

NEW SECTION

**WAC 296-128-780 Enforcement—Retaliation.** (1) An employee who believes that they were subject to retaliation by their employer, as defined in WAC 296-128-770, for the exercise of any employee right under chapter 49.46 RCW, may file a complaint with the department within one hundred eighty days of the alleged retaliatory action. The department may, at its discretion, extend the one hundred eighty-day period on recognized equitable principles or because extenuating circumstances exist. For example, the department may extend the one hundred eighty-day period when there is evidence that the employer has concealed or misled the employee regarding the alleged retaliatory action.

(2) If an employee files a timely complaint with the department alleging retaliation, the department will investigate the complaint and issue either a citation and notice of assessment or a determination of compliance within ninety days after the date on which the department received the complaint, unless the complaint is otherwise resolved. The department may extend the period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the period, and specifying the duration of the extension.

(3) The department may consider a complaint to be otherwise resolved when the employee and the employer reach a mutual agreement to remedy any retaliatory action, or the employee voluntarily and on the employee's own initiative withdraws the complaint. Mutual agreements include, but are not limited to, rehiring, reinstatement, back pay, and reestablishment of benefits.

(4) If the department's investigation finds that the employee's allegation of retaliation cannot be substantiated, the department will issue a determination of compliance to the employee and the employer detailing such finding.

(5) If the department's investigation finds that the employer retaliated against the employee, and the complaint is not otherwise resolved, the department may, at its discretion, notify the employer that the department intends to issue a citation and notice of assessment, and may provide up to thirty days after the date of such notification for the employer to take corrective action to remedy the retaliatory action. If the complaint is not otherwise resolved, then the department shall issue a citation and notice of assessment. The department's citation and notice of assessment may:

(a) Order the employer to make payable to the employee earnings that the employee did not receive due to the employer's retaliatory action, including interest of one percent per month on all earnings owed. The earnings and interest owed will be calculated from the first date earnings were owed to the employee;

(b) Order the employer to restore the employee to the position of employment held by the employee when the retaliation occurred, or restore the employee to an equivalent position with equivalent employment hours, work schedule, benefits, pay, and other terms and conditions of employment;

(c) Order the employer to cease using any policy that counts the use of paid sick leave as an absence that may lead to or result in discipline against the employee;

(d) For the first violation, order the employer to pay the department a civil penalty as specified in WAC 296-128-790; and

(e) For a repeat violation, order the employer to pay the department up to double the civil penalty as specified in WAC 296-128-790.

(6) The department will send the citation and notice of assessment or determination of compliance to both the employer and employee by service of process or using a method by which the mailing can be tracked or the delivery can be confirmed to their last known addresses.

(7) During an investigation of the employee's retaliation complaint, if the department discovers information suggesting alleged violations by the employer of the employee's other rights under chapter 49.46 RCW, and all applicable rules, the department may investigate and take appropriate enforcement action without requiring the employee to file a new or separate complaint. If the department determines that the employer violated additional rights of the employee under chapter 49.46 RCW, and all applicable rules, the employer may be subject to additional enforcement actions for the violation of such rights. If the department discovers information alleging the employer retaliated against or otherwise violated rights of other employees under chapter 49.46 RCW, and all applicable rules, the department may launch further investigation under chapter 49.46 RCW, and all applicable rules, without requiring additional complaints to be filed.

(8) The department may prioritize retaliation investigations as needed to allow for timely resolution of complaints.

(9) Nothing in WAC 296-128-780 through 296-128-800 impedes the department's ability to investigate under the authority prescribed in RCW 49.48.040.

(10) Nothing in WAC 296-128-780 through 296-128-800 precludes an employee's right to pursue private legal action.

