

Preliminary Small Business Economic Impact Statement	Rules implementing Initiative 1433, An Act Related to Fair Labor Standards – Paid Sick Leave and Retaliation Chapter 296-128 WAC, Minimum wages
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Date: July 5, 2017

1. Describe the proposed rule, including: a brief history of the issue; an explanation of why the proposed rule is needed; and a brief description of the amendments in this proposal that would impose new or additional costs on affected businesses, including small businesses.

In November 2016, Washington voters approved Initiative Measure No. 1433 (I-1433), a ballot measuring concerning labor standards. I-1433 was codified under Chapter 49.46 RCW.

I-1433, in part, requires employers provide their employees paid sick leave, the purpose of which is to promote public health, family stability and economic security, balanced with the demands of the workplace. I-1433 includes: provisions addressing the accrual and carry over of paid sick leave, defines what paid sick can be used for and when, and prohibits employers from retaliating against employees for exercising any rights provided by Chapter 49.46 RCW.

I-1433 directed the Department of Labor and Industries (L&I) to adopt and implement rules to carry out and enforce the initiative, including but not limited to procedures for notification to employees and reporting regarding sick leave, and protecting employees from retaliation for the lawful use of sick leave and exercising other rights under Chapter 49.46 RCW.

The changes in the proposed rules that impose new or additional costs on businesses are: amendments to the recordkeeping requirements; requirements related to employee notification and reporting; and requirements related to the paid sick leave increments of use.

2. Identify which businesses are required to comply with the proposed rule using the North American Industry Classification System (NAICS).

The initiative applies to all businesses that have paid employee(s) in Washington State covered under Chapter 49.46 RCW. The proposed rule is intended to implement requirements of the initiative. Therefore, all businesses with employees covered under Chapter 49.46 RCW are required to comply with the proposed rule. Table 1 below shows the total number of establishments and employment by each industry (2016Q1, ESD). This data does not distinguish between employees covered under Chapter 49.46 RCW and those currently not covered.

Table 1: Establishments and employment by industry (excluding nonemployers)

NAICS	Industry	# of establishments	Total employment
11	Agriculture, forestry, fishing and hunting	5,749	87,020
21	Mining	145	2,268
23	Construction	18,288	158,058
31, 32, 33	Manufacturing	6,908	299,917
22	Utilities	572	18,662
42	Wholesale trade	12,421	128,622
44, 45	Retail trade	18,842	352,976
48, 49	Transportation and warehousing	4,708	119,900

51	Information	3,630	121,833
52	Finance and insurance	8,010	92,114
53	Real estate and rental and leasing	7,314	49,989
54	Professional and technical services	20,465	193,301
55	Management of companies and enterprises	664	43,032
56	Administrative and waste services	9,803	156,907
61	Educational services	3,321	278,421
62	Health care and social assistance	48,152	449,342
71	Arts, entertainment and recreation	2,600	67,945
72	Accommodation and food services	15,240	253,471
81	Other services, except public administration	17,196	91,832
92	Public administration	1,938	157,734

3. Identify and analyze the probable costs to comply with the proposed rule.

The probable costs analyzed included both the following required and optional elements of the proposed rule. The proposed rule changes determined to be exempt from the cost benefit analysis requirement were not considered¹.

Require elements of the proposed rule:

- **WAC 296-128-010, Recordkeeping**

Rule Overview: The existing recordkeeping requirements of RCW 49.46 are amended to incorporate payroll or other records documenting sick leave accrued, used, and paid to employees. Employers must keep records that show, for each employee, paid sick leave accruals each month, and any unused paid sick leave available for use; paid sick leave reductions each month, and the date of the employee's commencement of employment.

Costs to be estimated: The costs associated with the recordkeeping requirements created by the initiative.

- **WAC 296-128-630, Paid sick leave usage**

Rule Overview: Employers must allow employees to use paid sick leave in increments consistent with the employer's payroll system and practices, not to exceed one hour. For example, if an employer's normal practice is to track increments of work for the purposes of compensation in fifteen-minute increments, then an employer must allow employees to use paid sick leave in fifteen-minute increments.

