



# 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

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> Preproposal Statement of Inquiry was filed as WSR 09-13-077; or | <input checked="" type="checkbox"/> Original Notice       |
| <input type="checkbox"/> Expedited Rule Making--Proposed notice was filed as WSR _____; or          | <input type="checkbox"/> Supplemental Notice to WSR _____ |
| <input type="checkbox"/> Proposal is exempt under RCW 34.05.310(4).                                 | <input type="checkbox"/> Continuance of WSR _____         |

**Title of rule and other identifying information:** Chapter 296-127 WAC, Prevailing Wage

**Hearing location(s):**

See Attachment 2.

Date: \_\_\_\_\_ Time: \_\_\_\_\_

**Submit written comments to:**

Name: Sally Elliott  
Address: Post Office Box 44400  
Olympia, Washington 98504-4400  
e-mail [yous235@lni.wa.gov](mailto:yous235@lni.wa.gov)  
fax (360) 902-5292 by July 1, 2010

**Assistance for persons with disabilities:** Contact Sally Elliott at [yous235@lni.wa.gov](mailto:yous235@lni.wa.gov) or (360) 902-6411

**Date of intended adoption:** August 17, 2010  
(Note: This is NOT the effective date)

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The prevailing wage rules have not gone through a comprehensive review since the early 1990s. The Department has reviewed the rules and will be making amendments to reflect court decisions and statutory amendments, integrate administrative policies, streamline current processes, create consistency with the Prevailing Wage Act, clarify language, add explanatory notes, and make housekeeping changes. See Attachment 1 for a list of proposed changes and a brief description of the purpose and effect.

**Reasons supporting proposal:** See purpose statement.

**Statutory authority for adoption:** Chapter 39.12 RCW, RCW 43.22.051, and RCW 43.22.270

**Statute being implemented:** Chapter 39.12 RCW and RCW 43.22.270

**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:

**DATE**  
May 18, 2010

**NAME** (type or print)  
Judy Schurke

**SIGNATURE**

**TITLE**  
Director

**CODE REVISER USE ONLY**

OFFICE OF THE CODE REVISER  
STATE OF WASHINGTON  
FILED

**DATE: May 18, 2010**  
**TIME: 3:35 PM**

**WSR 10-11-116**

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

NA

Name of proponent: Department of Labor and Industries

- Private
- Public
- Governmental

Name of agency personnel responsible for:

| Name                           | Office Location      | Phone          |
|--------------------------------|----------------------|----------------|
| Drafting..... David Soma       | Tumwater, Washington | (360) 902-5330 |
| Implementation... Steve McLain | Tumwater, Washington | (360) 902-6348 |
| Enforcement..... Steve McLain  | 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.

These rules are specifically exempt from the SBEIS requirement because none of the proposed rules will impose more than minor costs on businesses [see RCW 19.85.030(1)(a)]. In general, prevailing wage work is work done at the cost of the public. It is expected that businesses performing public work pass on the costs of paying prevailing wage rates to the public through their submission of bids. Additionally, many of the proposed rules are intended to clarify rule language without changing effect [see RCW 19.85.025(3), referencing RCW 34.05.310(4)(d)].

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

Address: Department of Labor & Industries

Post Office Box 44400

Olympia, Washington 98504-4400

Phone (360) 902-6411

Fax (360) 902-5292

E-mail yous235@lni.wa.gov

No: Please explain:

**Attachment (1)**  
Purpose Statement

The proposed rulemaking includes the following changes:

