

ADULT ENTERTAINMENT ESTABLISHMENTS

NEW SECTION

WAC 296-128-90010 Definitions. (1) "Adult entertainment" has the same meaning as in RCW 49.17.470.

(2) "Adult entertainment establishment" or "establishment" has the same meaning as in RCW 49.17.470.

(3) "Amounts collected" means an establishment's designated charges for private performance areas and any individual performance in a private or nonprivate area, based on the establishment's designation of what those services cost, whether presumed, contractual, or posted.

(4) "Director" means the director of the department of labor and industries, or the director's designated representative.

(5) "Entertainer" means any person who provides adult entertainment within an adult entertainment establishment, whether or not a fee is charged or accepted for entertainment and whether or not the person is an employee under RCW 49.46.010.

(6) "Leasing fee" means a fee, charge, or other request for money from an entertainer by an establishment in exchange for the entertainer's access or use of the establishment premises or for allowing an entertainer to conduct entertainment on the premises.

(7) "Tips or gratuities" or "tips and gratuities" means any amount freely given by a customer to an entertainer. Tips and gratuities are in addition to, and do not count towards an entertainer's amounts collected.

NEW SECTION

WAC 296-128-90020 Leasing fee and other fee requirements. (1) An establishment is not required to collect leasing fees or other fees from an entertainer. If an establishment charges an entertainer any leasing fee or other fee including, but not limited to, entertainment fees or room charges, such fee(s) must:

(a) Apply equally to all entertainers in a given establishment;

(b) Apply due dates or required timing of fee payment equally to all entertainers in a given establishment;

(c) Be stated in a written contract, including a method for estimating the total amount collected by the entertainer in any eight-hour period for the purposes of calculating maximum leasing fee rates in accordance with WAC 296-128-90040; and

(d) Continue to apply for a period of not less than three months.

(2) An establishment may not charge an entertainer fees or interest:

(a) For late payments or nonpayment of any fee;

(b) For an entertainer's failure to appear at a scheduled time;

(c) That result in the entertainer carrying forward an unpaid balance from any previously incurred leasing fee;

(d) In an amount greater than the entertainer receives during the applicable period of access to or usage of the establishment premises; or

(e) Within an eight-hour period, any leasing fee that exceeds:

(i) The lesser of \$150 or 30 percent of amounts collected by the entertainer in a nonprivate performance area; plus

(ii) 30 percent of amounts collected by the entertainer for adult entertainment provided in a private performance area.

(iii) "30 percent of amounts collected" should be calculated based on the estimated amount determined by the establishment in the written contract, and not based on the exact amounts collected by an entertainer during their shift.

(3) This section does not prevent an establishment from providing leasing fee discounts or credits to encourage scheduling or charge leasing fees that vary based on the time of day, so long as these are applied uniformly.

(4) This section does not require an establishment to count exact amounts collected by an entertainer at the end of a period of work.

NEW SECTION

WAC 296-128-90030 Tips and gratuities. (1) Entertainers are not required to surrender any tips or gratuities including, but not limited to, participating in any tip pool.

(2) Entertainers are not required to disclose tip or gratuity amounts to an establishment.

(3) Tips and gratuities are in addition to, and do not count towards, amounts collected by the entertainer.

(4) An establishment may not take adverse action against an entertainer in response to the entertainer's use of, collection of, or refusal to surrender tips or gratuities.

NEW SECTION

WAC 296-128-90040 Written contracts of leasing fees—Administrative requirements. (1) Any leasing fee or other fee including, but not limited to, entertainment fees or room charges, charged by an establishment to an entertainer must be stated in a written contract.

(2) If the establishment charges leasing fees, the written contract must include:

(a) A method for estimating the total amount collected by the entertainer in any eight-hour period;

(b) The effective dates of the contract;

(c) The duration of the contract, to be a period of not less than three months;

(d) Leasing fee discounts or credits offered to the entertainer; and

(e) Designated costs of services considered to be amounts collected by the entertainer. If designated costs vary based on the time of day or the day of the week, the varied rates must be reflected in the contract.

