

# CONCISE EXPLANATORY STATEMENT

**WAC 296-23-362 – Independent medical examination (IME) – Accompanying Person**  
**WAC 296-23-364 – Definition of notification process required for workers to record independent medical examinations (IME)**  
**WAC 296-23-366 – Independent medical examination (IME) – Recording notification time frame**

Public Hearing: February 6, 2024

Adoption: March 26, 2024

Effective: April 26, 2024

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## **I. Purpose of Rulemaking**

### **A. Background**

As required by Substitute House Bill 1068 (SHB 1068), passed during the 2023 legislative session, the new rules are necessary to define the notification process for when a worker wants to record IMEs requested by the department and self-insured employers. The existing accompaniment rule needs updating to remove the prohibition against having someone accompany a worker to mental health IMEs.

### **B. Summary of the rulemaking activities**

The department stakeholdered the proposed rules with the following groups:

- Washington State Self-Insurers Association (WSIA)
- Washington State Association for Justice (WSAJ)
- Workers Compensation Advisory Committee (WCAC)
- Retrospective Rating Advisory Committee (RAC) through Gov Delivery
- Industrial Insurance Medical Advisory Committee (IIMAC)
- Advisory Committee on Health Care Innovation and Evaluation (ACHIEv)
- IME Business and Labor Advisory Team
- IME Coalition
- IME Roundtable

A hybrid meeting was held October 27, 2023, to take comments and feedback from interested stakeholders on the draft rule language. Approximately 91 people attended.

Stakeholder comments were received and considered throughout the rulemaking process.

## **II. Changes to the Rules (Proposed rule versus rule adopted)**

### **WAC 296-23-362 – Independent medical examination (IME) – Accompanying Person**

- The order of subsections (2) and (3) were swapped for flow. This was recommended by a stakeholder.

**WAC 296-23-364 - Definition of notification process required for workers to record independent medical examinations (IME)**

- No changes.

**WAC 296-23-366 - Independent medical examination (IME) – Recording notification time frame**

- No changes.

### **III. Comments on Proposed Rule**

#### **A. Comment Period**

The public comment period for this rulemaking was January 2, 2024, through February 6, 2024. Eight people submitted written comments.

#### **B. Public Hearing**

The public hearing was held in an in-person/virtual/telephonic meeting on February 6, 2024, at 2:00 pm. Department staff and one other person attended the in-person hearing. Forty-four people attended the hearing virtually/telephonic. Testimony was given by four people.

#### **C. Summary of Comments Received and L&I's Responses**

Below is a summary of the comments the department received and the department's response.

General Comments	L&I Response
<p>Please do not allow L&amp;I IMEs to be videoed by the injured worker, it will only add to the fiscal quagmire at The Department, and will not serve the worker.</p>	<p>RCW 51.36.070(4)(a) gives the worker the right to video or audio record an independent medical examination (IME). As such, the department cannot prohibit what the statute specifically allows a worker to do.</p>
<p>When the job is offered to interpreters, the IME scheduling portal should include a warning of the intent to record.</p>	<p>This is outside the scope of these rules, which were limited to implementing the following provisions under 2023’s SHB 1068: defining the notification process a worker must follow when they want to record an IME as directed by RCW 51.36.070(4)(b); and allowing an observer to be present for all examinations as permitted under RCW 51.36.070(4)(i). Your comments will be shared with the department unit handling this information.</p>
<p>We urge the department to use its rulemaking ability to clarify the allowance of providers to co-record IMEs in situations where the worker has elected to record the IME, as we feel the department is incorrectly interpreting the need for worker consent before the co-recording can take place.</p> <p>The Department needs to listen to all the hearings on this bill to consider whether there were any hints of co-recording intent and share with the public.</p> <p>I request the assistant attorney general provide legal rationale for interpretation of this law. Once obtained the Department needs to share the opinion with the public and the legislature.</p>	<p>This is outside the scope of these rules, which were limited to implementing the following provisions under 2023’s SHB 1068: defining the notification process a worker must follow when they want to record an IME as directed by RCW 51.36.070(4)(b); and allowing an observer to be present for all examinations as permitted under RCW 51.36.070(4)(i). There are ongoing discussions on this issue outside of this rulemaking.</p>
<p>We urge the Department to ignore any request to permit or regulate co-recording and that the Department refrain from putting anything in its IME recording rules either allowing or co-</p>	<p>This is outside the scope of these rules, which were limited to implementing the following provisions under 2023’s SHB 1068: defining the notification process a worker must follow when they</p>

