CONCISE EXPLANATORY STATEMENT
Chapter 296-128 WAC, Minimum Wages
Public Hearings: November 7, 2023 and November 8, 2023
Adoption: November 30, 2023
Effective: January 1, 2024

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I. Purpose of Rulemaking

The Washington State Legislature passed Engrossed Substitute Senate Bill 5111 (ESSB 5111), Chapter 267, Laws of 2023, during the 2023 legislative session, which amends RCW 49.46.210 and 49.46.180 to require payment for accrued and unused sick leave for certain construction workers. The proposed rules are needed to clarify and enforce the new requirements. Additional rules are needed to address existing statutory requirements in RCW 49.46.180, as well as general cleanups of the paid sick leave rules. This rulemaking creates new rule sections and amends existing rules.

a. Background

RCW 49.46.180 (effective January 1, 2019) currently allows certain employers to pay out sick leave before usage to certain construction workers. While typical employees cannot be paid their sick leave before usage, RCW 49.46.180 currently allows this for construction workers under a collective bargaining agreement in certain circumstances.

RCW 49.46.200 and 49.46.210 (effective January 1, 2018) mandated employers to provide paid sick leave to employees under the Minimum Wage Act. Employers do not have to pay out sick leave balances upon separation to typical employees.

Due to the passage of ESSB 5111 (effective January 1, 2024), employers must pay out accrued and unused sick leave balances to certain workers in the construction industry following separation. ESSB 5111 specifies that this requirement applies for workers covered under the North American industry classification system industry code (NAICS) 23, except for North American industry classification system code 236100, residential building construction, who have not met the 90th day eligibility under RCW 49.46.210(1)(d) at the time of separation. This NAICS industry code covers construction workers and other workers associated with construction work, including administrative staff at enterprises performing construction work.

b. Summary of the Rulemaking Activities

The department identified a group of stakeholders including the Washington State Building Trades Council, local laborers unions, business, and workers. These stakeholders were involved in pre-draft rule development sessions where they provided written and verbal comment on pre-draft rule language before the formal comment period. There will also be opportunities for stakeholders and general public to provide written comments and/or testimony during public hearings and the formal comment period.

II. Changes to the Rules

The following are the changes between the proposed rules and the rules as adopted, other than minor editing:

WAC 296-128-760 Construction workers covered by a collective bargaining agreement under RCW 49.46.180.

Proposed: (1) RCW 49.46.180 allows a construction worker covered by a collective bargaining agreement to receive payment for paid sick leave before usage under the terms of a collective bargaining agreement if: (a) The leave itself becomes available for protected use by at least the 90th calendar day of employment as established in RCW 49.46.210 (1)(d); (b) The union signatory to the collective bargaining agreement is an approved referral union program authorized under RCW 50.20.010 and WAC 192-210-110; (c) The collective bargaining agreement provides equivalent sick leave provisions that meet the requirements of RCW 49.46.200 through 49.46.830, and all applicable rules; and (d) The requirements of RCW 49.46.200 through 49.46.830 are expressly waived in the collective bargaining agreement in clear and unambiguous terms or in an addendum to an existing agreement including an agreement that is open for negotiation provided the sick leave portions were previously ratified by the membership. (2) An employer may not make a deduction from paid sick leave payment to a construction worker covered by a collective bargaining agreement before usage or upon separation, unless such deduction meets the requirements set forth in RCW 49.48.010 and WAC 296-126-025. (3) If a construction worker covered by a collective bargaining agreement is rehired within 12 months after separation from employment by the same employer, whether at the same or a different business location, and was paid their paid sick leave before usage under RCW 49.46.180, and still had protected accrued, unused sick leave available for use, the accrued, unused sick leave must be reinstated for use upon rehire but does not have to be paid when used. (4) When a construction worker covered by a collective bargaining agreement separates from employment, is rehired within 12 months of separation, whether at the same or a different business location of the employer, and has reached the 90th calendar day of employment prior to separation, the previously accrued, unused sick leave balance must be made available for use upon rehire. If the construction worker covered by a collective bargaining agreement did not reach the 90th calendar day of employment prior to separation, the previous period of employment must be counted for purposes of determining the date upon which the employee is entitled to use sick leave. (5) Upon rehire, an employer must provide notification to the construction worker covered by a collective bargaining agreement of the amount of accrued, unused paid sick leave available for use by the employee, including sick leave paid before usage.

