

WSR 24-11-021
EXPEDITED RULES
DEPARTMENT OF
LABOR AND INDUSTRIES
[Filed May 7, 2024, 9:15 a.m.]

Title of Rule and Other Identifying Information: Paid sick leave; amending WAC 296-128-600, 296-128-765, and 296-128-99140.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The purpose of this proposal is to amend rules for accordance with recently passed legislation, ESSB 5793 and SB 5979. The proposed rules implement ESSB 5793 and SB 5979 without material change. SB 5979 changes which workers in the construction industry must receive paid sick leave pay outs following separation. ESSB 5793 allows workers to use paid sick leave when their child's school or place of care is closed after the declaration of an emergency by a local or state government or agency or by the federal government and expands the definition of family member.

Reasons Supporting Proposal: The changes in this expedited rule making will align with the current statutory requirements under RCW 49.46.210 and statutory requirements effective January 1, 2025, from ESSB 5793.

Statutory Authority for Adoption: Chapter 49.46.210 RCW.

Statute Being Implemented: RCW 49.46.210.

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

Name of Proponent: Department of labor and industries, governmental.

Name of Agency Personnel Responsible for Drafting: Bridget Osborne, Tumwater, Washington, 360-902-5552; Implementation and Enforcement: Bryan Templeton, Tumwater, Washington, 360-902-6639.

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

This notice meets the following criteria to use the expedited adoption process for these rules:

Adopts or incorporates 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.

Explanation of the Reason the Agency Believes the Expedited Rule-Making Process is Appropriate: Expedited rule making is necessary to align rule sections in accordance with recent changes to Washington state statutes, effective March 13, 2024, and January 1, 2025, without changing its effect.

NOTICE

THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EX-

PRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO Bridget Osborne, Department of Labor and Industries, Fraud Prevention and Labor Standards, Employment Standards, P.O. Box 44510, Olympia, WA 98504-4510, phone 360-902-5552, fax 360-902-5350, email ESRules@Lni.wa.gov, AND RECEIVED BY July 22, 2024, by 5:00 p.m.

May 7, 2024
Joel Sacks
Director

OTS-5389.1

AMENDATORY SECTION (Amending WSR 23-24-044, filed 11/30/23, effective 1/1/24)

WAC 296-128-600 Definitions. (1) "Absences exceeding three days" means absences exceeding three consecutive days an employee is required to work. For example, assume an employee is required to work on Mondays, Wednesdays, and Fridays, and then the employee uses paid sick leave for any portion of those three work days in a row. If the employee uses paid sick leave again on the following Monday, the employee would have absences exceeding three days.

(2) "Commencement of his or her employment" as provided in RCW 49.46.210 (1)(d), means no later than the beginning of the first day on which the employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace. "Commencement of their employment" has the same meaning.

(3) "Construction industry employer" means an employer in the industry described in North American industry classification system industry code 23, except for residential building construction code 2361.

~~(4) "Construction worker" ((is any nonexempt employee covered under the 2022 North American Industry Classification System (NAICS) industry code 23, except for those employees who perform only work described in NAICS 2361, residential building construction. This includes employees who work for an employer who performs construction-related work as described in NAICS 23, but are not directly engaged in the construction work itself, such as nonexempt administrative staff))~~ means a worker who performed service, maintenance, or construction work on a job site, in the field or in a fabrication shop using the tools of the worker's trade or craft.

~~((4))~~ (5) "Construction worker covered by a collective bargaining agreement" as provided in RCW 49.46.180, means a ((nonexempt employee)) worker who performed service, maintenance, or construction work on a job site, in the field or in a fabrication shop using the tools of the worker's trade or craft who is covered by a collective bargaining agreement ((, provided that)). To meet this definition, the union signatory to the collective bargaining agreement ((is)) must be an approved referral union program authorized under RCW 50.20.010 and in compliance with WAC 192-210-110, the collective bargaining agreement ((establishes)) must establish equivalent sick leave provisions, as provided in RCW 49.46.180(2), and the ((requirements of RCW 49.46.200 through 49.46.830 are)) collective bargaining agreement or

CBA addendum must expressly (~~waived in the collective bargaining agreement~~) waive the requirements of RCW 49.46.200 through 49.46.830 in clear and unambiguous terms or in an agreed addendum to an existing agreement (~~including an agreement that is open for negotiation provided the sick leave portions were~~) previously ratified (~~by the membership. This does not include employees who are not directly engaged in construction work itself, such as nonexempt administrative staff~~).

~~((5))~~ (6) "Department" means the department of labor and industries.

~~((6))~~ (7) "Director" means the director of the department of labor and industries, or the director's authorized representative.

~~((7))~~ (8) "Employee" has the same meaning as RCW 49.46.010(3). An employee includes a construction worker or construction worker covered by a collective bargaining agreement unless a more specific provision applies.

~~((8))~~ (9) "Employer" has the same meaning as RCW 49.46.010(4).

