



PROPOSED RULE MAKING

CR-102 (July 2022) (Implements RCW 34.05.320) Do NOT use for expedited rule making

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FILED

DATE: November 09, 2022

TIME: 2:49 PM

WSR 22-23-065

Agency: Employment Security Department

☒ **Original Notice**

☐ **Supplemental Notice to WSR** _____

☐ **Continuance of WSR** _____

☒ **Preproposal Statement of Inquiry was filed as WSR 22-15-002 ; or**

☐ **Expedited Rule Making--Proposed notice was filed as WSR** _____; or

☐ **Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1); or**

☐ **Proposal is exempt under RCW** _____.

Title of rule and other identifying information: (describe subject) WAC 192-170-080 Leave of absence.

Hearing location(s):

Date:	Time:	Location: (be specific)	Comment:
December 29, 2022	9:00 am	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=cVRGU0cwblIhdmZHQUZhdSs5ZlNhQT09

Date of intended adoption: January 6, 2023 (Note: This is **NOT** the effective date)

Submit written comments to:

Name: Josh Dye

Address: P.O. Box 9046, Olympia, WA 98507-9046

Email: rules@esd.wa.gov

Fax: 844-652-7096

Other:

By (date) 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

Other:

By (date) 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 Department received a petition requesting that the Department 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 the Employment Security Department in 2011 under *In re Ausburn*, Empl. Sec. Comm'r Dec.2d 971 (2011). In 2021, the U.S. 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). Rulemaking 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 RCW 50.12.040 provide general rulemaking authority to the Employment Security Department. RCW 50.04.310 defines when an individual is "unemployed" and not "unemployed."

Statute being implemented: RCW 50.04.310

Is rule necessary because of a:			
Federal Law?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Federal Court Decision?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
State Court Decision?		<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If yes, CITATION:			
Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: N/A			
Type of proponent: <input type="checkbox"/> Private <input checked="" type="checkbox"/> Public <input type="checkbox"/> Governmental			
Name of proponent: (person or organization) Unemployment Law Project			
Name of agency personnel responsible for:			
	Name	Office Location	Phone
Drafting:	Josh Dye	Olympia, WA	360-890-3472
Implementation:	JR Richards	Olympia, WA	360-463-1079
Enforcement:	JR Richards	Olympia, WA	360-463-1079
Is a school district fiscal impact statement required under RCW 28A.305.135?			<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
If yes, insert statement here:			
<p>The public may obtain a copy of the school district fiscal impact statement by contacting:</p> <p>Name:</p> <p>Address:</p> <p>Phone:</p> <p>Fax:</p> <p>TTY:</p> <p>Email:</p> <p>Other:</p>			
Is a cost-benefit analysis required under RCW 34.05.328?			
<input checked="" type="checkbox"/> Yes: A preliminary cost-benefit analysis may be obtained by contacting: Name: Josh Dye Address: P.O. Box 9046, Olympia, WA 98507-9046 Phone: 360-890-3472 Fax: 844-652-7096 TTY: Relay 771 Email: rules@esd.wa.gov Other: https://esd.wa.gov/newsroom/rulemaking/leave-of-absence			
<input type="checkbox"/> No: Please explain:			
Regulatory Fairness Act and Small Business Economic Impact Statement			
Note: The Governor's Office for Regulatory Innovation and Assistance (ORIA) provides support in completing this part.			
(1) Identification of exemptions:			
This rule proposal, or portions of the proposal, may be exempt from requirements of the Regulatory Fairness Act (see chapter 19.85 RCW). For additional information on exemptions, consult the exemption guide published by ORIA . Please check the box for any applicable exemption(s):			
<input type="checkbox"/> This rule proposal, or portions of the proposal, is exempt under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations. Please cite the specific federal statute or regulation this rule is being adopted to conform or comply with, and describe the consequences to the state if the rule is not adopted. Citation and description:			
<input type="checkbox"/> This rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule.			
<input type="checkbox"/> This rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.			

- ☐ This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(3\)](#). Check all that apply:
- | | |
|---|---|
| <input type="checkbox"/> RCW 34.05.310 (4)(b)
(Internal government operations) | <input type="checkbox"/> RCW 34.05.310 (4)(e)
(Dictated by statute) |
| <input type="checkbox"/> RCW 34.05.310 (4)(c)
(Incorporation by reference) | <input type="checkbox"/> RCW 34.05.310 (4)(f)
(Set or adjust fees) |
| <input type="checkbox"/> RCW 34.05.310 (4)(d)
(Correct or clarify language) | <input type="checkbox"/> RCW 34.05.310 (4)(g)
(i) Relating to agency hearings; or (ii) process requirements for applying to an agency for a license or permit) |
- ☐ This rule proposal, or portions of the proposal, is exempt under [RCW 19.85.025\(4\)](#) (does not affect small businesses).
- ☐ This rule proposal, or portions of the proposal, is exempt under RCW ____.
- Explanation of how the above exemption(s) applies to the proposed rule:

(2) Scope of exemptions: *Check one.*

- ☐ The rule proposal is fully exempt (*skip section 3*). Exemptions identified above apply to all portions of the rule proposal.
- ☐ The rule proposal is partially exempt (*complete section 3*). The exemptions identified above apply to portions of the rule proposal, but less than the entire rule proposal. Provide details here (consider using [this template from ORIA](#)):
- ☐ The rule proposal is not exempt (*complete section 3*). No exemptions were identified above.

(3) Small business economic impact statement: *Complete this section if any portion is not exempt.*

If any portion of the proposed rule is **not exempt**, does it impose more-than-minor costs (as defined by RCW 19.85.020(2)) on businesses?

- ☒ No Briefly summarize the agency's minor cost analysis and how the agency determined the proposed rule did not impose more-than-minor costs. The proposed amendment to the rule does not create additional costs to employers.
- ☐ Yes Calculations show the rule proposal likely imposes more-than-minor cost to businesses and a small business economic impact statement is required. Insert the required small business economic impact statement here:

The public may obtain a copy of the small business economic impact statement or the detailed cost calculations by contacting:

Name:
Address:
Phone:
Fax:
TTY:
Email:
Other:

Date: November 9, 2022

Name: Dan Zeitlin

Title: Employment System Policy Director

Signature:

