the employer or elsewhere.

(2) "Affiliate" means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. For purposes of this subsection, "control" means the possession, directly or indirectly, of more than 50 percent of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(3) "Aggregated data" has the same meaning as "aggregated work speed data" and means information that an employer has combined or collected in summary or other form such that the data cannot be identified with any individual.

(4) "Defined time period" means any unit of time measurement equal to or less than the duration of an employee's shift, and includes hours, minutes, and seconds and any fraction thereof.

(5) "Department" means the department of labor and industries.

(6) "Designated employee representative" means any employee representative including, but not limited to, an authorized employee representative that has a collective bargaining relationship with the employer.

(7) "Director" means the director of the department of labor and industries or the director's designee.

(8) "Employee" means an employee who is not exempt under RCW 49.46.010 (3)(c) and works at a warehouse distribution center.

(9) "Employee work speed data" has the same meaning as "work speed data" and means information an employer collects, stores, analyzes, or interprets relating to an individual employee's performance of a quota including, but not limited to, quantities of tasks performed, quantities of items or materials handled or produced, rates or speeds of tasks performed, measurements or metrics of employee performance in relation to a quota, and time categorized as performing tasks or not performing tasks. Work speed data does not include qualitative performance assessments, personnel records, or itemized wage statements pursuant to department rules, except for any content of those records that includes work speed data as defined in this subsection.

(10) "Employer" means a person who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary services, or staffing agency, independent contractor, or any similar entity, at any time, employs or exercises control over the wages, hours, or working conditions of 100 or more employees at a single warehouse distribution center in the state or 1,000 or more employees at one or more warehouse distribution centers in the state.

(a) For the purposes of determining the number of employees employed at a single warehouse distribution center or at one or more

warehouse distribution centers, all employees employed directly or indirectly, or through an agency or any other person, and all employees employed by an employer and its affiliates, must be counted.

(b) For the purposes of determining responsible employers, all agents or other persons, and affiliates must be deemed employers and are jointly and severally responsible for compliance with this chapter.

(11) "Establishment" means a single physical location where business is conducted or where services or industrial operations are performed. Normally, one business location has only one establishment. When distinct and separate economic activities are performed at a single physical location each would be considered separate establishments provided:

(a) No one industry description in the North American Industrial Classification System applies to the joint activities of the establishments;

(b) Separate reports are routinely prepared for each establishment on the number of employees, their wages and salaries, sales or receipts, and other business information; and

(c) Employment and output are significant for both activities.

(12) "Person" means an individual, corporation, partnership, limited partnership, limited liability partnership, limited liability company, business trust, estate, trust, association, joint venture, agency, instrumentality, or any other legal or commercial entity, whether domestic or foreign.

(13) "Plain language" means language that is clear, concise, and visually easy to read. It must use common words, rather than jargon, acronyms, or unnecessary legal language.

(14) "Preferred language" means the employee's language of choice.

(15) "Quota" means a work performance standard, whether required or recommended, where:

(a) An employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard; or

(b) An employee's actions are categorized between time performing tasks and not performing tasks, if the employee may suffer an adverse employment action if they fail to meet the performance standard.

(16) "Reasonable travel time" means that the employee must have enough time to access break locations considering the architecture and geography of the facility and location within the facility that the employee is located at the time a break is required.

(17) "Similar employee" means a covered employee performing similar tasks at the same warehouse distribution center.

(18) "Warehouse distribution center" means an establishment engaged in activities as defined by any of the following North American Industry Classification System codes; however, such establishment is denominated:

(a) 493 for warehousing and storage, but does not include 493130 for farm product warehousing and storage;

(b) 423 for merchant wholesalers, durable goods;

(c) 424 for merchant wholesalers, nondurable goods; or

(d) 454110 for electronic shopping and mail-order houses.