- **WAC 296-127-010, Definitions for chapter 296-127 WAC.**
  - (3) **Industrial Statistician** – This definition revision reflects changes in department organization; there is no longer an Employment Standards, Apprenticeship, and Crime Victims (ESAC) division.
  - (4) **Assistant Director** – This definition is updated so that the term refers to the assistant director of “specialty compliance services” rather than the prior ESAC division.
  - (7)(a) “For the purposes of chapter 39.12 RCW,” is added to avoid confusion in applying “public work” terminology as it is used in other statutes. The manner of execution of the work, i.e., “by contract, purchase order, or any other legal agreement,” is stricken as superfluous and for consistency with chapter 39.12 RCW and RCW 39.04.010(4).
  - (7)(b) The reference to “municipal street railway system” is no longer applicable. The definition of “ordinary maintenance” is amended to adopt the definition as set forth in current applicable case law: *City of Spokane (Wheelabrator) v. Dep’t of Labor & Indus.*, 100 Wn. App. 805, 998 P.2d 913 (2000).
  - (8) **Contract** – For purposes of clarification, this definition deletes references to whether a contract is advertised or not. The “in writing” reference is deleted since it has been the source of confusion and misinterpretation.
  - (9) **Residential Construction** – end punctuation mark is corrected for grammar.
  - (10) **Filing**, (11) **Service**, and (12) **Issuance** – These definitions bring the rules into line with definitions as used in the Administrative Procedures Act, and/or to comport with plain meaning of terms. The definitions bring clarity to the chapter.
  - The added notes provide information about the newly adopted “residential construction” provisions in prevailing wage law (RCW 39.12.030), and the definitions section in general.
  
- **WAC 296-127-011, Time for determining prevailing wage.**
  - The change to Subsection (3)(c) removes sunsetted provisions referenced in the rule.
  - The revision in (6) makes it clear that “journey-level” wages is the wage rate level to be included in the schedule of rates to be incorporated into public works bid specifications and contract documents, consistent with department policy and practice.
  - The other revisions add provisions for service contracts, a subject not adequately addressed in current rules, and specifically state the need for annual wage updates in multi-year maintenance, service, and building service maintenance contracts, the cost of which annual wage updates shall be borne by the awarding agency. These rule proposals implement existing administrative policies and are consistent with the provisions of chapter 39.12 RCW.

**Attachment (1)**  
Purpose Statement

- **WAC 296-127-015, Applicability of prevailing wages for supervisors.**
  - Deletion of (1) removes references to “journey level in charge” work classification, etc. to reflect current conditions; there is no such work classification currently utilized in prevailing wage rate designations.
  - This change to current subsection (2)(a) changes the threshold for prevailing wage rate application to supervisor efforts from 20 percent of the hours worked on a public works project in a week to 10 percent of the hours worked on a public works project in a day. This is a more appropriate threshold and better fulfills the remedial purposes of the Prevailing Wage Act.
  
- **WAC 296-127-019, Survey methodology.**
  - Deletion of subsection (6)(d) is dictated by current law that prohibits the combining of adjacent county data to validate a survey.
  - The new subsection (8)(b)(iv) addresses the same issue and provides for the industrial statistician’s utilization of an alternative method to establish prevailing wage rates when insufficient hours to validate a survey are reported for a given county.
  
- **WAC 296-127-020, Interpretation of phrases used in chapter 39.12 RCW.**
  - This is a clean-up providing appropriate statutory references, making it clear that the successor liability provisions apply to RCW 39.12.065 as well as RCW 39.12.050 where the successor has actual or constructive knowledge of a predecessor’s liability, and clarifying that the “contractor” and “subcontractor” provisions apply to enforcement of all of chapter 39.12 RCW, not only RCW 39.12.050.
  
- **WAC 296-127-026, Exemptions for sole owners and their spouses, partnerships, corporations and employees of public agencies.**
  - The title is revised to (1) remove the “exemptions” language which has been a source of confusion and (2) to include limited liability companies in the provisions of the rule.
  - New subsection (1)(c) includes 30% ownership members of limited liability companies in the provisions of the rule. The inclusion of limited liability companies within rule coverage is consistent the intent of the rule and consistent with current business organizational structures. The introductory language also clarifies that the rule applies to “the work of” persons covered by the subsection, which ties in with new subsection (2) discussed below.
  - Subsection (4) [new subsection (1)(e)] removes a reference to public employees paid “on monthly or per diem salary,” a mode of payment no longer applicable, and makes it clear that the provision applies to all workers regularly employed by the state or any political subdivision.
  - New subsection (2) makes it clear that although the rule exempts certain individuals from requirements to be paid prevailing wages for their work, they are still subject to other provisions of prevailing wage law, including intent and

## Attachment (1)

### Purpose Statement

affidavit filing requirements. This is consistent with chapter 39.12 RCW and promotes greater clarity.