Adopted: (1) **Payment before usage.** RCW 49.46.180 allows a construction worker covered by a collective bargaining agreement to receive payment for paid sick leave before usage under the terms of a collective bargaining agreement if: (a) The leave itself becomes available for protected use by at least the 90th calendar day of employment as established in RCW 49.46.210 (1)(d); (b) The union signatory to the collective bargaining agreement is an approved referral union program authorized under RCW 50.20.010 and WAC 192-210-110; (c) The collective bargaining agreement provides equivalent sick leave provisions that meet the requirements of RCW 49.46.200 through 49.46.830, and all applicable rules; and (d) The requirements of RCW 49.46.200 through 49.46.830 are expressly waived in the collective bargaining agreement in clear and unambiguous terms or in an addendum to an existing agreement including an agreement that is open for negotiation provided the sick leave portions were previously ratified by the membership. (2) **Deductions for paid sick leave payments.** An employer may not make a deduction from paid sick leave payment to a construction worker covered by a collective bargaining agreement before usage, unless such deduction meets the requirements set forth in RCW 49.48.010 and WAC 296-126-025. (3) **Reinstatement of sick leave hours upon rehire.** If a construction worker covered by a collective bargaining agreement is rehired within 12 months after separation from employment by the same employer, whether at the same or a different business location, was paid their paid sick leave before usage under RCW 49.46.180, and still had protected accrued, unused sick leave available for use, the accrued, unused sick leave must be reinstated upon rehire. Any portion of sick leave already paid during a previous period of employment does not have to be paid again when used during reemployment. (4) **Use of sick leave upon rehire.** How to treat prior days of employment for access to

paid sick leave. (a) If a construction worker covered by a collective bargaining agreement separates from employment, is rehired within 12 months of separation, whether at the same or a different business location of the employer, was paid their paid sick leave before usage under RCW 49.46.180 and has reached the 90th calendar day of employment prior to separation, the construction worker covered by a collective bargaining agreement is eligible to use accrued sick leave immediately upon rehire. (b) If a construction worker covered by a collective bargaining agreement separates from employment, is rehired within 12 months of separation, whether at the same or a different business location of the employer, was paid their paid sick leave before usage under RCW 49.46.180, and did not reach the 90th calendar day of employment prior to separation, the previous period of employment must be counted for purposes of determining the date upon which they are entitled to use sick leave. (5) **Exceptions to subsections (3) and (4) of this section.** If a construction worker covered by a collective bargaining agreement separates from employment, is not rehired within 12 months of separation by the same employer, whether at the same or a different business location, the employer is not required to meet standards in subsection (3) or (4) of this section. (6) **Notification upon rehire.** Upon rehire, an employer must provide notification to the construction worker covered by a collective bargaining agreement of the amount of accrued, unused paid sick leave available for use by the employee, including sick leave paid before usage.

Note: These changes are interpretative updates provided to address the statutory requirement to provide access to leave upon reinstatement for construction workers covered by a collective bargaining agreement after rehire. Section 3 was updated to clarify that when a portion of sick leave has already been paid during a previous period of employment it does not have to be paid again when the residual leave is used during reemployment. Section (4) from the proposed (CR-102) rules was split into three sections to provide clarity about the statutory requirements around sick leave usage for construction workers covered after rehire covered by a collective bargaining agreement. Section 4(a) explains that when a construction worker covered by a collective bargaining agreement is rehired and reached their 90th calendar day prior to their separation, they are eligible for immediate access to accrued leave. Section 4(b) explains that such workers who did not reach the 90th calendar day prior to employment must have the previous period of employment counted towards the 90-day threshold. Section 5 makes it clear that sections (3) and (4) do not apply to workers after the 90-days. Section 6 is content previously in Section 4 and has been updated only to add a heading.

