

CONCISE EXPLANATORY STATEMENT (CES)

WAC 296-829 Helicopters Used as Lifting Machines
WAC 296-832 Late Night Retail Worker Crime Prevention
WAC 296-876 Ladders – Portable and Fixed
WAC 296-878 Safety Standards for Window Cleaning

The purpose of this rulemaking is to reformat existing safety and health rules to make them easier to read, understand, reference, and access electronically from a mobile device. This filing package is the first of an estimated ten filing packages.

The following section is being changed as indicated below:

CHANGES TO THE RULES (Proposed rule versus rule actually adopted):

WAC 296-829-30010(4):

“Stop fueling immediately if there is a spill.” changed to read: “You must stop fueling immediately if there is a spill.”

The intended date of adoption for this rule is April 22, 2014.

The intended effective date for this rule is July 1, 2014.

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

The public comment period for this rulemaking began December 17, 2013, and ended March 12, 2014.

A public hearing was held on January 23 and on March 11, 2014. Four people attended. One person testified.

Comment Received/Department Response:

Only one person gave testimony at the January 23, 2014, public hearing. No one attended the hearing held on March 11, 2014.

<i>Hearing Testimony Comments (1-23-2014)</i>	<i>Department Response</i>
<p>In the first place, this eRules package has marked as, like, package No. 1 in a series of packages..We'd like to have on the record that we're requesting that there be public hearings for each and every eRules package proposed by DOSH to the Department of Labor and Industries.</p>	<p>Any interested party must submit a timely objection when a CR-105 rulemaking package is filed, if they believe the expedited process is not appropriate for that rulemaking. The Administrative Procedures Act (APA) does not allow for 'standing' objections to future planned rulemaking packages.</p>
<p>In our petition related to the initial expedited rule making proposal, CR 105, our business manager Don·Perlot (phonetic) indicated that one of the reasons for making this request is that we think that there needs to be more transparency with the public related to proposals like this that do a massive reformatting of the rules.</p>	<p>The Department acknowledges this comment.</p>
<p>You had met -- Mr. Chair, you had mentioned in the premeeting before this public hearing that part of the history was that there was the innovative rules -- the innovative rules..They included a number of·reformattings.·Those rules were proposed on the basis·that they were not making changes; in fact, numerous changes were made to the protections of workers in this state, including the more than 7,000 members of IBEW·Local 77 in that those changes were adopted without public hearing through the expedited rule process, and it is clear that there are a number of deficiencies in those innovative rules that reduce the level of the rules being innovated to less-than-effective level in comparison to the federal OSHA counterpart, which is in contravention of the</p>	<p>The scope of the eRules project is deliberately limited to formatting only to ensure that no changes are made as a result of the reformatting.</p>

<i>Hearing Testimony Comments (1-23-2014)</i>	<i>Department Response</i>
WISHA law.	
<p>When we saw that there was, again, another reformatting process, it's not that we are opposed to reformatting the rules into a consistent approach, but the manner in which it is done and attempted to be done without a public process and to adopt them on the basis of the Department indicating they are making no changes kind of belies the history of what has occurred and happened to WISHA rules, which are the only rules within the state of Washington that can be relied upon by workers to protect their safety and health in the workplace.</p>	<p>The initial eRules CR-105 rulemaking filing package followed the public process defined in the APA for expedited rulemakings, and met the APA criteria for expedited rulemaking:</p> <p>34.05.353(1) An agency may file notice for the expedited adoption of rules in accordance with the procedures set forth in this section for rules meeting any one of the following criteria:</p> <p>(c) The proposed rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;</p>
<p>As a consequence, we believe that contrary to DOSH's indication on numerous occasions that no changes would be made and that changes are not either being proposed nor would changes be made throughout this process that whenever actual deficiencies or defects or less-than-effective aspects of rules that are being ---going through the eRules project are identified, that it is incumbent upon the Department of Labor and Industries to make those changes, to make the rules at least as effective as federal OSHA and certainly no less affective than the rules as they exist now.</p>	<p>The Department is clear that the eRules rulemaking does not involve any changes to rule requirements. This project parameter means that making any changes to rule requirements during the eRules project (even to make a rule "at least as effective as OSHA") would be procedurally invalid since no notice has been given to the public that substantive changes might be made to these rules.</p> <p>If the eRules project reveals that substantive changes are needed for any of these rules to make them as effective as OSHA, the changes to those rule requirements must be made in a separate rulemaking so the public has the opportunity to comment both on the proposed changes and on whether the existing rule truly is less effective than a corresponding OSHA rule.</p>

<i>Hearing Testimony Comments (1-23-2014)</i>	<i>Department Response</i>
<p>With respect to impact of these rules, it has been indicated both today and in the publications and on your website related to the eRules project that there is no impact; that there is no cost impact or tangible actual impact with respect to the rules..I would disagree..</p>	<p>The Department foresees no negative impact to employers and others from the eRules project because no rule requirements are changing.</p> <p>The Department foresees a positive impact on employers and others from the eRules project because of the increased accessibility and readability of rules when accessed via mobile devices such as tablets and smart phones, and from having all the rules share a single format.</p>
<p>The reformatting process of now reformatting numerous bulleted aspects of these rules back into this new format now creates numerous citables that previously didn't exist with the bulleted format which the Department, in its infinite wisdom, chose to employ in the innovations project so that the impact is that you certainly are creating an enumerable number of new citable aspects to these rules..</p>	<p>The Department disagrees with this statement for several reasons:</p> <p>The courts have taken a common-sense approach in determining how many separate violations may be cited and penalized. The general rule is that if an employer cannot violate one portion of a rule without simultaneously violating another section of the rule, only one penalty is appropriate: a rule either contains several separate independent requirements, or it does not. This is true regardless of whether the paragraphs containing these requirements are enumerated using bullets, numbers, or letters.</p> <p>The caselaw is consistent with the Department's longstanding policy of grouping violations that involve overlapping conduct into one violation with one penalty. Therefore, in rules that currently use bullets to enumerate paragraphs, if the various paragraphs contain independent requirements, these paragraphs may currently be cited and penalized separately.</p> <p>Further, if the argument that replacing bullet points with numbers increases the number of citable violations were followed to its logical conclusion, then the current rules using</p>

<i>Hearing Testimony Comments (1-23-2014)</i>	<i>Department Response</i>
	<p>bullet points would be invalid. They are not.</p> <p>The Department is clear that changes from bullet points to numbers and/or letters do not alter the substantive requirements of rules.</p>
<p>We don't actually oppose that, I'm just pointing out that it's hard to accept a statement that there is no impact..I think it's probably a positive impact, but it is an impact.</p>	<p>The Department foresees no negative impact to employers and others from the eRules project because no rule requirements are changing.</p> <p>The Department foresees a positive impact on employers and others from the eRules project because of the increased accessibility and readability of rules when accessed via mobile devices such as tablets and smart phones, and from having all the rules share a single format.</p>
<p>And we'll have comments that we'll present in written format by January 30 and appreciate the opportunity to make these comments..Thank you.</p>	<p>The Department acknowledges this comment.</p>

Only one piece of written commentary was received during the public comment period.

<i>Written Comments</i>	<i>Department Response</i>
<p>This letter provides follow-up and written comments regarding the rule making Public Hearing held on January 23,2014, concerning eRules as published in WSR 14-01-088.</p> <p>The comments below are offered on behalf of IBEW Local 77 which represents more than 7,000 members:</p>	<p>The Department acknowledges this comment.</p>

