



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Department of Labor and Industries

- Preproposal Statement of Inquiry was filed as WSR 08-10-074 ; or
- Expedited Rule Making--Proposed notice was filed as WSR _____; or
- Proposal is exempt under RCW 34.05.310(4).

- Original Notice
- Supplemental Notice to WSR _____
- Continuance of WSR _____

Title of rule and other identifying information: Chapter 296-128 WAC, Minimum Wages

Hearing location(s):
 Date: August 29, 2008 Time: 9:00 am
 Department of Labor and Industries
 7273 Linderson Way SW, S117
 Tumwater, Washington

Submit written comments to:
 Name: Sally Elliott
 Department of Labor and Industries
 Address: Post Office Box 44400
 Olympia, Washington 98504-4400
 e-mail yous235@lni.wa.gov
 fax (360) 902-5292 by August 29, 2008

Assistance for persons with disabilities: Contact
 Sally Elliott by August 1, 2008
 (360) 902-6411 or yous235@lni.wa.gov

Date of intended adoption: October 1, 2008
 (Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules:
 See attachment 1.

Reasons supporting proposal: See attachment 1.

Statutory authority for adoption: RCW 43.22.270 and 49.46.130

Statute being implemented: RCW 43.22.270 and 49.46.130

Is rule necessary because of a:

Federal Law? Yes No
 Federal Court Decision? Yes No
 State Court Decision? Yes No
 If yes, CITATION: Yes No
Bostain v. Food Express, Inc., 159
 Wn.2d 700, 153 P.3d 846 (2007)

DATE
 July 23, 2008

NAME (type or print)
 Judy Schurke

SIGNATURE

TITLE
 Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
 STATE OF WASHINGTON
 FILED

DATE: July 23, 2008
TIME: 11:35 AM

WSR 08-15-178

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

NA

Name of proponent: (person or organization) Department of Labor and Industries

- Private
 Public
 Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Rich Ervin	Tumwater, Washington	(360) 902-5310
Implementation.... Patrick Woods	Tumwater, Washington	(360) 902-6348
Enforcement..... Patrick Woods	Tumwater, Washington	(360) 902-6348

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

Yes. Attach copy of small business economic impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone () _____

fax () _____

e-mail _____

No. Explain why no statement was prepared.

The department did not conduct a Small Business Economic Impact Statement, since the proposed does not impose any costs on businesses in an industry (per RCW 19.85.030(1)).

Is a cost-benefit analysis required under RCW 34.05.328?

Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name: Sally Elliott
Department of Labor and Industries
Address: Post Office Box 44400
Olympia, Washington 98504-4400
e-mail yous235@lni.wa.gov

No: Please explain:

Attachment 1

The rulemaking is in response to *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 153 P.3d 846 (2007). In that case, the Court concluded that RCW 49.46.130(2)(f) requires overtime compensation for hours worked over 40 per week for interstate driving, including hours spent working out of state. Current rules require overtime pay for truck drivers only for their hours worked within Washington. These rules are not consistent with the decision under *Bostain* and need to be amended.

The Court's ruling directly affects two regulations with corresponding policies and enforcement practices. The Court's decision has invalidated portions of WAC 296-128-011 and WAC 296-128-012 where the rules define hours for purposes of overtime provisions as hours worked only within Washington state.

Employers may have relied on the two regulations before *Bostain*. Employers who paid workers on a basis other than an hourly basis with time and a half for overtime hours will have the opportunity to get formal review of their compensation systems.

WAC 296-128-011 and WAC 296-128-012 are being updated to reflect the March 2007 Supreme Court's decision in *Bostain*, by deleting "within the state" throughout the rules and adding language that allows employers to submit their compensation systems to the department for review and approval.

Employers are already able to submit their compensation systems to the department. However, the added language will expressly require the department to review compensation systems for time periods before March 1, 2007 (the date of the *Bostain* decision) of employers who relied on the department's regulations. The added language requires the department to review compensation systems submitted by employers, and approve such compensation systems for the time period for which the employers seek approval if the department's review finds that they complied with RCW 49.46.130(2)(f) for hours worked both in and out of the State of Washington. The added language does not change the employer's obligation to pay overtime for hours worked within and outside Washington under *Bostain* and RCW 49.46.130(2)(f). The department will not approve a compensation system for any time period unless the compensation system is reasonably equivalent to RCW 49.46.130 for hours worked both in and out of the State of Washington.