## NEW SECTION

### **WAC 296-128-790 Enforcement—Retaliation—Civil penalties. (1)**

If the department's investigation finds that an employer retaliated against an employee, pursuant to the procedures outlined in WAC 296-128-780, the department may order the employer to pay the department a civil penalty. A civil penalty for an employer's retaliatory action will not be less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid earnings attributable to the retaliatory action, whichever is greater. The maximum civil penalty for an employer's retaliatory action shall be twenty thousand dollars for the first violation, and forty thousand dollars for each repeat violation.

(2) The department may, at any time, waive or reduce any civil penalty assessed against an employer under this section if the department determines that the employer has taken corrective action to remedy the retaliatory action.

(3) The department will deposit civil penalties paid under this section in the supplemental pension fund established under RCW 51.44.033.

(4) Collections of amounts owed for unpaid citations and notices of assessment, as detailed in WAC 296-128-780(5), will be handled pursuant to the procedures outlined in RCW 49.48.086.

NEW SECTION

**WAC 296-128-800 Enforcement—Retaliation—Appeals.** (1) A person, firm, or corporation aggrieved by a citation and notice of assessment or a determination of compliance may, within thirty days after the date of such decision, submit a request for reconsideration to the department setting forth the grounds for seeking such reconsideration, or submit an appeal to the director pursuant to the procedures outlined in subsection (4) of this section. If the department receives a timely request for reconsideration, the department will either accept the request or treat the request as a notice of appeal.

(2) If a request for reconsideration is accepted, the department will send notice of the request for reconsideration to the employer and the employee. The department will determine if there are any valid reasons to reverse or modify the department's original decision to issue a citation and notice of assessment or determination of compliance within thirty days of receipt of such request. The department may extend this period by providing advance written notice to the employee and employer setting forth good cause for an extension of the period, and specifying the duration of the extension. After reviewing the reconsideration, the department will either:

(a) Notify the employee and the employer that the citation and notice of assessment or determination of compliance is affirmed; or

(b) Notify the employee and the employer that the citation and notice of assessment or determination of compliance has been reversed or modified.

(3) A request for reconsideration submitted to the department shall stay the effectiveness of the citation and notice of assessment or the determination of compliance pending the reconsideration decision by the department.

(4) Within thirty days after the date the department issues a citation and notice of assessment or a determination of compliance, or within thirty days after the date the department issues its decision on the request for reconsideration, a person, firm, or corporation aggrieved by a citation and notice of assessment or a determination of compliance may file with the director a notice of appeal.

(5) A notice of appeal filed with the director under this section shall stay the effectiveness of the citation and notice of assessment or the determination of compliance pending final review of the appeal by the director as provided for in chapter 34.05 RCW.

(6) Upon receipt of a notice of appeal, the director shall assign the hearing to an administrative law judge of the office of administrative hearings to conduct the hearing and issue an initial order. The hearing and review procedures shall be conducted in accordance with chapter 34.05 RCW, and the standard of review by the administrative law judge of an appealed citation and notice of assessment or determination of compliance shall be de novo. Any party who seeks to challenge an initial order shall file a petition for administrative review with the director within thirty days after service of the ini-

tial order. The director shall conduct administrative review in accordance with chapter 34.05 RCW.

(7) If a request for reconsideration is not submitted to the department within thirty days after the date of the original citation and notice of assessment or determination of compliance, and a person, firm, or corporation aggrieved by a citation and notice of assessment or determination of compliance did not submit an appeal to the director, then the citation and notice of assessment or determination of compliance is final and binding, and not subject to further appeal.

(8) The director shall issue all final orders after appeal of the initial order. The final order of the director is subject to judicial review in accordance with chapter 34.05 RCW.

(9) Director's orders that are not appealed within the time period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal.

(10) An employer who fails to allow adequate inspection of records in an investigation by the department under WAC 296-128-780 through 296-128-800 within a reasonable time period may not use such records in any appeal under such rules to challenge the correctness of any determination by the department.

#### NEW SECTION

**WAC 296-128-810 Enforcement—Paid sick leave.** (1) If an employee files a complaint with the department alleging that the employer failed to provide the employee with paid sick leave as provided in RCW 49.46.200 and 49.46.210, the department will investigate the complaint as an alleged violation of a wage payment requirement, as defined by RCW 49.48.082(12).