(3) An establishment's recorded tally of the number of dances performed by an entertainer multiplied by amounts collected by the entertainer, as designated in the written contract, may be considered a method for estimating the total amounts collected by the entertainer in any eight-hour period for the purposes of calculating maximum leasing fee rates in WAC 296-128-90020 (2)(e). Leasing fee or other fee violations caused by inaccurate tallies of the number of dances is considered a compensation violation and enforced under WAC 296-128-90080.

(4) An establishment must keep copies of written contracts and documents used in estimating the total amounts collected by an entertainer, including records of dance tallies, for three years from the contract end date.

(5) Failing to comply with this section is an administrative violation.

NEW SECTION

WAC 296-128-90050 Required signage—Administrative requirements.

(1) All establishments must display signage in areas designated for entertainers that communicate:

(a) Entertainers are not required to surrender any tips or gratuities; and

(b) An establishment may not take adverse action against an entertainer in response to the entertainer's use or collection of tips or gratuities.

(2) Failing to comply with this section is an administrative violation.

NEW SECTION

WAC 296-128-90060 Written notice of reason for termination or refusal to rehire—Administrative requirements.

(1) An establishment must provide an entertainer, or former entertainer, with written notice of the reason(s) for any termination or refusal to rehire that includes any applicable date(s) of events or corrective action that led to the termination or rehire refusal.

(2) An establishment must provide the written notice of reason(s) to the entertainer, or former entertainer, upon termination or refusal to rehire or within 10 business days of the termination or refusal to rehire the entertainer.

(3) An establishment is not required to provide an entertainer with written notice of reason(s) for any refusal to rehire an individual who last worked at the establishment more than three years from the request for rehire.

(4) Failing to comply with this section is an administrative violation.

NEW SECTION

WAC 296-128-90070 Retaliation. (1) It is unlawful for an establishment to interfere with, restrain, or deny the exercise of any entertainer right provided under or in connection with RCW 49.46.360 or associated rules.

(2) It is unlawful for an establishment to adopt or enforce any policy that may lead to or result in any termination or other adverse action against an entertainer for exercising their rights under RCW 49.46.360 and associated rules.

(3) It is unlawful for an establishment to take any adverse action against an entertainer because the entertainer has exercised their rights provided under chapter 49.46 RCW or associated rules. Such rights include, but are not limited to: The use or collection of tips or gratuities; filing an action, or instituting or causing to be instituted any proceeding under or related to RCW 49.46.360; or testifying or intending to testify in any such proceeding related to any rights provided under RCW 49.46.360 or associated rules.

(4) Adverse action means any action taken or threatened by an establishment against an entertainer for the entertainer's exercise of rights under RCW 49.46.360 or associated rules, that may include, but is not limited to:

(a) Denying, reducing, or delaying payment of amounts collected, tips and gratuities, or any other amounts owed;

(b) Threatening to take, or taking, action based upon the immigration status of an entertainer or an entertainer's family member;

(c) Terminating, suspending, or limiting reasonable access to the establishment;

(d) Altering order of performances or stage time of an entertainer;

(e) Not playing an entertainer's requested music list during their performance;

(f) Denial or delay of an entertainer's access to security services;

(g) Moving an entertainer from a private performance area to a nonprivate performance area, or otherwise interrupting, preventing, or delaying an entertainer's opportunity for higher income; or

(h) Preventing an entertainer from working in any other lawful occupation or business.

NEW SECTION

WAC 296-128-90080 Enforcement—Compensation. (1) The department may enforce any amounts owed including, but not limited to, amounts collected and tips or gratuities under RCW 49.46.360 and associated rules as a wage payment requirement under RCW 49.48.082.

(2) If an entertainer files a complaint with the department alleging amounts owed as a result of a violation of RCW 49.46.360 and associated rules, the department will investigate the complaint. Alleged violations include, but are not limited to, improper leasing fees or other fees, improper deductions, or the improper collection of amounts owed to an entertainer, including tips or gratuities.

(3) If the department determines that an establishment has violated a requirement of RCW 49.46.360 or associated rules, the department may order the establishment to pay entertainers all amounts owed, including interest of one percent per month on all amounts owed. The amounts and interest owed must be calculated from the first date amounts were owed to the entertainer, except that the department may not order the establishment to pay any amounts and interest that were owed more than three years before the date the complaint was filed with the department.