- **WAC 296-127-050, Filing statements of intent to pay prevailing wages and affidavits of wages paid for contracts under two thousand five hundred dollars.**
  - The title is revised to more specifically refer to the type of combined statement to which the rule applies, and to bring the amount of the contract covered into compliance with the statute (“two thousand five hundred dollars or less, including tax” rather than “under two thousand five hundred dollars”)
  - Other revisions are included to conform the rule to department policy for utilization of alternate, combined forms.
- **New Section WAC 296-127-055, Alternate filing of combined statement of intent to pay prevailing wages and affidavit of wages paid forms for limited public works contracts less than thirty-five thousand dollars including sales tax.**
  - This is a new rule to correspond with RCW 39.04.155(3).
- **WAC 296-127-060, Director of department of labor and industries to arbitrate disputes – General provisions.**
  - The revisions change the wording so that it is gender neutral.
- **WAC 296-127-061, Requests for arbitration.**
  - The revisions correct the instructions for filing a petition for arbitration and reduce the number of copies required to be filed.
- **WAC 296-127-062, Conduct of arbitration hearing.**
  - The revisions correct the instructions for filing a petition for arbitration, reducing the number of copies required to be filed, and the wording is revised so that it is gender neutral.
- **WAC 296-127-150, Notice of violation.**
  - The revisions clarify that certain provisions in notices of violation are applicable to only certain types of violations, i.e., RCW 39.12.065 violations as opposed to RCW 39.12.050 violations, and clean up the language used to describe the filing of a request for hearing in connection with a notice of violation.
- **WAC 296-127-160, Appeal of notice of violation.**
  - The revisions clarify the appeal process, using language consistent with the Administrative Procedures Act. The number of required copies of an appeal is reduced to two.
- **WAC 296-127-170, Hearing on notice of violation.**
  - The revisions clarify language, correct statute references, and reduce the number of copies required for filing a notice of appeal.

## **Attachment (1)**

### Purpose Statement

- **WAC 296-127-190, Filing of lien against retainage or bonds.**
  - The revisions correct statute references.
- **WAC 296-127-200, Surety bond payable to director.**
  - The revisions correct statute references.
- **WAC 296-127-300, Filing and service.**
  - The revisions correct addresses and filing procedures.
- **WAC 296-127-320, Payroll.**
  - The revisions to subsection (1) clarify that the payroll records must contain a statement of hours worked and overtime rates.
  - Subsection (2) revisions conform the rule to department policy with respect to: (a) the need for certified payroll records to contain the workers' entire social security number only if requested as part of an L&I investigation; (b) authorizing the use of only the last four digits of the Social Security number for satisfying certified payroll requests that are not part of an L&I investigation; and (c) requiring use of L&I "affirmation" language on all certified payroll records.

## **Attachment 2 – Prevailing Wage Public Hearings**

### **Tumwater:**

**Date:** June 28, 2010

**Time:** 1:00 p.m.

**Location:** Department of Labor and Industries  
7273 Linderson Way Southwest, Room S117  
Tumwater, Washington

### **Tukwila:**

**Date:** June 29, 2010

**Time:** 10:00 a.m.

**Location:** Department of Labor and Industries, Tukwila Service Location  
12806 Gateway Drive  
Tukwila, Washington

### **Spokane:**

**Date:** July 1, 2010

**Time:** 10:00 a.m.

**Location:** Department of Labor and Industries, Spokane Service Location  
901 N Monroe Street, Suite 100  
Spokane, Washington