<i>Written Comments</i>	<i>Department Response</i>
<p>1. In the last several years, L&I-DOSH has had a particularly poor track record using the CR-105 expedited rule making process to adopt or amend workplace safety and health regulations. Errors, defects and deficiencies have been commonplace including the 1990's "Innovations" effort which predominantly focused on re-formatting. Thus, when the eRules re-formatting rule making was initially rolled out as an expedited process, IBEW Local 77 requested a Public Hearing, improved transparency, and the identification of cost impacts. As a result, the current eRules package was available for public comment at a Public Hearing on January 23, 2014.</p>	<p>The initial eRules CR-105 rulemaking filing package followed the public process defined in the APA for expedited rulemakings, and met the APA criteria for expedited rulemaking:</p> <p>34.05.353(1) An agency may file notice for the expedited adoption of rules in accordance with the procedures set forth in this section for rules meeting any one of the following criteria:</p> <p>(c) The proposed rules only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;</p>
<p>2. We believe the proposed rules format utilized for the eRules, which is similar to that previously used for the outdoor heat exposure and construction crane rules, is reasonable if used consistently.</p>	<p>The Department acknowledges this comment.</p>
<p>3. While it is insisted by DOSH management that no change or impact will be created by the eRules project, we disagree. By converting "bullet" points in rules to "lettered or numbered" elements of the new eRules, almost every change represents a new "citable" rule requirement. Each citable created represents a potential impact.</p>	<p>The Department disagrees with this statement for several reasons:</p> <p>The courts have taken a common-sense approach in determining how many separate violations may be cited and penalized. The general rule is that if an employer cannot violate one portion of a rule without simultaneously violating another section of the rule, only one penalty is appropriate: a rule either contains several separate independent requirements, or it does not. This is true regardless of whether the paragraphs containing these requirements are enumerated</p>

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	<p>using bullets, numbers, or letters.</p> <p>The caselaw is consistent with the Department’s longstanding policy of grouping violations that involve overlapping conduct into one violation with one penalty. Therefore, in rules that currently use bullets to enumerate paragraphs, if the various paragraphs contain independent requirements, these paragraphs may currently be cited and penalized separately.</p> <p>Further, if the argument that replacing bullet points with numbers increases the number of citable violations were followed to its logical conclusion, then the current rules using bullet points would be invalid. They are not.</p> <p>The Department is clear that changes from bullet points to numbers do not alter the substantive requirements of rules.</p>
<p>4. DOSH senior management has insisted that rules will not be changed even though deficiencies or defects may be identified through the Public Hearing process. This is both inefficient and wasteful and does nothing to improve worker protection. We request that all defects, deficiencies, clarifications and corrections necessary to ensure that eRules are as-effective-as federal OSHA requirements be fixed. Also, we request that any current rule that is more effective than OSHA and/or in compliance with Washington State legislated mandates be kept at its most effective level.</p>	<p>The Department is clear that the eRules rulemaking does not involve any changes to rule requirements. This project parameter means that making any changes to rule requirements during the eRules project (even to make a rule “at least as effective as OSHA”) would be procedurally invalid since no notice has been given to the public that substantive changes might be made to these rules.</p> <p>If the eRules project reveals that substantive changes are needed for any of these rules to make them as effective as OSHA, the changes to those rule requirements must be made in a separate rulemaking so the public has the opportunity to comment both on the proposed changes and on whether the existing rule truly is less effective than a corresponding OSHA rule.</p>

<i>Written Comments</i>	<i>Department Response</i>
<p>5. The eRules CR-102 along with identifying the specific rules proposed for changes also identified Substitute Senate Bill (SSB) 5679. No explanation was provided for its inclusion and no relationship to the eRules proposal was provided. It appears this reference was simply made to suggest that DOSH was somehow complying with the intent of that legislation. The Department should clarify and explain the meaning of this inclusion.</p>	<p>The inclusion of a reference to Senate Bill (SSB) 5679 was an oversight.</p> <p>The Department is complying with the intent of this legislation using a process that overlaps the eRules project.</p>
<p>6. The DOSH website rules page included eRules proposals not scheduled for hearing on January 23, 2014. While probably inadvertent, it is important for the Department to be more precise and accurate when providing the public information concerning rule making. This simply serves as another reason to not use the expedited process.</p>	<p>An administrative error resulted in the DOSH website not being updated in a timely way. This error has now been corrected.</p> <p>The administrative error was in no way related to the eRules rulemaking process under way at the time of the error.</p>
<p>7. Public hearings through the CR-102 notification process must be utilized for all future eRules packages.</p>	<p>Any interested party must submit a timely objection when a CR-105 rulemaking package is filed, if they believe the expedited process is not appropriate for that rulemaking. The APA does not allow for 'standing' objections to future planned rulemaking packages.</p>
<p>Thank you for the opportunity to provide comments. We look forward to seeing the final product and to engaging in future proposals.</p>	<p>The Department acknowledges this comment.</p>