

CONCISE EXPLANATORY STATEMENT

Chapter 296-128 WAC – Minimum Wages

Public Hearings: November 8 and 9, 2017

Adoption: December 19, 2017

Effective: January 1, 2018

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I. Purpose of Rulemaking

The purpose of this rulemaking is to implement, carry out, and enforce Initiative 1433 directives pertaining to enforcement and retaliation of the paid sick leave law, passed in November 2016. Initiative 1433 requires the department's rules for enforcement of rights under this act must be at least equal to enforcement of the minimum wage and effective on January 1, 2018. Initiative 1433 requires employers to provide paid sick leave to employees beginning on January 1, 2018.

A. Background

On November 8, 2016, Washington voters approved Initiative Measure No. 1433 (I-1433), a ballot measure concerning labor standards. I-1433 was codified under chapter 49.46 RCW.

I-1433, in part, requires employers to provide their employees with 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 carryover of paid sick leave, defines what paid sick leave can be used for and when, and prohibits employers from retaliating against employees for exercising any rights provided by chapter 49.46 RCW.

In addition, I-1433 directed the Department of Labor & Industries (the department) 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 paid sick leave, and protecting employees from retaliation for the lawful use of paid sick leave and exercising other rights under chapter 49.46 RCW.

RCW 49.46.820 provides that I-1433 is to be liberally construed to carry out the intent, policies, and purposes of the Initiative.

B. Summary of the rulemaking activities

The department circulated draft proposed enforcement rule language to stakeholders in August 2017. Department staff held one well-attended stakeholder meeting to discuss the draft version of the rules in September prior to filing the CR-102 in October. Stakeholders were able to participate in person, by phone, or through the I-1433 engagement website, designed to enhance public participation and transparency in the rulemaking process. The engagement site provides stakeholders with a single location for: providing feedback and reviewing feedback submitted by other stakeholders on draft proposed versions of the rules; locating pertinent documents, such as the most updated version of the draft rule language, the text of I-1433, and stakeholder meeting agendas; and a timeline which outlines next steps in the rulemaking process.

To create preliminary draft rules to present to stakeholders in August, the department researched paid sick leave statutes and ordinances currently in place in a variety of jurisdictions and gleaned language responsive to the directives in I-1433 regarding enforcement and

retaliation. Since the enforcement and retaliation rules are required to be at least equal to the minimum wage enforcement rules, they were patterned after those rules. The department used input contributed by stakeholders during the process to prepare the final draft of the proposed rule language. While many questions were resolved during the process, the department continued working with stakeholders to address stakeholder concerns and refine the language of the rules.

II. Changes to the Rules

The following are the changes other than editing between the proposed rule and the rule as adopted.

WAC 296-128-780 [Enforcement – Retaliation]

- Subsection (5) – The department added “at its discretion” and “may” to reinforce that the department providing an employer with notice of its intent to issue a citation and notice of assessment, and potentially providing up to 30 days to take corrective action to remedy a retaliatory action, is discretionary.

WAC 296-128-790 [Enforcement – Retaliation – Civil penalties]

- Subsection (4) – The department added clarifying language which indicates that the collection of unpaid citations and notices of assessment will be for “amounts owed.”

WAC 296-128-800 [Enforcement – Retaliation – Appeals]

- Subsection (9) – The department added “Director’s” to specify that the language in this subsection specifically addresses an order issued by the Director of the Department of Labor & Industries.

WAC 296-128-810 [Enforcement – Paid sick leave]

- Subsection (2)(b) – The department added “whichever is greater” to indicate that the department, under this subsection, has the authority to order payment from the employer to an employee 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.
- Subsection (4) – The department added clarifying language to reflect that in addition to requiring a noncompliant employer to provide an employee access to paid sick leave they would have accrued absent the employer’s noncompliance, the department can also require the employer to pay to the employee their normal hourly compensation for hours of paid sick leave that would have accrued during the period of noncompliance.

WAC 296-128-820 [Enforcement – Tips and service charges]

- The department has updated the language to better align with enforcement of complaints pursuant to the procedures outlined in the Wage Payment Act, RCW 49.48.082 through 49.48.087.

WAC 296-128-840 [Complaints alleging a violation of other rights under chapter 49.46 RCW – Administrative appeals]

- Subsection (6) – The department omitted language to reflect that the language in this subsection applies to those circumstances specifically when penalties, not earnings, are assessed.

WAC 296-128-860 [Severability clause]

- The department added language to reflect that the severability clause applies to all rules drafted in accordance with chapter 49.46 RCW, not just the language which addresses enforcement of RCW 49.46.200 and 49.46.210.

III. Comments on Proposed Rules

The purpose of this section is to respond to the oral and written comments received through the public comment period and at the public hearing.