(2) When the department's investigation results in a finding that the employer failed to provide the employee with paid sick leave accrual, use, or carryover during an ongoing employment relationship, the employee may elect to:

(a) Receive full access to the balance of accrued paid sick leave hours unlawfully withheld by the employer, based on a calculation of at least one hour of paid sick leave for every forty hours worked as an employee during the period of noncompliance; or

(b) Receive payment from the employer at their normal hourly compensation for each hour of paid sick leave that the employee would have used or been reasonably expected to use, whichever is greater, during the period of noncompliance, not to exceed an amount the employee would have otherwise accrued. The employee will receive full access to the balance of accrued paid sick leave hours unlawfully withheld by the employer, less the number of paid sick leave hours paid out to the employee pursuant to this subsection.

(3) When the department's investigation results in a finding that the employer failed to provide the employee with paid sick leave accrual, use, or carryover, and the employee is no longer employed by the same employer, the employee may elect to receive payment at their normal hourly compensation, receive reinstatement of the balance of paid sick leave hours, or receive a combination of payment and reinstatement from the employer for all hours of paid sick leave that would have accrued during the period of noncompliance. Such hours must

be based on a calculation of at least one hour of paid sick leave for every forty hours worked as an employee.

(4) The department's notice of assessment, pursuant to RCW 49.48.083, may order the employer to provide the employee any combination of reinstatement and payment of accrued, unused paid sick leave hours assessed pursuant to subsection (2) or (3) of this section.

(5) For purposes of this section, an employer found to be in non-compliance cannot cap the employee's carryover of paid sick leave at forty hours to the following year for each year of noncompliance ("year" as defined in WAC 296-128-620(6)).

#### NEW SECTION

**WAC 296-128-820 Enforcement—Tips and service charges.** If an employee files a complaint with the department alleging that their employer failed to pay to the employee all tips and gratuities due to the employee under RCW 49.46.020, or all service charges due to the employee under RCW 49.46.020 and 49.46.160, the department will investigate the complaint. The department will investigate the complaint pursuant to the procedures outlined in the Wage Payment Act, RCW 49.48.082 through 49.48.087.

#### NEW SECTION

**WAC 296-128-830 Enforcement—Complaints alleging a violation of other rights under chapter 49.46 RCW—Duty of department to investigate—Citations—Civil penalties.** (1) If an employee files a complaint with the department alleging a violation of the employee's rights under chapter 49.46 RCW, and all applicable rules, that are not otherwise enforced by the department pursuant to WAC 296-128-780 through 296-128-820, or the Wage Payment Act, RCW 49.48.082 through 49.48.087, the department will investigate the complaint under this section. Alleged violations include, but are not limited to, failure of an employer to comply with: The recordkeeping requirements set forth in WAC 296-128-010; the requirements to maintain written policies or collective bargaining agreements, as outlined in WAC 296-128-650(3), 296-128-660(2), 296-128-710(1), and 296-128-730(4); and notification and reporting requirements set forth in WAC 296-128-760.

(a) The department may not investigate any such alleged violation of rights that occurred more than three years before the date that the employee filed the complaint.

(b) If an employee files a timely complaint with the department, the department will investigate the complaint and issue either a citation assessing a civil penalty or a closure letter within sixty days after the date on which the department received the complaint, unless the complaint is otherwise resolved. The department may extend the period by providing advance written notice to the employee and the employer setting forth good cause for an extension of the period, and specifying the duration of the extension.

(c) The department will send notice of a citation assessing a civil penalty or the closure letter to both the employer and the employee by service of process or using a method by which the mailing can be tracked or the delivery can be confirmed to their last known addresses.

(2) If the department's investigation finds that the employee's allegation cannot be substantiated, the department will issue a closure letter to the employee and the employer detailing such finding.

