

WSR 22-23-065

PROPOSED RULES

EMPLOYMENT SECURITY DEPARTMENT

[Filed November 9, 2022, 2:49 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 22-15-002.

Title of Rule and Other Identifying Information: WAC 192-170-080
Leave of absence.

Hearing Location(s): On December 29, 2022, at 9:00 a.m., Zoom, Meeting ID 838 4143 3857, Passcode 530117, Call in 253-215-8782. Join Zoom meeting <https://esd-wa-gov.zoom.us/j/83841433857?pwd=cVRGU0cwbllhdmZHQUZhdSs5ZlNhQT09>.

Date of Intended Adoption: January 6, 2023.

Submit Written Comments to: Josh Dye, P.O. Box 9046, Olympia, WA 98507-9046, email rules@esd.wa.gov, fax 844-652-7096, by December 29, 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 [Teresa.eckstein@esd.wa.gov], by December 22, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The proposal clarifies that an individual on a leave of absence is eligible for unemployment benefits as long as the individual: (1) Meets the definition of "unemployed" per RCW 50.04.310; and (2) meets all other eligibility requirements provided in RCW 50.20.010.

Reasons Supporting Proposal: In May of 2022, the employment security department (department) received a petition requesting that the department amend WAC 192-170-080 to eliminate subsection (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 the employment security department 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 (November 22, 2021). Rule making is therefore necessary to revisit whether individuals on a leave of absence should or should not be considered "unemployed."

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

Statute Being Implemented: RCW 50.04.310.

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

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: Not applicable.

Name of Proponent: Unemployment Law Project, public.

Name of Agency Personnel Responsible for Drafting: Josh Dye, Olympia, Washington, 360-890-3472; Implementation and Enforcement: JR Richards, Olympia, Washington, 360-463-1079.

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 Josh Dye, P.O. Box 9046, Olympia, WA 98507-9046, phone 360-890-3472, fax 844-652-7096, TTY relay 711, email rules@esd.wa.gov, <https://esd.wa.gov/newsroom/rulemaking/leave-of-absence>.

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. The proposed amendment to the rule does not create additional costs to employers.

November 9, 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.]