



Washington State Legislature

Governor Inslee,

We request an immediate repeal of the Department of Labor and Industry's ("L&I") emergency rulemaking petition filed on October 18, 2021, adopted as WSR-21-21-074¹ pursuant to Revised Code to Washington ("RCW") 34.05.350(3).

WSR-21-21-074 was adopted upon a finding with identical language to RCW 34.05.350(1)(a): "That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest." We recognize that your role in reviewing such an appeal is limited to analysis under RCW 34.05.350(1), and we hope that you will repeal the rule, given the lack of transparency in the adoption, the lack of change in conditions, and the arbitrary and capriciousness of WSR-21-21-074.

Lack of Transparency in Rulemaking

While not a factor in RCW 34.05.350(1)(a), we note the sheer lack of transparency in the adoption of this emergency rule. We, as a co-equal branch to your office, only discovered this rule through constituents that brought it to our attention. As we searched for this rulemaking on L&I's website, we were only able to find it through the link provided below (see: footnote 1), which was provided by sources familiar with L&I's bureaucracy—we could not find this proposed rulemaking on our own. Such lack of transparency dilutes public trust in our government and fails to show the agency's good faith in promulgating the rule.

If L&I desires to make such a rule, it should do so in an open and transparent manner that would allow public review and comment. Even if an opportunity for review and comment is not afforded the public, L&I's website should host the proposed rulemaking to grant easy access to the public. Such an approach would align with the Attorney General's statement on a transparent government: "A transparent and accessible government is essential to a successful free society, and fosters trust and confidence in government."² WSR 21-21-074 was neither open nor transparent.

¹ Washington Department of Labor & Industries Rulemaking Order, No. WSR 21-21-07, October 18, 2021. Available at: <https://content.govdelivery.com/accounts/WADLI/bulletins/2f840a0>

² Washington State Office of the Attorney General, *Open Government*, available at: <https://www.atg.wa.gov/open-government>.



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Lack of Change of Conditions to Support the Need for WSR 21-21-074

RCW 34.05.350(2) notes that “[i]dentical or substantially similar emergency rules may not be adopted in sequence unless conditions have changed.”³ This is relevant as WSR 21-19-118 was adopted on September 20, 2021, and the change in conditions are as follows: (1) you issued Proclamation 21.14.2; and (2) daily COVID-19 case counts have decreased while COVID-19 vaccinations have increased. Through the adoption of WSR-21-21-074, L&I uses Proclamation 21-14.2, to justify its claim for a change in condition without actually justifying a change in condition. Under such a definition, any unilateral emergency regulations constitute a change in condition justifying the adoption of emergency administrative rules. More to the point, vaccination rates have increased since the issuance of your Proclamation⁴ and case counts and hospitalizations have declined over the months of September and October 2021,⁵ removing any legitimate claim that a “change in condition” necessitates the proposed rule.

Arbitrary and Capriciousness of WSR 21-21-074

The proposed Rule provides that “an employer can be cited for a violation of the ‘safe place’ rule **where there are no specific rules** to address the particular hazard.”⁶ We recognize the “safe place” rule; nonetheless, L&I has provided guidance on the “safe place” rule that should suffice.⁷ Adopting such a broad, vague rule without clear direction will lead to arbitrary enforcement. The proposed rule further states that “Lack of COVID-19 hazard controls such as failure to address symptomatic employees can be cited under the safe place standard.” Again, this component of the proposed rule leads to broad, imprecise regulation. As written, the proposed rule expressly allows L&I to enforce against an instance where no rules exist. Such a rule is arbitrary and capricious as it has “wilful and unreasoning action, action without consideration and in disregard of the facts and circumstances of the case.”⁸

³ RCW 34.05.350(2).

⁴ Washington Department of Health Covid-19 Data Dashboard, available at: <https://www.doh.wa.gov/emergencies/covid19/datadashboard>. Last accessed: 10/25/2021.

⁵ *Id.*

⁶ WSR 21-21-074, Page 3; emphasis added.

⁷ <https://www.lni.wa.gov/safety-health/safety-rules/enforcement-policies/DD170.pdf>

⁸ *State v. Ford*, 110 Wn. 2d 827, 830 (Wash. 1988); citing *Sweitzer v. Industrial Ins. Comm’n*, 116 Wn. 398, 401 (1921).



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L&I cannot demonstrate that it “exercised honestly and upon due consideration”⁹ or a “process of reason”¹⁰ to arrive at the rule as L&I simply deferred to your Proclamation and allowed for enforcement of the “safe place” rule where “no specific rule” exists. Such decisions demonstrate no independent agency judgment and allow agent the ability to exercise full discretion to enforce and interpret the proposed rule. While the Agency is granted great deference in its rulemaking efforts, emergency regulations may only be adopted when the “agency for good cause finds that immediate adoption of the rule is necessary for the preservation of the public health, safety, or general welfare.”¹¹ In this instance, there is no clear case for “good cause” or “the preservation of the public health, safety, or general welfare” as your Proclamation already addresses these issues, leaving WSR 21-21-074 arbitrary and capricious.

Conclusion

We seek immediate repeal of WSR 21-21-074 as it: (1) lacks transparency; (2) lacks supporting basis of a demonstration of change in conditions; and (3) is arbitrary and capricious. This request is timely as WSR 21-21-074 was filed on October 18, 2021, and RCW 34.05.350(3) provides that a requests for repeal of emergency rules must be made to your office within seven days.

Governor, for the sake of our state, work with us.

Sincerely,

Jesse L. Young
State Representative
26th Legislative District

Jim Walsh
State Representative
19th Legislative District

⁹ *Id.*

¹⁰ *Squaxin Island Tribe v. Dep't of Ecology*, 177 Wn. App. 734, 740 (2013); quoting *Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501 (2002)

¹¹ *State v. Mackenzie*, 114 Wn. App. 687, 698 (Wash. Ct. App. 2002).



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Mike Padden

Mike Padden
State Senator
Legislative District 4

Rob Chase

Rob Chase
State Representative
Legislative District 4

Phil Fortunato

Phil Fortunato
State Senator
Legislative District 31

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Cyndy Jacobsen
State Representative
Legislative District 25

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Robert Sutherland
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Legislative District 39

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Perry Dozier
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Jeff Wilson
State Senator
Legislative District 19