A. Comment Period

The public comment period for this rulemaking began October 3, 2017, and ended November 17, 2017. The department received six written comments.

B. Public Hearings

Location	Number Attended	Number Testified
November 8, 2017 - Spokane	95	11
November 9, 2017 - Tumwater	92	11

C. Summary of Comments Received on the Proposed Rules and Department Response

The department has analyzed all the comments received on the proposed rules in detail and responses to these comments by category are listed below. While this list represents the majority of all the comments, some individual comments may not be listed if the issue raised and response provided are adequately represented and additional entries would be duplicative.

Stakeholder Comments	Department Response
General	
<p>1. There is still significant work to be done to implement the regulations which have yet to be finalized, and there should be a delay in enforcement of the Initiative to allow the time necessary to put the processes and procedures in place to ensure compliance with the regulations, once finalized. Specifically, limit enforcement actions for one year, and waive all penalties and only issue correction directives for any finding of noncompliance.</p>	<p>On November 8, 2016, voters in Washington passed Initiative Measure No. 1433 (I-1433). I-1433, as passed by voters, requires employers provide paid sick leave effective January 1, 2018, and that the department adopt and implement rules to carry out and enforce I-1433. The initiative did not provide a delay for enforcement. In January 2017, the department began the stakeholder engagement process for development of the administrative rules for I-1433, and committed to stakeholders that the administrative rules would be finalized before the paid sick leave effective date of January 1, 2018.</p> <p>If an investigation by the department results in a finding of noncompliance, the department may, at any time, waive or reduce a civil penalty assessed if the director determines that the employer has taken corrective action to resolve the violation.</p>
<p>2. The rules should reflect that sick leave can be part of paid time off which can be used for vacation time as well. Sick leave does not have to be separate from vacation time in order to provide the employee additional flexibility to how they want to use their time.</p>	<p>WAC 296-128-700 allows employers to provide a combined vacation/sick leave benefit under a PTO program. The rule provides that “[p]aid time off (PTO) provided to employees by an employer’s PTO program (e.g., a program that combines vacation leave, sick leave, or other forms of leave into one pool), created by a written policy or a collective bargaining agreement, satisfies the requirement to provide paid sick leave if the PTO program meets or to provide paid sick leave if the PTO program meets or exceeds the provisions of RCW 49.46.200 and 49.46.210, and all applicable rules, exceeds the provisions of RCW 49.46.200 and 49.46.210, and all applicable rules.”</p>

<p>3. RCW 49.48.083 includes provisions that could be helpful to employers. Not including these employer rights, in part or in whole, would mean that the department did not recognize, meet, include, and extend the current minimum standards for wage enforcement into the rules enforcing other provisions of I-1433.</p>	<p>RCW 49.48.083 is included, in whole, in the enforcement rules for paid sick leave and tips and service charges.</p> <p>RCW 49.48.083(3)(b), with the exception of section 3(b)(i), is incorporated in 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). The department did not incorporate RCW 49.48.083(3)(b)(i) (... if the employer reasonably relied on: (i) A rule related to any wage payment requirement) because WAC 296-128-830 sets forth rules for enforcement of rights where wages are not owed to an employee.</p>
<p>4. Please make this law non-applicable to businesses with less than 10 or 20 employees.</p>	<p>The requirements set forth in RCW 49.46.200 and 49.46.210 do not differentiate based on business size. The applicability of such requirements are based on the definition of “employer”, as defined at RCW 49.46.010(4).</p>
<p>5. Please provide more guidance as to what a “Washington-based” employee is.</p>	<p>I-1433 was codified into the existing Minimum Wage Act (chapter 49.46 RCW), and did not amend the definition of “employee” under chapter RCW 49.46. Therefore, the existing definitions apply for entitlement to paid sick leave. As a result, if an individual meets the definition of “employee” then the protections of the Minimum Wage Act apply to such employee.</p> <p>Under case law, the protections of the Minimum Wage Act apply to “Washington-based” employees. If an employer has a Washington-based employee, such employee is entitled to the protections of the Washington Minimum Wage Act (including paid sick leave). The department has committed to developing an administrative policy clarifying frequently asked questions surrounding this concept to provide further guidance.</p>