~~((9))~~ (10) "Frontloading" means providing an employee with paid sick leave before it has accrued at the rate required by RCW 49.46.210 (1) (a).

~~((10))~~ (11) "Health-related reason," as provided in RCW 49.46.210 (1) (b) (iii), means a serious public health concern that could result in bodily injury or exposure to an infectious agent, biological toxin, or hazardous material. Health-related reason does not include closures for inclement weather.

~~((11))~~ (12) "Hours worked" shall be interpreted in the same manner as WAC 296-126-002(8).

~~((12))~~ (13) "Normal hourly compensation" means the hourly rate that an employee would have earned for the time during which the employee used paid sick leave. For employees who use paid sick leave for hours that would have been overtime hours if worked, employers are not required to apply overtime standards to an employee's normal hourly compensation. Normal hourly compensation does not include tips, gratuities, service charges, holiday pay, or other premium rates, unless the employer or a collective bargaining agreement allow for such considerations. However, where an employee's normal hourly compensation is a differential rate, meaning a different rate paid for the same work performed under differing conditions (e.g., a night shift), the differential rate is not a premium rate.

~~((13))~~ (14) "Regular and normal wage" has the same meaning as normal hourly compensation.

~~((14))~~ (15) "Separation" and "separates from employment" mean the end of the last day an employee is authorized or required by the employer to be on duty on the employer's premises or at a prescribed workplace.

~~((15))~~ (16) "Verification" means evidence that establishes or confirms that an employee's use of paid sick leave is for an authorized purpose under RCW 49.46.210 (1) (b) and (c).

~~((16))~~ (17) "Workweek" means a fixed and regularly recurring period of 168 hours, or seven consecutive 24 hour periods. It may begin on any day of the week and any hour of the day, and need not coincide with a calendar week.

AMENDATORY SECTION (Amending WSR 23-24-044, filed 11/30/23, effective 1/1/24)

WAC 296-128-765 Construction workers under RCW 49.46.210 (1) (1) (effective January 1, 2024). (1) Following separation, construction industry employers must pay the balance of accrued and unused paid sick leave to construction workers classified under NAICS code 23 who have not reached the 90th calendar day of employment, except for construction workers who perform work limited to work only under NAICS code 236100.

(2) When a construction worker is rehired within 12 months of separation, whether at the same or a different business location of the employer, any sick leave previously paid out following separation does not need to be reinstated.

(3) When a construction worker is rehired within 12 months of separation, whether at the same or a different business location of the construction industry employer, the previous period of employment must be counted for purposes of determining the date upon which the ((employee)) construction worker is entitled to use paid sick leave.

AMENDATORY SECTION (Amending WSR 22-24-034, filed 11/30/22, effective 1/1/23)

WAC 296-128-99140 Paid sick time usage. (1) A driver is entitled to use earned paid sick time for the following purposes authorized in RCW 49.46.210(5):

(a) An absence resulting from the driver's mental or physical illness, injury, or health condition; to accommodate the driver's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or a driver's need for preventive medical care;

(b) To allow the driver to provide care for an authorized family member under RCW 49.46.210 with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care for a family member who needs preventive medical care;

(c) When the driver's child's school or place of care has been closed by order of a public official for any health-related reason or, beginning January 1, 2025, after the declaration of an emergency by a local or state government or agency, or by the federal government;

(d) For absences for which an employee would be entitled to leave under RCW 49.76.030;

(e) During an account deactivation or other status that prevents the driver from performing network services on the transportation network company's platform, unless the deactivation or status is due to a verified allegation of sexual assault or physical assault perpetrated by the driver; and

(f) A transportation company may provide more generous paid sick time policies or permit use of paid sick time for additional purposes or family members.

(2) After three consecutive days of account deactivation, a driver may request paid sick time for any portion of the deactivation period, unless the deactivation or status is due to a verified allegation of sexual assault or physical assault perpetrated by the driver.

(3) A driver is entitled to use accrued earned paid sick time upon recording 90 hours of passenger platform time on the transportation network company's driver platform. Transportation network companies may allow drivers to use accrued, unused paid sick time prior to recording 90 hours of passenger platform time.

(4) Upon recording 90 hours of passenger platform time on the transportation network company's driver platform, a transportation network company must make earned accrued paid sick time available for use to the driver.

(5) A driver is entitled to use earned paid sick time if the driver has recorded passenger platform time as a driver within 90 calendar days preceding the driver's request to use earned paid sick time.

(6) Earned paid sick time must be made available for use within a communication system for drivers.

(7) A transportation network company must allow drivers to use paid sick time in four-hour increments, not to exceed eight hours within one day. A transportation network company may allow paid sick time usage in shorter increments.

(8) A transportation network company must allow drivers to claim earned paid sick time through a communication system within a time frame during which a driver was eligible to use their earned paid sick time and projected absences, so long as the absence is for an authorized purpose under RCW 49.46.210.

(9) A driver may choose to use earned paid sick time simultaneously for multiple transportation network companies during the same time period for a purpose authorized under RCW 49.46.210.