WAC 296-128-765 Construction workers under RCW 49.46.210 (1)(l) (effective January 1, 2024).
Proposed: (1) Following separation, employers must pay the balance of accrued and unused paid sick leave to construction workers classified under NAICS code 23, except for construction workers who perform work limited to work only under NAICS code 236100, who have not reached the 90th calendar day of employment. (2) When a construction worker is rehired within 12 months of separation, whether at the same or a different business location of the employer, the previous period of employment must be counted for purposes of determining the date upon which the employee is entitled to use paid sick leave.

Adopted: (1) Following separation, employers must pay the balance of accrued and unused paid sick leave to construction workers classified under NAICS code 23 who have not reached the 90th calendar day of employment, except for construction workers who perform work limited to work only under NAICS code 236100. (2) When a construction worker is rehired within 12 months of separation, whether at the same or a different business location of the employer, any sick leave previously paid out following separation does not need to be reinstated. (3) When a construction worker is rehired within 12 months of separation, whether at the same or a different business location of the employer, the previous period

of employment must be counted for purposes of determining the date upon which the employee is entitled to use paid sick leave.

Note: Section 3 is an interpretative statement provided to address the statutory requirement to provide access to accrued sick leave after 90 days, which was not previously separately provided in the proposed rule.

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 hearings.

a. Comment Period

The public comment period for this rulemaking began on October 3, 2023, and ended November 9, 2023. The department received 26 written comments.

b. Public Hearings

Location	Number Attended	Number Testified
November 7, 2023-Tumwater	6	1
November 8, 2023-Virtual	44	3

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

The department has analyzed all of the comments received on the proposed rules in detail and responds to these comments below. Comments on the proposed rules were reviewed, summarized, and sorted into categories. Responses are organized within the categories 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. The department has responded to the substance of the comments it received. In some cases, final rule language was changed as a result of comment review and analysis; in other cases, the responses indicate why a change was not made.

<table>
<tr><th>Category</th><th>Response</th></tr>
<tr><td colspan="2">WAC 296-128-600</td></tr>
<tr><td colspan="2">Definitions.</td></tr>
<tr><td>“The use of “NAICS code 23” in ESSB 5111 was the Legislature’s attempt to limit the reach of this paid sick leave policy change to both union and nonunion construction workers and to exempt residential construction. The bill was never meant to include nonexempt administrative staff that support construction workers in the back office in the construction industry.”</td><td rowspan="2">ESSB 5111 refers to workers covered under the North American industry classification system industry code 23 (NAICS 23). L&I’s definition of “construction worker” in rule is consistent with the pool of workers who fall under NAICS 23. This interpretation is also consistent with L&I’s position during the legislative session that this broad definition included workers employed by construction enterprises who were not actively employed in performing the trades themselves.</td></tr>
<tr><td>“It is our belief that the intent of this legislation was to ensure the transient workforce within the</td></tr>
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construction industry, not to include residential building construction, would be compensated if their tenure with a construction employer did not last ninety-days. Administrative staff are not transient in nature and their employment is not dependent upon shorter project durations. Adding them to the definition of "construction worker" is unnecessarily confusing and burdensome…"	L&I's fiscal notes on the bills also was based on an estimate of all workers in construction industry and not those in trades only. While L&I's adopted rule language continues to include nonexempt administrative staff, based on the nature of their work, we do not believe a significant number of administrative staff separate from employment before 90 days, thus most of these workers would not be entitled to paid sick leave pay outs following separation.
"On the second page under WAC 296-128-600, second paragraph. L&I is including administrative staff in the sick leave accrual. This was never the intent of the act. We would request administrative staff be removed."	
"Please consider removing "nonexempt administrative staff" from the definition of "construction worker" in the best interest of the construction industry in the state of Washington."	
"However the proposed rule includes an overly broad definition of construction worker that includes administrative staff who are not hired from a union referral system and are not on site and therefore do not meet the intent of the law."	
"We believe the paid sick leave pay-out requirements contained in ESB 5111 should NOT pertain to office/administrative staff."	
"And so, now, yes, I would like to say that we are concerned about the coverage for the office-staff employees. I mean, clearly the intent of this bill was to cover the construction workers who simply can't work beyond 90 days and, you know -- and, therefore, never vest and -- because their project simply ends. And so covering office workers is really beyond the intent of the bill itself. So I would encourage removing office workers from coverage of the -- of the rules. And, also, as an aside, I'll say it's a bit difficult having the hearings -- these hearings yesterday and today and then comments are in tomorrow. And I know we got to kind of hurry so the industry can adjust to the final rules before the January 1 start date. But it does seem like a couple of days for folks to prepare their comments after the hearings would be nice. So, if there is any opportunity for extending that deadline by even	