NEW SECTION

WAC 296-136-020 Determining employer size for quota requirement coverage. Employer size for the purposes of this chapter is determined based on the number of employees on the day of the alleged violation or the average number of employees over the previous 12 months, whichever is greater. For businesses operating less than one year, the size is based on the maximum number of employees since the company has been in business.

NEW SECTION

WAC 296-136-030 Warehouse quota written descriptions and notices. (1) An employer must provide to each employee, upon hire, or within 30 calendar days of July 1, 2024, a written description as required by RCW 49.84.020 which includes:

- (a) Each quota to which the employee is subject, including the quantified number of tasks to be performed or materials to be produced or handled within a defined time period;
- (b) Any potential adverse employment action that could result from failure to meet each quota; and
- (c) Any incentives or bonus programs associated with meeting or exceeding each quota.

(2) The format of the written description may be provided in an electronic or hard copy.

(3) The written description must be in plain language.

(4) The initial written description must be provided immediately in English or English and the employee's choice of the top six other languages spoken in the state, according to the current languages identified by the Washington office of financial management. If an employee makes the employer aware of a preferred language outside of English and the top six other languages spoken in the state, the employee must receive the initial written description within 15 calendar days and any future written descriptions in their preferred language and English.

(5) The written description must inform the employee of their protections under RCW 49.84.020 and associated rules.

(6) When providing a written description with an incentive or bonus program associated, such description must:

- (a) Describe any rate(s) in which the incentive or bonus is paid; and
- (b) How any rate(s) apply to the quantified number of tasks to be performed or materials to be produced or handled within a defined time period.

(7) Whenever there is a change to the quota that results in a different quota than the most recent written description provided to the employee, the employer must:

- (a) Notify the employee verbally or in writing as soon as possible and before the employee is subject to the new quota; and
- (b) Provide the employee with an updated written description of each quota to which the employee is subject within two business days of the quota change in English and the employee's choice of the top six other languages spoken in the state, according to the current languages identified by the Washington office of financial management, or

any preferred language outside of English and the top six other languages spoken in the state, if previously identified by the employee.

(8) Whenever an employer takes an adverse action against an employee in whole or in part for failure to meet a quota, the employer must provide that employee with the applicable quota for the employee and the personal work speed data for the employee that was the basis for the adverse action.

NEW SECTION

WAC 296-136-040 Quota time periods and reasonable travel time.

(1) The time period considered in a quota, including time designated as productive time or time on task must include:

(a) Time for rest breaks and reasonable time to travel to designated locations for rest breaks;

(b) Reasonable travel time to on-site designated meal break locations. Meal breaks are not considered time on task or productive time unless the employee is required by the employer to remain on duty on the premises or at a prescribed worksite in the interest of the employer;

(c) Time to perform any activity required by the employer in order to do the work subject to any quota;

(d) Time to use the bathroom, including reasonable travel time; and

(e) Time to take any actions necessary for the employee to exercise the employee's right to a safe and healthful workplace pursuant to chapter 49.17 RCW including, but not limited to, time to access tools or safety equipment necessary to perform the employee's duties.

(2) "Reasonable travel time" allows any employee enough time to access break locations and must consider the architecture and geography of the facility and location within the facility that the employee is located at the time a break is required.

(3) Employees must be allowed time to take meal and rest periods as required by WAC 296-126-092.

(4) Employees paid on a commission or piece work basis, wholly or partially, must be paid in accordance with WAC 296-126-021.

NEW SECTION

WAC 296-136-050 Labor standard quota violations except under chapter 49.17 RCW. (1) A quota violates a labor standard under chapter 49.84 RCW and applicable labor standard rules if the quota:

(a) Does not provide sufficient time as required under RCW 49.84.025 (1) (a), (b), and (c); or

(b) Prevents the performance of any activity required by the employer for the employee to do the work subject to any quota. "Any activity" includes travel to food safety stations, clock in stations, or supervisor check-ins.

(2) An employee is not required to meet a quota that violates chapter 49.84 RCW or any applicable labor standard rule.