Costs to be estimated: The administrative cost of processing leave usage in increments of one hour or less. When employees use paid sick leave, some employers may experience costs associated with covering the employee's absence. While L&I recognizes there are costs to employers, these costs are attributable to the initiative which created the employee's right to use paid sick leave and are not considered in this analysis. Additionally, many employers will not automatically cover an employee's absence by calling another employee to fill in. There are an array of options available to employers to cover an employee's absence while on paid sick leave that do not cause any increased cost, including, but not limited to rearranging rest and meal breaks, working with fewer employees, or filling in

¹ See Chapter 1 of the Cost Benefit Analysis

themselves. For purposes of estimating costs associated with the rule in general, it would be difficult to predict how employers will address this issue.²

During the rule development process, some employers commented that while they normally track work in small increments, including 5 minutes or less, allowing leave in those increments would be infeasible. Similarly, some employers commented one -hour increments would be infeasible. To mitigate the costs in these situations, L&I added the variance provision in WAC 296-128-640.

- **WAC 296-128-760, Employer notification and reporting to employees**

Rule Overview: Employers must notify each employee of their entitlement to paid sick leave, the rate of accrual, the authorized purposes for use of paid sick leave, and that employers may not retaliate against employees for the lawful use of paid sick leave and other rights provided under Chapter 49.46 RCW. Employers can decide whether the notification is written or electronic. A one-time notification must be given to existing employees no later than March 1, 2018. New hires are notified on the date of commencement of their employment. Employers must report to employees about their leave balances each month, but only if they have worked since the prior notification.

Costs to be estimated: The administrative costs associated with providing initial notice to existing employees, providing notice to new hires, and satisfying the ongoing monthly reporting requirements.

Optional elements of the proposed rule:

- **WAC 296-128-640, Variance from required increments of paid sick leave usage**

Rule Overview: This rule permits L&I to grant a variance from the increment of use requirement if an employer can show “good cause” that providing paid sick leave in increments consistent with the employer’s payroll system and practices, not to exceed one hour, is infeasible, and the variance does not affect the health, safety, or welfare of employees. Variances may be sought by submitting a written application. Affected employees are given notice of the employer's request for variance and have an opportunity to be heard. L&I will grant a variance if good cause is shown and will issue an order detailing the terms of the variance. Variance determinations are subject to reconsideration. L&I may issue temporary variances. The terms of any variance granted must be made readily available to employees.

Costs to be estimated: The administrative costs associated with completing the application for a variance, communicating with employees about the variance request and their right to participate in L&I's determination, and costs associated with presenting any additional information, if requested, as part of the process.

- **WAC 296-128-650, Reasonable notice**

Rule Overview: The initiative permits employers to require reasonable notice of an absence from work for the use of paid sick leave for an authorized purpose. If the need for leave is foreseeable, the employer may, but is not required to, ask for advance notice from the employee. Employers may ask for less notice, but if the employer does not have a policy on the number of days for advance notice, an employee must provide at least ten days notice, or as early as practicable, to use paid sick leave.

² According to a study of New York City’s paid sick leave law, 84 % of employers reported covering short absences of non-exempt employees taking sick leave by temporarily assigning work to other workers, allowing employees to swap shifts, putting the work on hold, or having some employees work from home while out sick. (Center Economic and Policy Research (2016), “No Big Deal: The Impact of New York City’s Paid Sick Days Law on Employers”, available at <http://cepr.net/images/stories/reports/nyc-paid-sick-days-2016-09.pdf>)

When the need for paid sick leave is unforeseeable, an employer may, ask for notice as soon as possible before the scheduled start of a shift, unless it is not practicable to do so. Another person can provide notice to the employer on the employee's behalf. Notice requirements must comply with the Domestic Violence Leave Act, must be part of a written policy or collective bargaining agreement, and must be provided to employees before notice is required for the use of paid sick leave.

Costs to be estimated: Administrative costs associated with creating a written policy for employees to provide advance notice for the use of paid sick leave.

- **WAC 296-128-660, Verification for absences exceeding three days**

Rule Overview: The rule allows, but does not require, employers to ask employees to verify any absence exceeding three days is for an authorized purpose. As part of the employer's verification requirement, an employer may require an employee to provide verification from a health care provider. If an employer has a notification policy, the policy must be in writing and provided to the employee in advance of requiring the employee to provide verification. If an employer creates a verification policy requiring an employee to provide verification from a health care provider, employers are prohibited from asking about the nature of the condition for which leave is used, and must keep any medical information obtained confidential.