(3) If the department determines that the violation of rights under chapter 49.46 RCW, and all applicable rules, that are not enforced by the department pursuant to WAC 296-128-780 through 296-128-820, or the Wage Payment Act, RCW 49.48.082 through 49.48.087, was a willful violation, and the employer fails to take corrective action, the department may order the employer to pay the department a civil penalty as specified in (a) of this subsection.

(a) A citation assessing a civil penalty for a willful violation of such rights will be one thousand dollars for each willful violation. For a repeat willful violator, the citation assessing a civil penalty will not be less than two thousand dollars for each repeat willful violation, but no greater than twenty thousand dollars for each repeat willful violation.

(b) The department may not issue a citation assessing a civil penalty if the employer reasonably relied on:

(i) A written order, ruling, approval, opinion, advice, determination, or interpretation of the director; or

(ii) An interpretive or administrative policy issued by the department and filed with the office of the code reviser. In accordance with the department's retention schedule obligations under chapter 40.14 RCW, the department will maintain a complete and accurate record of all written orders, rulings, approvals, opinions, advice, determinations, and interpretations for purposes of determining whether an employer is immune from civil penalties under (b) of this subsection.

(c) The department may, at any time, waive or reduce a civil penalty assessed under this section if the director determines that the employer has taken corrective action to resolve the violation.

(d) The department will deposit civil penalties paid under this section in the supplemental pension fund established under RCW 51.44.033.

(4) For purposes of this section, the following definitions apply:

(a) "Repeat willful violator" means any employer that has been the subject of a final and binding citation for a willful violation of one or more rights under chapter 49.46 RCW, and all applicable rules, within three years of the date of issuance of the most recent citation for a willful violation of one or more such rights.

(b) "Willful" means a knowing and intentional action that is neither accidental nor the result of a bona fide dispute.

#### NEW SECTION

**WAC 296-128-840 Complaints alleging a violation of other rights under chapter 49.46 RCW—Administrative appeals.** (1) A person, firm, or corporation aggrieved by a citation assessing a civil penalty is-

sued by the department under WAC 296-128-830 may appeal the citation assessing a civil penalty to the director by filing a notice of appeal with the director within thirty days of the department's issuance of the citation assessing a civil penalty. A citation assessing a civil penalty not appealed within thirty days is final and binding, and not subject to further appeal.

(2) A notice of appeal filed with the director under this section will stay the effectiveness of the citation assessing a civil penalty pending final review of the appeal by the director as provided for in chapter 34.05 RCW.

(3) Upon receipt of a notice of appeal, the director will assign the hearing to an administrative law judge of the office of administrative hearings to conduct the hearing and issue an initial order. The hearing and review procedures will be conducted in accordance with chapter 34.05 RCW, and the standard of review by the administrative law judge of an appealed citation assessing a civil penalty will be de novo. Any party who seeks to challenge an initial order shall file a petition for administrative review with the director within thirty days after service of the initial order. The director will conduct administrative review in accordance with chapter 34.05 RCW.

(4) The director will issue all final orders after appeal of the initial order. The final order of the director is subject to judicial review in accordance with chapter 34.05 RCW.

(5) Orders that are not appealed within the period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal.

(6) An employer who fails to allow adequate inspection of records in an investigation by the department under WAC 296-128-830 through 296-128-850 within a reasonable time period may not use such records in any appeal under such rules to challenge the correctness of any determination by the department of penalties assessed.

#### NEW SECTION

**WAC 296-128-850 Complaints alleging a violation of other rights under chapter 49.46 RCW—Collection procedures.** Collections of unpaid citations assessing civil penalties will be handled pursuant to the procedures outlined in RCW 49.48.086.

#### NEW SECTION

**WAC 296-128-860 Severability clause.** If any provision of the rules in this chapter, or their application to any person or circumstance is held invalid, the remainder of these rules or their application of the provision to other persons or circumstances is not affected.