



RULE-MAKING ORDER

CR-103 (June 2004) (Implements RCW 34.05.360)

Agency: Department of Labor and Industries

- Permanent Rule
 Emergency Rule

Effective date of rule:

Permanent Rules

- 31 days after filing.
 Other (specify) (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Effective date of rule:

Emergency Rules

- Immediately upon filing.
 Later (specify) _____

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes No If Yes, explain:

Purpose: 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(1) 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 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. Language will also be added that requires the department to review compensation systems submitted by employers, and approve such compensation systems retroactively if the department's review finds that they complied with *Bostain* and RCW 49.46.130(2)(f).

Citation of existing rules affected by this order:

Repealed: None
 Amended: WAC 296-128-011 and WAC 296-128-012
 Suspended: None

Statutory authority for adoption: RCW 43.22.270 and 49.46.130

Other authority : None.

PERMANENT RULE ONLY (Including Expedited Rule Making)

Adopted under notice filed as WSR 08-15-178 on July 23, 2008.

Describe any changes other than editing from proposed to adopted version: WAC 296-128-012(3): "relied on WAC 296-128-011(1)" was replaced with "employed drivers who worked over 40 hours a week consisting of both in-state and out-of-state hours anytime". Further, the last sentence of the proposed regulation was deleted. The sentence stated as follows: "Approval of a reasonably equivalent compensation system under this subsection shall constitute continuing approval for the period the employer uses the compensation system." These changes were made in response to public comments received. Please see the attached explanation of the principle reasons for the changes. See Attachment 1. A technical change has also been made that deletes the reference to subsection (2)(f) of RCW 49.46.130.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: Sally Elliott phone (360) 902-6411
 Address: Post Office Box 44400 fax (360) 902-5292
 Olympia, Washington 98504-4400 e-mail yous235@lni.wa.gov

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
 That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

Date adopted: October 21, 2008

NAME (TYPE OR PRINT)

Judy Schurke

SIGNATURE

TITLE

Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
 STATE OF WASHINGTON
 FILED

DATE: October 21, 2008

TIME: 3:04 PM

WSR 08-21-150

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	_____	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	<u>2</u>	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	_____	Amended	<u>2</u>	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	<u>2</u>	Repealed	_____
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The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	<u>2</u>	Repealed	_____

Attachment 1

There are three changes from the CR 102 proposed amendments.

First, the Department made a technical change by deleting the reference to “(2)(f)” when referring to RCW 49.46.130. We deleted it based on review of RCW 49.46.130(2)(f), the provision that creates the “reasonably equivalent to time-and-a-half” exemption. The deletion also makes the statutory reference consistent with the statutory reference in WAC 296-128-012(1)(a).

Second, the Department deleted the last sentence of the proposed regulation. It reads as follows: “Approval of a reasonably equivalent compensation system under this subsection shall constitute continuing approval for the period the employer uses the compensation system.”

The Department does not intend to, by promulgating the proposed regulation, impinge on rights of workers to receive reasonably equivalent overtime wages. The use of the word “shall” in the sentence appears to provide automatic continuing approval regardless of changes in circumstances into the future, potentially rendering it not reasonably equivalent in practice. The Department believes that employers may need to make adjustments for unforeseen changes or circumstances for a reasonably equivalent system to be valid in the future.

While deleting this sentence from the proposed regulation, the Department will be including additional language in approval letters to employers. That approval language will contain a statement that changes in circumstances may affect continuing approval. This will provide employers and employees the notice and knowledge that continuing approval is based on consistency with the plan.

Third, the Department changed the language in the second sentence of WAC 296-128-012(3). That sentence now begins with the language, “An employer who employed drivers who worked over forty hours a week consisting of both in-state and out-of-state hours anytime...” The intent of the proposed subsection is to offer, for a discrete period of time, the benefit of a process for scrutiny to all employers with interstate drivers with out-of-state overtime hours. The Department changed the proposed language to reflect that the subsection applies only to employers with interstate drivers.