(4) Unless the complaint is otherwise resolved or withdrawn by the entertainer, the department shall issue either a citation and notice of assessment or a determination of compliance. The department may not investigate any alleged violation that occurred more than three years before the date that the entertainer filed the complaint.

(5) If the department determines that the violation of rights under RCW 49.46.360 or associated rules was a willful violation, and the establishment fails to take corrective action, the department may order the establishment 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 \$1,000 or an amount equal to 10 percent of the total amount of unpaid amounts owed, whichever is greater, for each willful violation. For a repeat willful violator, the citation assessing a civil penalty will not be less than \$2,000, but no greater than \$20,000 for each repeat willful violation.

(b) The department may not assess a civil penalty if the establishment 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 establishment 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.

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

(6) During any investigation under RCW 49.46.360, if the department discovers information suggesting additional violations of any requirements of RCW 49.46.360 or any associated rules, the department may investigate and take appropriate enforcement action without any additional complaint. The department may also initiate an investigation on behalf of one or more entertainers for a violation of any requirements of RCW 49.46.360 or any associated rules, when the director otherwise has reason to believe that a violation may have occurred or will occur.

(7) The department may conduct a consolidated investigation for any alleged violations identified under RCW 49.46.360 or associated rules, when there are common questions of law or fact involving entertainers for the same establishment.

(8) The department may, for the purposes of enforcing RCW 49.46.360 or any associated rules, issue subpoenas to compel the attendance of witnesses or parties and the production of documents and records, administer oaths and examine witnesses under oath, take depositions, and seek affidavits or other verifications. The department may request an establishment perform a self-audit of any records. The results or conclusions of the self-audit must be provided to the department within a reasonable time. Reasonable timelines will be specified in the self-audit request. The records examined by the establishment in order to perform the self-audit must be made available to the department upon request.

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

(a) "Repeat willful violator" means any establishment that has been the subject of a final and binding citation for a willful violation of one or more rights under RCW 49.46.360, and all associated 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 296-128-90090 Enforcement—Administrative violations. (1)

If an entertainer files a complaint with the department alleging a violation of any administrative requirement of RCW 49.46.360 or any associated rules, the department will investigate the complaint under RCW 49.46.360. Alleged violations include, but are not limited to, failure of an establishment to comply with: Written contract requirements of RCW 49.46.360 (2) and (3), signage requirements of RCW 49.46.360(5), notice requirements of RCW 49.46.360(6), and associated rules.

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

(3) If an entertainer 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, unless the complaint is otherwise resolved.

(4) If the department's investigation finds that an entertainer's allegation cannot be substantiated, the department will issue a closure letter to the entertainer and the establishment detailing such finding.

(5) If the department's investigation finds that the establishment violated an administrative requirement, and the complaint is not otherwise resolved, the department may, at its discretion, notify the establishment that the department intends to issue a citation and notice of assessment. The department may provide up to 30 days after the date of such notification for the establishment to take corrective ac-

tion to remedy the violation. 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 establishment to provide written notices of reasons for the termination or refusal to rehire an entertainer;

(b) Order the establishment to cease using any written contracts, policies, or notices that are in violation of RCW 49.46.360 or associated rules;

(c) Order the establishment to update and correct any written contracts, policies, or notices that are in violation of RCW 49.46.360 or associated rules;

(d) For the first violation, order the establishment to pay the department a civil penalty; and

(e) For a repeat violation, order the establishment to pay the department up to double the last civil penalty issued.

(6) If the department determines that the violation of rights under RCW 49.46.360 or associated rules was a willful violation, and the establishment fails to take corrective action, the department may order the establishment 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 \$1,000 for each willful violation. For a repeat willful violator, the citation assessing a civil penalty will not be less than \$2,000, but no greater than \$20,000 for each repeat willful violation.

(b) The department may not assess a civil penalty if the establishment 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 establishment 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.

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

(7) The department will send notice of a citation assessing a civil penalty or the closure letter to both the establishment and the entertainer.