Employer verification requirements may not result in an unreasonable burden or expense on employees. If an employee believes an employer's verification requirements result in an unreasonable burden or expense, employees must be allowed to provide an oral or written explanation to their employer asserting that the leave was for an authorized purpose and how the verification requirement results in an unreasonable burden or expense. An employer must consider the employee's explanation and make a reasonable effort to identify alternative methods for the employee to meet the employer's verification requirement, including mitigating any out-of-pocket expenses associated with meeting medical verification requirements or accepting the employee's oral or written explanation as a form of verification that meets the employer's requirements. If the employer and employee are unable to resolve a disagreement, either may consult with L&I, and the employee can file a complaint. If an employer does have a verification requirement, such employee verification must be provided within a ten-day calendar period after the leave begins, and verification requirements must be in a written policy made readily available to employees before verification requirements are requested by employers. Verification requirements must be consistent with the Domestic Violence Leave Act and the Family and Medical Leave Act.

Costs to be estimated: Administrative costs associated with creating a policy explaining notification requirements to employees, making the policy readily available to employees, and administering the policy.

- **WAC 296-128-700, Shared Leave**

Rule Overview: This rule allows, but does not require, employers to establish a shared paid sick leave program in which an employee may choose to donate paid sick leave to a coworker. The employer must have a written policy or a collective bargaining agreement describing the shared leave program. The employer must notify employees of the policy and make the information readily available to employees.

Costs to be estimated: Costs associated with developing a written program, notifying employees, and making the information available to employees.

- **WAC 296-128-730, Frontloading**

Rule Overview: The rule allows, but does not require, employers to establish processes that provide employees to use paid sick leave before it has accrued. If an employer chooses to provide employees with paid sick leave to use before they have accrued it, the employer must have a written policy or collective bargaining agreement describing the program to employees and explaining how balances are administered before the employee can use the frontloaded leave. Employees must be notified about their paid sick leave available for use not less than monthly.

Costs to be estimated: Costs associated with developing a written policy and creating processes to front load leave and to notify employees about balances.

As detailed in Chapter 2 of the L&I’s Cost Benefit Analysis, the following is the summary of the annualized costs of the required and optional rule amendments.

Table 2: Summary of the annualized costs for small businesses and large businesses for each required and optional proposed rule element

Cost component	Required or optional	Small (1-49 employees)	10% of Largest (250+ employees)
Costs of notification, monthly reporting and recordkeeping requirements.	Required	\$37,625,242 - \$43,023,370	\$2,403 - \$4,807
Costs of increment requirement for PSL usage and variance application.	Required	\$6,747,607 - \$7,416,332	\$585,574 - \$585,822
All Required		\$44,372,848 - \$50,439,703	
Costs of verification for absences exceeding three days.	Optional	\$1,175,275 - \$1,936,893	\$108,090 - \$177,753
Costs of creating & updating a comprehensive PSL written policy.	Optional	\$10,838,895 - \$27,853,718	\$2,403 - \$6,009
Recordkeeping costs for optional programs.	Optional	\$373,052 - \$1,492,207	10% of Largest (250+ employees)
All Optional		\$12,387,221 - \$31,282,818	

For more information, see Chapter 2 of the Cost Benefit Analysis, which includes our cost impact analysis for the proposed rule.

The Cost Benefit Analysis (CBA) is available on the L&I website or it may be obtained by:

Email: i1433Rules@Lni.wa.gov

Phone: Allison Drake at (360) 902-5304

4. Determine whether the proposed rule may impose a disproportionate impact on small businesses compared to the 10 percent of businesses that are the largest businesses required to comply with the proposed rule.

Section 3 provides the details on the estimated total costs of each identified rule amendment. To determine whether or not the proposed rule may have a disproportionate impact on small businesses, L&I also is required to derive and compare the unit cost for small businesses (with 50 or fewer employees) and for largest businesses as well. Due to data limitations, we choose the group of businesses with 1-49 employees as a representative of small business, and those with 250 and more employees as a representative of largest businesses that are required to comply with the rule. In addition, cost-per-employee is most commonly used as the basis for this comparison. Employment data is readily available for each different firm size. For these reasons, this measure is also used here for comparison purpose.

Based on the total costs analyzed in the previous section for these two groups and their corresponding employment, L&I estimates that the per-employee cost for the required elements of the proposed rule for small businesses is approximately 6.6 to 7.6 times the unit cost for the 10% of the largest businesses. For both the required and optional elements of the proposed rule, the per-employee cost for small businesses is approximately 6.5 to 10.3 times the unit cost for the 10% of the largest businesses. Therefore, L&I concludes this proposed rule will impose disproportionate impact on small businesses.