(3) An employer may not take adverse action against an employee for failing to meet a quota that violates RCW 49.84.030, this section,

or that was not disclosed to the employee as required under RCW 49.84.020 and any applicable rule.

NEW SECTION

WAC 296-136-060 Employer recordkeeping requirements. (1) An employer must establish, maintain, and preserve contemporaneous, true, and accurate records of the following:

- (a) Each employee's own personal work speed data;
- (b) The aggregated work speed data for similar employees at the same warehouse distribution center; and
- (c) The written descriptions of each quota the employee was provided pursuant to RCW 49.84.020 and any applicable rule.

(2) The required records must be maintained and preserved throughout the duration of each employee's period of employment and for the period required by this subsection.

(a) Except as required under (b) of this subsection, subsequent to an employee's separation from the employer, records relating to the six-month period prior to the date of the employee's separation from the employer must be preserved for at least three years from the date of the employee's separation.

(b) Where an employer has taken adverse action against an employee in whole or in part for failure to meet a quota, the employer must preserve the records relating to the basis for the adverse action for at least three years from the date of the adverse action.

(c) The employer must make records available to the director upon request.

(3) Records on how the time periods required under RCW 49.84.025 or WAC 296-136-040 were considered in determining any quota must be preserved for three years.

(4) Nothing in this section requires an employer to collect or keep such records if the employer does not use quotas or monitor work speed data.

(5) An employer who fails to allow adequate inspection of records in an inspection by the department within a reasonable time period may not use such records in any appeal to challenge the correctness of any citation and notice issued by the department.

NEW SECTION

WAC 296-136-070 Employee right to request written description and records. (1) An employee has the right to request, at any time, a written description of each quota to which the employee is subject, a copy of the employee's own personal work speed data for the prior six months, and a copy of the prior six months of aggregated work speed data for similar employees at the same warehouse distribution center.

(2) A former employee has the right to request, within three years subsequent to the date of their separation from the employer, a written description of the quota to which they were subject as of the date of their separation, a copy of the employee's own personal work speed data for the six months prior to their date of separation, and a copy of aggregated work speed data for similar employees at the same

warehouse distribution center for the six months prior to their date of separation.

(3) An employer must provide records requested under this section at no cost to the employee or former employee.

(4) An employer must provide records requested under this section as soon as practicable and subject to the following:

(a) Requested records of written descriptions of a quota must be provided no later than two business days following the date of the receipt of the request;

(b) Requested personal work speed data and aggregated work speed data must be provided no later than seven business days following the date of the receipt of the request; and

(c) Requested written descriptions must be available in the employee's preferred language.

(5) Nothing in this section requires an employer to use quotas or monitor work speed data. An employer that does not use quotas or monitor work speed data has no obligation to provide records under this section.

NEW SECTION

WAC 296-136-080 Protection from adverse action for failure to meet a quota in violation of labor standards. (1) An employer may not take adverse action against an employee in whole or in part for failing to meet a quota that violates RCW 49.84.030 or this chapter. A quota that violates the law may not be any factor leading to an adverse action by the employer.

(2) A person who has adverse action taken against them in whole or in part for failure to meet a quota that violates RCW 49.84.030 or this chapter may file a complaint with the department in accordance with WAC 296-136-140.

NEW SECTION

WAC 296-136-090 Retaliation protections. (1) A person including, but not limited to, an employer, his or her agent, or person acting as or on behalf of a hiring entity, or the officer or agent of any entity, business, corporation, partnership, or limited liability company, may not discharge or in any way retaliate, discriminate, or take adverse action against an employee or former employee for exercising any rights established in this chapter, or for being perceived as exercising rights established in this chapter including, but not limited to:

(a) Initiating a request for information about a quota or personal work speed data pursuant to RCW 49.84.037 or associated rules; and

(b) Making a complaint to the employer, the director, or any local, state, or federal governmental agency or official, related to a quota that is allegedly in violation of this chapter.

