STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
*Division of Occupational Safety and Health*
*P.O. Box 44620, Olympia, Washington 98504-4620*
Via Email

Washington Retail Association
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Dear Ms. Gundersen,

Thank you for submitting your comments on the draft proposed rule language implementing Engrossed Substitute House Bill 1097 (ESHB 1097). ESHB 1097 made changes to how the Department of Labor & Industries (L&I) handles and processes safety and health discrimination complaints under RCW 49.17.160. We have provided responses to your comments below.

**WAC 296-360-030 (p.9) Filing a complaint of discrimination**

- P.4 "the employee's authorized" representative – is a licensed attorney the only potential "authorized" representative in the current WAC or does the "authorized" insertion before "representative" change who could be a representative for the employee?

The changes in WAC 296-360-030 are clarifying only and do not change the standard around who can file a complaint on behalf of an employee. Anyone from a friend or family member to an attorney can be an authorized representative. During the investigation process, we do have a requirement to have a letter of representation from an attorney or notice of appearance for appearances at the Board of Industrial Appeals.

**WAC 296-360-045 (p.9) Appropriate relief for violations of RCW**

- The current language makes it look like these are the only appropriate relief options, but the session law states that "Appropriate relief may include, but is not limited to, …". (p.8 line 1)
    - Concern: whether there is a finding of violation or not, the employer and employee relationship would deteriorate to the point that restoring the worker to the prior or an equivalent position would not be desirable for either side. The line referenced in the session law means that other options are available outside of restoring the complainant to the position or the equivalent position.
    - Suggestion: Provide an option for both sides to NOT be forced into an employment relationship with a prior legal history involved. This is

especially important for a small to medium size business where reassignment to an equivalent position is not practicable or available.

We appreciate you highlighting this concern. We feel this is better addressed through our investigation and policies on determining what relief is appropriate. We take all facts into account when determining the relief most appropriate for the complainant (employee). Where reinstatement is not feasible, such as where the employer has ceased doing business or there is so much hostility between the employer and the complainant that continued employment would be unbearable. Front pay in lieu of reinstatement can be awarded from the date of discharge up to a reasonable amount of time for the complainant to obtain another job. We would like to note that the statute and the rule specifically allow the complainant to appeal the relief granted in the notice of assessment. This was not the standard before Engrossed Substitute House Bill 1097 was passed. Specifically RCW 49.17.160(6) middle of the subsection, and WAC 296-360-180(2)(a)(ii) of the draft proposed language.

**WAC 296-360-050 Withdrawal of complaint**

- Both the current WAC or the proposed revision leaves much discretion to the agency. For example, does this mean the division would have unlimited time to investigate or pursue whatever course of action? Example, it appears that this is a current practice of the division. It is important to ensure that forwarding the complaint to another jurisdiction upon a voluntary withdrawal by the complainant. Is this course of action supported by statute?
- Overall, are there any limitations to what the division is allowed to do or continue to investigate upon a voluntary withdrawal of a complaint?

Enforcing the provisions of RCW 49.17.160 is not only a matter of protecting the rights of individual employees but also of protecting the public interest. The Department's jurisdiction cannot be foreclosed as a matter of law by the unilateral action of a complainant. An L&I investigator will conduct sufficient investigation to reach a recommendation on whether a violation occurred regarding a complaint in cases warranting resolution by withdrawal.

**WAC 296-360-080 Persons protected by RCW 49.17.160**

- Would you provide the reference that defines the meaning of "economic realities" under (1) in the current WAC language? Or does the case law referenced (and crossed out in the proposed rule) provide the definition for "economic realities?
- The same question for removing the NLRB case under (2).

The "economic realities" test is defined as a judicial method of determining the nature of a business transaction or situation especially**:** a test used by courts for the purpose of determining if a person is an employee by considering such things as the extent of the alleged employer's ability to control, hire, fire, and discipline the person, the nature of the person's duties, and the payment of wages. The economic realities test and that applicants are considered employees are still the tests and law we will use in our discrimination investigations and remain in our Discrimination Manual, and in the rules published by OSHA.

The case citations were removed solely in the event those cases are distinguished by other court cases.

**WAC 296-360-175 Penalties for violations of RCW 49.17.160**

- HB 1097's Bill Report (p.1) specified the current minimum civil penalty at $100 and maximum at $7,000 or $70,000 for willful or repeated violations. Therefore, the penalties table proposed lacks the discretionary assessment allowed within the current range of minimum to the maximum penalty.
- Is this assessment by employer size and the multipliers used for repeated violation established in statue passed by the legislature or based on OSHA's practice?

RCW 49.17.160(4)(c) states "A civil penalty not to exceed the maximum penalty for a **serious violation under this chapter** may be assessed for the first occurrence. A civil penalty not to exceed the maximum penalty for a repeat violation under this chapter may be assessed for each repeat occurrence. Civil penalties are not contingent upon relief being granted to the worker."

When the statute states "under this chapter" we look at RCW 49.17.180 that outlines civil penalties under WISHA. RCW 49.17.180(2) does state a penalty for a serious violation cannot exceed $7,000 per violation. However, the following sentence allows the penalty amount to be higher if we have to meet a standard to have our state plan with federal OSHA. We then looked at OSHA penalties for discrimination violations to set the penalty amounts, these can be found in a memo issued by OSHA entitled "2022 Annual Adjustments to OSHA Civil Penalties". In this memo, OSHA has updated their penalties for discrimination cases, we are required to meet these penalties to continue to qualify our state plan with OSHA.

We very much appreciate the time and effort put into submitting your comments, and for your ongoing engagement in our rulemaking process. We anticipate filing the proposed rules next week and you will have an opportunity to provide written comments or give oral testimony during the public hearing process. If you have questions, please do not hesitate to reach out to us by phone, 360-902-4233 or by email Josefina.Magana@Lni.wa.gov.

Sincerely,

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