a day or two, I think that would be great. But main thing is the coverage of the office (staff)…"	
"5111 is really to address the building-trades construction workers who are in the field and are often mobile. They can move from one employer to another from day to day, week to week, month to month. And there was a concern by the advocates of that bill, the proponents of that bill, that those individuals would never benefit from the Paid Sick Leave law. There was never, as far as I can recall, a discussion about office staff. It was really addressing these journeymen and apprentice workers in the field, that they just never reach the 90 days. So, we would just respectfully ask that the Department take another look at the breadth of the definition and exclude office staff from the "construction worker" definition that it set forth in this draft rule."	
WAC 296-128-760	
Construction workers covered by a collective bargaining agreement under RCW 49.46.180.	
"Under 296-128-760, Subsection 3 says that if a worker works less than 90 days, they would be paid their unused sick leave. If that worker comes back within a 12-month period, the unused sick leave would be available for use, unpaid. This process creates a tremendous administrative burden on my members. In some cases, carpenters work for several different members throughout the year. There is no way efficiently track the sick hours an employee has accrued. We would suggest delaying implementation of this at least until a more efficient process can be agreed upon."	Engrossed Substitute Senate Bill 5111 proscribed an implementation date of January 1, 2024, so the rules implementing the statutes must be effective on January 1, 2024. However, the department has adjusted the final rule language in WAC 296-128-760 and WAC 296-128-765 to better clarify the paid sick leave requirements surrounding rehiring construction workers and construction workers covered by a collective bargaining agreement. The department has adjusted the language of the title to "construction workers covered by a collective bargaining agreement" instead of

"And I also encourage the Department, when setting the rules, to take into consideration as many contingencies as they can. As you know, there are 100 different scenarios that will come up as this is trying to be implemented. And the more clarification around these rules that we have, the better to ensure consistency for all companies and for all employees. An example of that would be to define "separation from employment" and what that looks like. For example, if a contractor still has work available for a worker but they choose to leave before that 90 days, does that apply to them? Again, the -- the intent of the legislation was for those who didn't have the work available and had to move on but couldn't meet that 90-day threshold. So, if the work is still available, does that apply? And, again, what if they're working both residential and commercial construction, and how that is tracked and monitored, because we do have, especially on the subcontractor side, those who work in both industries."	"construction worker under a collective bargaining agreement" for clarity (matching the defined termed sourced from RCW 49.46.180). Section 3 was updated to clarify that when a portion of sick leave has already been paid during a previous period of employment it does not have to be paid again when the residual leave is used during reemployment. Section (4) from the proposed (CR-102) rules was split into three sections to provide clarity about the statutory requirements around sick leave usage for construction workers covered after rehire covered by a collective bargaining agreement. Section 4(a) explains that when a construction worker covered by a collective bargaining agreement is rehired and reached their 90th calendar day prior to their separation, they are eligible for immediate access to accrued leave. Section 4(b) explains that such workers who did not reach the 90th calendar day prior employment must have the previous period of employment counted towards the 90-day threshold. Section 5 makes it clear that sections (3) and (4) do not apply to workers after the 90 days. Section 6 is content previously in Section 4 and has been updated only to add a heading. Section 3 is an interpretative statement provided to address the statutory requirement to provide access to accrued sick leave after 90 days, which was not previously separately provided in the proposed rule. Employers have had the obligation to provide notice under RCW 49.46.210 and WAC 296-128-760 since the enactment in 2018. These rules only make it clear that those notice requirements still apply.
"Written notice of available sick leave becomes an issue as well with a transient work force. Verifying accrued time and used time becomes extremely difficult. We would suggest a delay in implementation until a better tracking system can be developed."	