(2) An employee or former employee need not explicitly refer to this section or the rights established in this chapter to be protected from an adverse action. The protection provided in this section applies to former employees and to employees who mistakenly but in good faith allege violations of this chapter.

(3) (a) If a person takes adverse action against an employee or former employee within 90 days of the employee engaging or attempting to engage in activities protected by this chapter, there is a rebuttable presumption that the adverse action is a retaliatory action in violation of this section.

(b) The presumption may be rebutted by a preponderance of the evidence that:

(i) The action was taken for other permissible reasons; and

(ii) The engaging or attempting to engage in activities protected by this chapter was not a motivating factor in the adverse action.

(4) An employee or former employee who believes that they were subject to retaliation under this section may file a complaint with the department in accordance with WAC 296-136-140.

NEW SECTION

WAC 296-136-100 Department investigations. (1) (a) An employee may file a complaint with the department alleging a violation under this chapter or applicable rules under this section, except for violations and enforcement of RCW 49.84.032 and 49.84.040 and associated rules. The department must investigate the complaint.

(b) The department may not investigate any such alleged violation of rights that occurred more than three years before the date that the employee filed the complaint.

(c) If an employee files a timely complaint with the department, the department must investigate the complaint and issue either a citation and notice of assessment or a determination of compliance within 90 days after the date on which the department received the complaint, unless the complaint is otherwise resolved. The department may extend the period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the period and specifying the duration of the extension.

(d) The department must send the citation and notice of assessment or the determination of compliance to both the employer and the employee by service of process or using a method by which the mailing can be tracked or the delivery can be confirmed to their last known addresses.

(2) If the department's investigation finds that the employee's allegation cannot be substantiated, the department must issue a determination of compliance to the employee and the employer detailing such finding.

(3) The director or their designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as they may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter.

(4) The director may initiate an investigation without an employee's complaint to ensure compliance with this chapter. The department may also initiate an investigation on behalf of one or more employees when the director otherwise has reason to believe that a violation has occurred or will occur.

(5) The department may conduct a consolidated investigation for any alleged violation identified under chapter 49.84 RCW, or associated rules, when there are common questions of law or fact. If the department consolidates such matters into a single investigation, it will provide notice to the employer.

(6) The department may request an employer perform a self-audit of any records relating to chapter 49.84 RCW which must be provided within a reasonable time. Reasonable timelines will be specified in the self-audit request. The department must determine reasonable time based on the number of affected employees and the period of time covered by the self-audit. The records examined by the employer in order to perform the self-audit must be made available to the department upon request.

(7) Upon the department's request, an employer must notify affected employees in writing that the department is conducting an investigation. The department may require the employer to include a general description of each investigation as part of the notification, including the allegations and whether the notified employee may be affected. The employer may consult with the department to provide the information for the description of the notification of investigation.

(8) Upon receiving a complaint, the department may request or subpoena the records of the warehouse distribution center.

(9) In addition to any enforcement authority provided in this chapter or applicable rules, the department may enforce any violation under this chapter or applicable rules, except for violations and enforcement of RCW 49.84.032, by filing an action in the superior court for the county in which the violation is alleged to have occurred. If the department prevails, it is entitled to reasonable attorneys' fees and costs, in the amount to be determined by the court.

NEW SECTION

WAC 296-136-110 Investigation—Civil penalties. (1) If the department determines that the employer has violated a requirement of WAC 296-136-100, the department may order the employer to pay the department a civil penalty of not less than \$1,000 for a first violation. Repeat violations may escalate as follows: The second violation may not exceed \$5,000. The third violation and each violation thereafter may not exceed \$10,000.

(2) For enforcement actions under this section, if any person fails to pay an assessment under this chapter, or under any rule under this chapter, after it has become a final and unappealable order, or after the court has entered final judgment in favor of the agency, the director may initiate collection procedures in accordance with the collection procedures under RCW 49.48.086.