WAC 296-128-780 Enforcement – Retaliation	
<p>6. In situations where an employee’s allegation of retaliation cannot be substantiated, it would be more accurate for the department to issue a determination of “unsubstantiated” than to issue a determination of “compliance.”</p>	<p>RCW 49.46.810 requires that “[t]he department's rules for enforcement of rights under [Initiative 1433] shall be at least equal to enforcement of the minimum wage.” The department enforces the minimum wage through the Wage Payment Act (RCW 49.48.082 through 49.48.087). A “determination of compliance” must be issued under the Wage Payment Act for a claim that cannot be substantiated. A determination of compliance provides further appeal rights that may provide a party the opportunity to substantiate the claim.</p>
<p>7. The inclusion of language which provides an employer with an additional 30 days to take corrective action to remedy a retaliatory action undoes the incentive created in subsection (3) for employers to move quickly to resolve complaints with their employees as soon as the complaint is filed to avoid a negative determination.</p>	<p>The department has the discretion to allow the additional 30-day cure period. The 30-day period is intended to provide an additional period of time to allow an employer to take corrective action to remedy the retaliatory act. The department added language to this section to allow the department to evaluate whether an additional time period for cure is warranted on a case-by-case basis.</p>
<p>8. The department will need to provide clear guidance as to the legal standards that it will use in reaching the determination that retaliatory action has been established.</p>	<p>The department will provide this guidance in its operations manual for industrial relations agents tasked with investigating allegations of retaliation.</p>
<p>9. It is appreciated that the department will not treat retaliation as single incidences, unrelated to other violations, and visited only upon one worker, but will instead consider whether other violations have occurred and whether other workers have been impacted.</p>	<p>WAC 296-128-780(7) allows the department to investigate additional violations it identifies during the course of an investigation. <i>See</i> WAC 296-128-780(7) (“[i]f 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 <i>may</i> launch further investigation under chapter 49.46 RCW, and all applicable rules, without requiring additional complaints to be filed” (emphasis added)).</p>

<p>10. The language “because extenuating circumstances exist” is not necessary and creates the possibility of an unlimited statute of limitations.</p>	<p>This language is similar to WAC 296-360-030(4), which sets forth the standards for investigations of Washington Industrial Safety and Health Act (WISHA) discrimination. The department anticipates that similar protocols and procedures will be used to investigate allegations of retaliation under the Minimum Wage Act.</p>
<p>WAC 296-128-790 Enforcement - Retaliation - Civil penalties</p>	
<p>11. The rules should allow for claimants to take initiative in pursuing collections by providing that the claimant may collect through the department’s Collections Division or pursue collections privately after notice to the department.</p>	<p>RCW 49.48.085(1) provides that “[a]n employee who has filed a wage complaint with the department may elect to terminate the department’s administrative action, thereby preserving any private right of action, by providing written notice to the department within ten business days after the employee’s receipt of the department’s citation and notice of assessment.” An individual has a private right of action for enforcement, and does not have to go through the department’s administrative investigation and collections process. However, once they choose to do so, the department is responsible for any collections that result from the department’s administrative action. This is consistent with the department’s duties under the Wage Payment Act.</p>
<p>12. The penalties in this section are in excess of the penalties in existing statute. The penalties should be consistent with, and not greater than, the penalties in RCW 49.48.083.</p> <p>13. The penalties in this section are punitive in nature, and may violate protections of due process provided by the U.S. Constitution.</p>	<p>RCW 49.46.810 provides that “[t]he department’s rules for enforcement of rights under [Initiative 1433] shall be at least equal to enforcement of the minimum wage.” The department has discretion to assess an appropriate penalty, given the employee’s lost earnings due to the retaliatory act (see WAC 296-128-790(1)). The flexibility of the penalty structure recognizes that there is the potential for the significant loss of employee earnings due to an employer’s unlawful retaliatory act.</p>

WAC 296-128-800 Enforcement – Retaliation – Appeals	
14. This section should clearly state that interest will accumulate during appeals, and that the department will calculate and collect interest on the workers’ behalf.	Interest will accumulate during appeals, consistent with the Wage Payment Act (<i>see</i> RCW 49.48.083(2) and 49.48.086(1)).
WAC 296-128-810 Enforcement – Paid sick leave	
15. The addition of a penalty which requires employers to allow employees to carry over leave in excess of 40 hours is not supported by the Initiative, and should be removed from the final rules.	RCW 49.46.210(1)(j) provides that “[u]nused paid sick leave carries over to the following year, except that an employer is not required to allow an employee to carry over paid sick leave in excess of forty hours.” This provision of the law addresses circumstances in which the employer has provided paid sick leave as required by RCW 49.46.200 and 49.46.210, and all applicable rules. The department’s rule fills the gap where an employer has unlawfully failed to do so.
16. Clarification is needed on what is intended by the statement “reasonably expected to use.”	<p>WAC 296-128-810(2)(b) states that “[w]hen 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...[r]eceive payment from the employer at their normal hourly compensation for each hour of paid sick leave that the employee would have used or been <i>reasonably expected to use</i>, whichever is greater, during the period of noncompliance, not to exceed an amount the employee would have otherwise accrued” (emphasis added).</p> <p>The department will provide more guidance in an administrative policy, but other jurisdictions have interpreted reasonably expected to use by relying on recent data regarding “the frequency of work-loss days” for adults aged 18 and over as published by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), Summary Health Statistics for U.S. Adults.</p> <p>Seattle currently has this remedy in place. Please see the Seattle Human</p>