(8) During any investigation under RCW 49.46.360 or associated rules, if the department discovers information suggesting additional violations of any requirements of RCW 49.46.360 or any associated rules, the department may investigate and take appropriate enforcement action without any additional complaint. The department may also initiate an investigation on behalf of one or more entertainers for a violation of any requirements of RCW 49.46.360 or any associated rules, when the director otherwise has reason to believe that a violation may have occurred or will occur.

(9) The department may conduct a consolidated investigation for any alleged administrative violations identified under RCW 49.46.360

or associated rules, when there are common questions of law or fact involving entertainers for the same establishment.

(10) The department may, for the purposes of enforcing RCW 49.46.360 or any associated rules, issue subpoenas to compel the attendance of witnesses or parties and the production of documents and records, administer oaths and examine witnesses under oath, take depositions, and seek affidavits or other verifications. The department may request an establishment perform a self-audit of any records. The results or conclusions of the self-audit must be provided to the department within a reasonable time. Reasonable timelines will be specified in the self-audit request. The records examined by the establishment in order to perform the self-audit must be made available to the department upon request.

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

(a) "Repeat willful violator" means any establishment that has been the subject of a final and binding citation for a willful violation of one or more rights under RCW 49.46.360, and all associated 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 296-128-90100 Enforcement—Retaliation. (1) An entertainer who believes that they were subject to retaliation by their establishment, as defined in WAC 296-128-90010, for the exercise of any entertainer rights under RCW 49.46.360 or associated rules, may file a complaint with the department within 180 days of the alleged retaliatory action. The department may, at its discretion, extend the 180-day period on recognized equitable principles or because extenuating circumstances exist. For example, the department may extend the 180-day period when there is evidence that the establishment may have concealed or misled the entertainer regarding the alleged retaliatory action.

(2) If an entertainer 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, unless the complaint is otherwise resolved.

(3) The department may consider a complaint to be otherwise resolved when the entertainer and the establishment reach a mutual agreement to remedy any retaliatory action, or the entertainer voluntarily withdraws the complaint. Mutual agreements include, but are not limited to, rehiring, reinstatement, and payment of amounts due.

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

(5) If the department's investigation finds that the establishment retaliated against the entertainer, and the complaint is not otherwise resolved, the department may, at its discretion, notify the establishment that the department intends to issue a citation and notice of assessment. The department may provide up to 30 days after the date

of such notification for the establishment 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 establishment to make payable to the entertainer earnings or other amounts that the entertainer did not receive due to the establishment's retaliatory action, including interest of one percent per month on all amounts owed. The amounts and interest owed will be calculated from the first date amounts were owed to the entertainer;

(b) Order the establishment to restore the entertainer to the position held by the entertainer when the retaliation occurred, or restore the entertainer to an equivalent position with equivalent hours, schedule, benefits, pay, and other terms and conditions of entertainer's position;

(c) Order the establishment to cease using any policy that may lead to or result in discipline against the entertainer for exercising their rights under RCW 49.46.360 or associated rules;

(d) Order the establishment to update and correct any written contracts, policies, or notices that are in violation of RCW 49.46.360 or associated rules;

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

(f) For a repeat violation, order the establishment 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 establishment and entertainer.

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

(8) Nothing in WAC 296-128-90010 through 296-128-90100 impedes the department's ability to investigate under the authority prescribed in RCW 49.48.040.

(9) Nothing in WAC 296-128-90010 through 296-128-90100 precludes an entertainer's right to pursue private legal action.

NEW SECTION

WAC 296-128-90110 Administrative appeals. (1) A person, firm, or corporation aggrieved by a citation or determination of compliance

issued by the department under WAC 296-128-90090 through 296-128-90100 may appeal the citation or determination of compliance to the director by filing a notice of appeal with the director within 30 days of the department's issuance of the citation. A citation or determination of compliance not appealed within 30 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 or determination of compliance 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 or determination of compliance will be de novo. Any party who seeks to challenge an initial order shall file a petition for administrative review with the director within 30 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 establishment that fails to allow adequate inspection of records in an investigation by the department under WAC 296-128-90090 through 296-128-90100 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 amounts due and penalties assessed.

NEW SECTION

WAC 296-128-90120 Collection procedures. Collections of unpaid citations will be handled pursuant to the procedures outlined in RCW 49.48.086.

NEW SECTION

WAC 296-128-90130 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.