(3) If the department finds that a quota violates chapter 49.84 RCW, the department may order the employer to review and provide a corrected written quota to the affected employee or employees within 15 calendar days and place a letter in the employee's personnel file to acknowledge the correction. If the employer fails to do so, the employer may be subject to the penalties under subsection (1) of this section and associated rules.

(4) Civil penalties must be deposited into the supplemental pension fund established under RCW 51.44.033.

NEW SECTION

WAC 296-136-120 Enforcement of meal and rest break violations resulting from quota violations. (1) If an employee files a complaint with the department alleging that employer has violated a requirement of this chapter or any rule adopted under this chapter resulting in a rest or meal period violation, the department will investigate the complaint pursuant to the procedures outlined in RCW 49.84.045, WAC 296-136-100, and 296-136-130.

(2) During an investigation, if the department discovers information suggesting additional violations of chapter 49.84 RCW or associated rules, the department may investigate and take appropriate enforcement action without any additional complaint in accordance with WAC 296-136-100. The department may also conduct a consolidated investigation for any alleged violation identified under chapter 49.84 RCW in accordance with WAC 296-136-100.

(3) If the department determines that the employer has violated a requirement of this chapter or any rule adopted under this chapter resulting in a rest or meal period violation, the employer must pay the employee one additional hour of pay at the employee's regular rate of pay for each day there is a violation. The employer must pay the employee at the employee's regular rate of pay for rest and meal periods where the employee is required to remain on duty or on the employer's premises at the employer's direction subject to call. The regular rate of pay is the hourly rate at which the employee is paid, but may not be less than the established minimum wage rate. The regular rate of pay is determined by dividing the amount of compensation received per week by the total number of hours worked during that week.

(4) If the department determines that an employer has violated a requirement of this chapter or any rule adopted under this chapter resulting in a rest or meal period violation, the department may order the employer to pay to the employee interest of one percent per month on all amounts owed. The interest owed must be calculated from the first date amounts were owed to the employee, except that the department may not order the employer to pay any interest that were owed more than three years before the date the complaint was filed with the department.

NEW SECTION

WAC 296-136-130 Appeals. (1) For enforcement actions under RCW 49.84.045, WAC 296-136-100, and 296-136-120, a person, firm, or corporation aggrieved by a citation and notice of assessment or determination of compliance by the department or any rules adopted under this chapter may appeal the citation and notice of assessment or determination of compliance to the director by filing a notice of appeal with the director within 15 calendar days of the department's issuance of the citation and notice of assessment or determination of compliance. A citation and notice of assessment or determination of compliance not appealed within 15 calendar days is final and binding, and not subject to further appeal.

(2) A notice of appeal filed with the director under this section stays the effectiveness of the citation and notice of assessment or determination of compliance pending final review of the appeal by the director as provided in chapter 34.05 RCW.

(3) Upon receipt of a notice of appeal, the director must assign the hearing to an administrative law judge of the office of administrative hearings to conduct the hearing and issue an initial order. The hearing and review procedures must be conducted in accordance with chapter 34.05 RCW, and the standard of review by the administrative law judge of an appealed citation and notice of assessment must be de novo. Any party who seeks to challenge an initial order must file a petition for administrative review with the director within 30 days after service of the initial order. The director must conduct an administrative review in accordance with chapter 34.05 RCW.

(4) The director must issue all final orders after appeal of the initial order. The final order of the director is subject to judicial review in accordance with chapter 34.05 RCW.

(5) Orders that are not appealed within the time period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal.

(6) An employer who fails to allow adequate inspection of records in an investigation by the department under this chapter within a reasonable time period may not use such records in any appeal under this section to challenge the correctness of any determination by the department of the penalty assessed.

NEW SECTION

WAC 296-136-140 Retaliation—Enforcement. (1) An employee or former employee who believes that they were subject to retaliation by their employer, as defined in chapter 49.84 RCW and associated rules, for the exercise of any employee right under chapter 49.84 RCW, may file a complaint with the department within 180 days of the alleged retaliatory action. The department may, at its discretion, extend the 180-day period on recognized equitable principles or because extenuating circumstances exist. For example, the department may extend the 180-day period when there is evidence that the employer has concealed or misled the employee regarding the alleged retaliatory action.