recording IMEs.	want to record an IME as directed by RCW 51.36.070(4)(b); and allowing an observer to be present for all examinations as permitted under RCW 51.36.070(4)(i). There are ongoing discussions on this issue outside of this rulemaking.
Rulemaking should be opened for all items published on the departments' FAQ. The Department's definition of "material alteration" of the recording is subjective and too broad.	This is outside the scope of these rules, which were limited to implementing the following provisions under 2023's SHB 1068: defining the notification process a worker must follow when they want to record an IME as directed by RCW 51.36.070(4)(b); and allowing an observer to be present for all examinations as permitted under RCW 51.36.070(4)(i). This information will be shared with the appropriate parties within the department.
The Department should table implementing these rules and bring the stakeholders back together so we can figure out all the chaos the FAQs have caused in this recording process.	The rules are necessary under 2023's SHB 1068, which directed the department create rules defining the notification process the worker must follow when they want to record an independent medical examination under RCW 51.36.070(4)(b).
<b>WAC 296-23-362 - Independent medical examination (IME) – Accompanying Person</b>	
Few if any mental health providers have agreed to recording requests due to these providers' understanding that it is unethical to diminish privacy due to a third party's presence during these exams causing rescheduling and delays of IMEs.	RCW 51.36.070(3) and (4) provides a list of the types of examinations the worker has the right to record. This includes mental/psychiatric examinations.
Propose renumbering subsections (2) and (3) and reverse those to read more fluently. Subsection (2) would start with "the accompanying person cannot be..."	Thank you for your comments. See changes.
I oppose the last paragraph in this rule as vague and ambiguous. This states, "The Department may designate other conditions	Thank you for your comments. The department is not proposing any change to this existing language.

<p>under which the accompanying person is allowed to be present during the IME." Not a lot of information on what would constitute that process and how the Department would do that or what other conditions the Department may consider be present.</p>	
<p><b>WAC 296-23-364 - Definition of notification process required for workers to record independent medical examinations (IME)</b></p>	
<p>Interpreters have the same right as the IME firm or examiner to be notified of a worker’s intention to record independent medical examinations (IME). Please amend WAC 296-23 as follows:</p> <ul style="list-style-type: none"> <li>• That the proposed WAC 296-23-364 language include interpreters as one of the parties to be notified in writing of the worker’s intention to record the independent medical examination.</li> </ul>	<p>This is outside the scope of these rules, which are limited to implementing the following provisions under 2023’s SHB 1068: defining the notification process a worker must follow when they want to record an IME as directed by RCW 51.36.070(4)(b); and allowing an observer to be present for all examinations as permitted under RCW 51.36.070(4)(i). RCW 51.36.070(4)(b) indicates notice must be made to the scheduling entity. This information will be shared with the appropriate parties at the department.</p>
<p><b>WAC 296-23-366 - Independent medical examination (IME) – Recording notification timeframe</b></p>	
<p>Interpreters have the same right as the IME firm or examiner to be notified of a worker’s intention to record independent medical examinations (IME). Please amend WAC 296-23 as follows:</p> <ul style="list-style-type: none"> <li>• That the proposed WAC 296-23-366 language include interpreters as one of the parties to be allowed to waive the seven day calendar requirement.</li> <li>• That the proposed WAC 296-23-366 language stating that if the notification is received less than seven calendar days prior to the IME, interpreters have the right to decline the assignment without penalties.</li> </ul>	<p>This is outside the scope of these rules, which are limited to implementing the following provisions under 2023’s SHB 1068: defining the notification process a worker must follow when they want to record an IME as directed by RCW 51.36.070(4)(b); and allowing an observer to be present for all examinations as permitted under RCW 51.36.070(4)(i). RCW 51.36.070(4)(b) indicates notice must be made to the scheduling entity. This information will be shared with the appropriate parties at the department.</p>

Please consider extending the notification of recording time under WAC 296-23-366 from seven days (7) to (14) fourteen days.

Thank you for your comments. Seven days is consistent with RCW 51.36.070 and current department rules.