	<p>Rights Rules which address “Retroactive PSST”: https://www.seattle.gov/Documents/Departments/CivilRights/shrr-chapter 40-rev 061115.pdf</p>
<p>WAC 296-128-820 Enforcement – Tips and service charges</p>	
<p>17. The addition of, “pay to the employee all tips and gratuities” language is a significant departure from the language of I-1433. The language should be changed to read, “...to pay its employees all tips and gratuities...”</p>	<p>The department has updated the language to better align with enforcement of complaints pursuant to the procedures outlined in the Wage Payment Act, RCW 49.48.082 through 49.48.087. The department determined that the language as proposed could create ambiguity in its application to employee claims. The department updated the language to reflect that the department will investigate claims that an employee was not paid tips, gratuities, or service charges that were due to the employee.</p> <p>The department has committed to providing further guidance in administrative policy on tips, gratuities, and service charges.</p>
<p>18. The tips and service charges language should not be updated to reflect the “due to the employee” language. However, the reference to RCW 49.46.020 should remain.</p>	<p>The department determined that the language as proposed could create ambiguity in its application to employee claims. The department updated the language to reflect that the department will investigate claims that an employee was not paid tips, gratuities, or service charges that were due to the employee. The department also added clarifying language to specify that the department will investigate complaints when received.</p> <p>The department has committed to providing further guidance in administrative policy on tips, gratuities, and service charges.</p>

<p>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</p>	
<p>19. The penalties in this section are in excess of the penalties in existing statute. The penalties should be consistent with, and not greater than, the penalties in RCW 49.48.083.</p>	<p>RCW 49.48.083(3)(a) states that “[a] civil penalty for a willful violation of a wage payment requirement shall be not less than one thousand dollars or an amount equal to ten percent of the total amount of unpaid wages, whichever is greater. The maximum civil penalty for a willful violation of a wage payment requirement shall be twenty thousand dollars.” WAC 296-128-830 states that “[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.”</p> <p>For the first willful violation, the penalty is potentially much smaller than the penalty assessed under RCW 49.48.083(3)(a). The penalty can never be greater than the maximum penalty set forth by RCW 49.48.083(3)(a).</p>
<p>WAC 296-128-840 Complaints alleging a violation of other rights under chapter 49.46 RCW - Administrative appeals</p>	

<p>20. There is no reason to restrict any party from fully defending their position at hearing. It is the administrative law judge's right to determine the weight given any facts, and to limit what records can be submitted during the course of appeal would undermine that ability for an employer to have a complete, fair trial.</p>	<p>RCW 49.46.810 states that "[t]he department's rules for enforcement of rights under [Initiative 1433] shall be at least equal to enforcement of the minimum wage." The department enforces the minimum wage through the Wage Payment Act (RCW 49.48.082 through 49.48.087). RCW 49.48.084(6) states that "[a]n employer who fails to allow adequate inspection of records in an investigation by the department under this chapter within a reasonable time period may not use such records in any appeal under this section to challenge the correctness of any determination by the department of wages owed or penalty assessed."</p> <p>The inclusion of this language reflects how the department currently enforces the minimum wage under the Wage Payment Act.</p>
<p>WAC 296-128-850 Complaints alleging a violation of other rights under chapter 49.46 RCW – Collection procedures</p>	<p>No comments received.</p>
<p>WAC 296-128-860 Severability clause</p>	<p>No comments received.</p>

D. Summary of Comments Received on the Proposed Rules and Department Response

Stakeholder Comments	Department Response
<p>We still have concerns that we have not completely reconciled the fact that we split this in two. The small business impact statement and the economic impact statements have been not combined to take into account the fact that you're creating two different rules, that you really should relook at that whole thing as a whole once the rules are complete to determine if it really is an impact to small businesses.</p>	<p>This rulemaking addresses the administrative enforcement provisions of the substantive requirements of I-1433. As a result, there are no costs of compliance to employers under the enforcement rules. These proposed enforcement rules are the procedural requirements related to the investigation of complaints, issuance of civil penalties, appeals of department decisions, and collections. The rules are consistent with RCW 49.46.810, and the requirements for investigations, civil penalties, appeals, and collections under the Wage Payment Act under RCW 49.48.083 though RCW 49.48.086, or are interpretative of provisions of I-1433 and the Wage Payment Act. As such, the Regulatory Fairness Act, chapter 19.85 RCW, does not require a small business economic statement for these rules.</p>