(2) If an employee files a timely complaint with the department alleging retaliation, the department will investigate the complaint and issue either a citation and notice of assessment or a determination of compliance within 90 days after the date on which the department received the complaint, unless the complaint is otherwise resolved. The department may extend the time period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the time period, and specifying the duration of the extension.

(3) The department may consider a complaint to be otherwise resolved when the employee and the employer reach a mutual agreement to remedy any retaliatory action, or the employee voluntarily and on the employee's own initiative withdraws the complaint. Mutual agreements include, but are not limited to, rehiring, reinstatement, back pay, and reestablishment of benefits.

(4) If the department's investigation finds that the employee's allegation of retaliation was rebutted by the employer and cannot be substantiated, the department will issue a determination of compliance to the employee and the employer detailing such finding.

(5) If the department's investigation finds that the employer retaliated against the employee, and the complaint is not otherwise resolved, the department may, at its discretion, notify the employer that the department intends to issue a citation and notice of assessment, and may provide up to 30 days after the date of such notification for the employer to take corrective action to remedy the retaliatory action. If the complaint is not otherwise resolved, then the department shall issue a citation and notice of assessment. The department's citation and notice of assessment may:

(a) Order the employer to make payable to the employee earnings that the employee did not receive due to the employer's retaliatory action, including interest of one percent per month on all earnings owed. The earnings and interest owed will be calculated from the first date earnings were owed to the employee;

(b) Order the employer to restore the employee to the position of employment held by the employee when the retaliation occurred, or restore the employee to an equivalent position with equivalent employment hours, work schedule, benefits, pay, and other terms and conditions of employment;

(c) Order the employer to pay the department a civil penalty as specified in WAC 296-136-150.

(6) The department will send the citation and notice of assessment or determination of compliance to both the employer and employee by service of process or using a method by which the mailing can be tracked or the delivery can be confirmed to their last known addresses.

(7) During an investigation of the employee's retaliation complaint, if the department discovers information suggesting alleged violations by the employer of the employee's other wage and labor standard protections in statutes and applicable rules, the department may investigate and take appropriate enforcement action without requiring the employee to file a new or separate complaint. If the department determines that the employer violated additional wage and labor standard protections in statutes and applicable rules, the employer may be subject to additional enforcement actions for the violation of such rights. If the department discovers information alleging the employer retaliated against or otherwise violated wage and labor standard protections in statutes and applicable rules, the department may launch further investigation under chapters 49.46 and 49.84 RCW, and all applicable rules, without requiring additional complaints to be filed.

(8) The department may prioritize retaliation investigations as needed to allow for timely resolution of complaints.

(9) Nothing in chapter 49.84 RCW or associated rules impedes the department's ability to investigate under the authority prescribed in RCW 49.84.040.

NEW SECTION

WAC 296-136-150 Retaliation—Civil penalties. (1) If the department's investigation finds that an employer retaliated against an employee, pursuant to the procedures outlined in WAC 296-136-140, the department may order the employer to pay the department a civil penalty. A civil penalty for an employer's retaliatory action will not be less than \$1,000 or an amount equal to 10 percent of the total amount

of unpaid earnings attributable to the retaliatory action, whichever is greater. The maximum civil penalty for an employer's retaliatory action shall be \$20,000 for the first violation, and \$40,000 for each repeat violation.

(2) The department may, at any time, waive or reduce any civil penalty assessed against an employer under this section if the department determines that the employer has taken corrective action to remedy the retaliatory action.

(3) The department will deposit civil penalties paid under this section in the supplemental pension fund established under RCW 51.44.033.

(4) Collections of amounts owed for unpaid citations and notices of assessment, as detailed in WAC 296-136-140(5), will be handled pursuant to the procedures outlined in RCW 49.48.086.