Table 2: Cost comparison between small businesses and large businesses

Firm Size		Total costs per year	Per-employee cost per year
Small (1-49 employees) Number of businesses = 196,148 Total employment = 1,222,866	Required costs	\$44,372,848 - \$50,439,703	\$36.29- \$41.25
	Total required and optional costs	\$56,760,070 - \$81,722,521	\$46.42 - \$66.83
10% of Largest (250+ employees) Number of businesses = 135 Total employment = 108,159	Required costs	\$587,978 – \$590,629	\$5.44 - \$5.46
	Total required and optional costs	\$698,772 – \$775,593	\$6.46 - \$7.17

5. If the proposed rule is likely to impose a disproportionate impact on small businesses, identify the steps taken to reduce the costs of the rule on small businesses.

L&I is taking the following steps to reduce the costs of the rule on small businesses:

5.1 As described below, L&I added language to the rule specifically to mitigate cost where possible.

- WAC 296-128-630 Paid sick leave usage and WAC 296-128-640 Variance from required increments of paid sick leave usage**
 Under the proposed rules, employers must allow employees to use paid sick leave in increments consistent with the employer’s payroll system and practices, not to exceed one hour. For example, if an employer’s normal practice is to track increments of work for the purposes of compensation in fifteen-minute increments, then an employer must allow employees to use paid sick leave in fifteen-minute increments. During the rule development process, some employers commented that while they normally track work in small

increments, including 5 minutes or less, allowing leave in those increments would be infeasible. Similarly, some employers commented one-hour increments would be infeasible. To mitigate the costs in situations, L&I added the variance provisions to address cost mitigation and provide a less burdensome alternative. Additionally, although the variance review process can take 60 days, or more under limited circumstances, the process allows for the issuance of a temporary variance where immediate action is necessary. If granted, a temporary variance will remain valid until L&I makes a decision on the variance.

- **Multiple WACs, Paid Sick Leave Policies**

The proposed rules do not require employers to have written policies unless employers choose to require employees to give reasonable notice before paid sick leave is used; choose to require employees to provide verification for use of paid sick leave; to establish a shared leave program, or to frontload paid sick leave. Since these are not required elements of the rule, written policies are needed to ensure employees understand how the employer's administration of the optional features of the initiative and rules are carried out. To mitigate any potential costs the policy requirements may create, L&I proposed WAC 296-128-610, providing for sample policies that will meet its standard for compliance with these rules.

- **WAC 296-128-660 Verification for absences exceeding three days**

The initiative states “[a]n employer’s requirements for verification may not result in an unreasonable burden or expense on the employee...” Rather than automatically requiring an employer pay all or a part of the costs associated with obtaining medical verification when doing so places an unreasonable burden or expense on the employee, the proposed rule provides the employer and employee with flexibility to identify alternatives for the employee to meet the employer’s verification requirement in a manner which does not result in an unreasonable burden or expense on the employee. When an employer requires an employee to provide verification from a medical provider, and the employee asserts that such verification requirement results in an unreasonable burden or expense on the employee, one option an employer may consider is mitigating the employee’s out-of-pocket expense.

5.2 L&I will be pursuing other steps to mitigate costs to small business, including:

- Developing and implementing a robust outreach and education program small business are informed about what they need to know to comply with the law
- Developing a standard application form for employers to use to request a variance from required increments of paid sick leave usage
- Developing a template letter to use for medical verification
- Reach out to payroll software companies to help develop instructions on how to program the software for Washington’s paid sick leave requirements
- Consider other mitigation techniques including those suggested by small businesses or small business advocates

6. Describe how small businesses were involved in the development of the proposed rule.

In order to have rules place before the paid sick leave implementation date of January 1, 2018, L&I began a comprehensive rulemaking development process with the public and with stakeholders, which began in January 2017. As part of the process, L&I set up an engagement website that gave the public an opportunity to review and comment throughout, including small businesses.

An initial public meeting with stakeholders was held, and L&I asked stakeholders to provide feedback on key questions to be covered in the rules. A draft document containing stakeholder input was created and

circulated, and stakeholders were able to provide comment on each other's contributions. An initial version of the proposed rules was circulated during April 2017, and a second public meeting was held to discuss the initial version and to obtain stakeholder comment. Thereafter, a second version of the rules was drafted and circulated during May 2017, and a third public meeting was held. Small business employers and organizations representing small businesses were involved in these processes.

7. Identify the estimated number of jobs that will be created or lost as the result of compliance with the proposed rule.

L&I believes that potential job impact is mostly the result of the initiative, which granted employees benefit of paid sick leaves. L&I lacks credible information or data to come up with an estimate on how many jobs will be created or lost due to the proposed rule.