NEW SECTION

WAC 296-136-160 Retaliation appeals. (1) For enforcement actions under RCW 49.84.040 and associated rules, a person, firm, or corporation aggrieved by a citation and notice of assessment or a determination of compliance may, within 30 days after the date of such decision, submit a request for reconsideration to the department setting forth the grounds for seeking such reconsideration, or submit an appeal to the director pursuant to the procedures outlined in subsection (4) of this section. If the department receives a timely request for reconsideration, the department will either accept the request or treat the request as a notice of appeal.

(2) If a request for reconsideration is accepted, the department will send notice of the request for reconsideration to the employer and the employee. The department will determine if there are any valid reasons to reverse or modify the department's original decision to issue a citation and notice of assessment or determination of compliance within 30 days of receipt of such request. The department may extend this period by providing advance written notice to the employee and employer setting forth good cause for an extension of the period, and specifying the duration of the extension. After reviewing the reconsideration, the department will either:

(a) Notify the employee and the employer that the citation and notice of assessment or determination of compliance is affirmed; or

(b) Notify the employee and the employer that the citation and notice of assessment or determination of compliance has been reversed or modified.

(3) A request for reconsideration submitted to the department shall stay the effectiveness of the citation and notice of assessment or the determination of compliance pending the reconsideration decision by the department.

(4) Within 30 days after the date the department issues a citation and notice of assessment or a determination of compliance, or within 30 days after the date the department issues its decision on the request for reconsideration, a person, firm, or corporation aggrieved by a citation and notice of assessment or a determination of compliance may file with the director a notice of appeal.

(5) A notice of appeal filed with the director under this section shall stay the effectiveness of the citation and notice of assessment

or the determination of compliance pending final review of the appeal by the director as provided for in chapter 34.05 RCW.

(6) Upon receipt of a notice of appeal, the director shall assign the hearing to an administrative law judge of the office of administrative hearings to conduct the hearing and issue an initial order. The hearing and review procedures shall be conducted in accordance with chapter 34.05 RCW, and the standard of review by the administrative law judge of an appealed citation and notice of assessment or determination of compliance shall be de novo. Any party who seeks to challenge an initial order shall file a petition for administrative review with the director within 30 days after service of the initial order. The director shall conduct administrative review in accordance with chapter 34.05 RCW.

(7) If a request for reconsideration is not submitted to the department within 30 days after the date of the original citation and notice of assessment or determination of compliance, and a person, firm, or corporation aggrieved by a citation and notice of assessment or determination of compliance did not submit an appeal to the director, then the citation and notice of assessment or determination of compliance is final and binding, and not subject to further appeal.

(8) The director shall issue all final orders after appeal of the initial order. The final order of the director is subject to judicial review in accordance with chapter 34.05 RCW.

(9) Director's orders that are not appealed within the time period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal.

(10) An employer who fails to allow adequate inspection of records required under chapter 49.84 RCW and this chapter within a reasonable time period when requested by the department during an investigation may not use such records in any appeal to challenge the correctness of any determination by the department.

NEW SECTION

WAC 296-136-170 Discretionary enforcement provisions. (1) The department may enforce this section by engaging in coordinated and strategic enforcement efforts with the divisions within the department including, but not limited to, the division of fraud prevention and labor standards, the division of occupational safety and health, and insurance services. The department may access data from various divisions including employer-reported injury data and enforcement actions in warehouses, and the identity of uninsured employers, and employers who are committing workers' compensation fraud, wage theft, or other information relevant to the department's authority.

(2) The department may strategically collaborate with stakeholders to educate workers and employers about their rights and obligations under this part, respectively, in order to increase compliance.

NEW SECTION

WAC 296-136-180 Severability clause. If any provision of the rules in this chapter, or their application to any person or circumstance is held invalid, the remainder of these rules or their applica-

tion of the provision to other persons or circumstances is not affected.