



PROPOSED RULE MAKING

CR-102 (June 2012)

(Implements RCW 34.05.320)
Do NOT use for expedited rule making

Agency: Department of Revenue

- Preproposal Statement of Inquiry was filed as WSR 15-11-100; or
- Expedited Rule Making--Proposed notice was filed as WSR; or
- Proposal is exempt under RCW 34.05.310(4) or 34.05.330(1).

- Original Notice
- Supplemental Notice to WSR
- Continuance of WSR

Title of rule and other identifying information: WAC 458-20-105 (Rule 105) *Employees distinguished from persons engaging in business* explains the conditions that serve to indicate whether persons are engaging in business or are employees.

Hearing location(s):
Capitol Plaza Building
2nd Floor Large Conference Room
1025 Union Avenue SE
Olympia, Washington

Copies of draft rules are available for viewing and printing on our website at [Rules Agenda](#)

Call in option can be provided upon request no later than 3 days before the hearing date.

Date: September 9, 2015 **Time:** 10:00 a.m.

Date of intended adoption: September 16, 2015
(Note: This is NOT the effective date)

Submit written comments to:

Name: Gayle Carlson
Address: Department of Revenue
Post Office Box 47453
Olympia, Washington 98504-7453

E-mail: GayleC@dor.wa.gov

By: September 9, 2015

Assistance for persons with disabilities: Contact Mary Carol LaPalm (360) 725-7499 or Renee Cosare (360) 725-7514 no later than 10 days before the hearing date. For Hearing Impaired please contact us via the Washington Relay Operator at (800) 833-6384.

Purpose of the proposal and its anticipated effects, including any changes in existing rules:

- The Department is proposing to revise Rule 105 to:
- Add the definition of “engaging in business” as found in RCW 82.04.150;
 - Add that personal chefs are independent contractors;
 - Add subsection headings where there were none; and
 - Update the rule as needed.

Reasons supporting proposal: RCW 82.04.150 definitions updated and to address personal chefs.

Statutory authority for adoption: RCW 82.32.300 and 82.01.060(2)

Statute being implemented:

Is rule necessary because of a:

- Federal Law? Yes No
 - Federal Court Decision? Yes No
 - State Court Decision? Yes No
- If yes, CITATION:

DATE August 4, 2015

NAME Dylan Waits

SIGNATURE

TITLE
Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: August 04, 2015

TIME: 2:56 PM

WSR 15-16-115

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters: None

Name of proponent: Department of Revenue

- Private
 Public
 Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... Gayle Carlson	1025 Union Ave. SE. Ste #544, Olympia ,WA	(360) 534-1576
Implementation.... Dylan Waits	1025 Union Ave. SE. Ste #544, Olympia ,WA	(360) 534-1583
Enforcement..... Alan Lynn	1025 Union Ave. SE. Ste #544, Olympia ,WA	(360) 534-1599

Has a small business economic impact statement been prepared under chapter 19.85 RCW or has a school district fiscal impact statement been prepared under section 1, chapter 210, Laws of 2012?

Yes. Attach copy of small business economic impact statement or school district fiscal impact statement.

A copy of the statement may be obtained by contacting:

Name:

Address:

phone ()

fax ()

e-mail

No. Explain why no statement was prepared.

The rules do not impose any new performance requirements or administrative burden on any small business not required by statute.

Is a cost-benefit analysis required under RCW 34.05.328?

Yes A preliminary cost-benefit analysis may be obtained by contacting:

Name:

Address:

phone ()

fax ()

e-mail

No: Please explain:

The proposed rules are not significant legislative rules as defined by RCW 34.05.328.

AMENDATORY SECTION (Amending WSR 92-06-082, filed 3/4/92, effective 4/4/92)

WAC 458-20-105 Employees distinguished from persons engaging in and operating a business. (1) **Introduction.** The Revenue Act imposes taxes (~~upon~~) on persons engaged in taxable business (~~but~~) activity, which does not (~~upon~~) include persons acting solely in the capacity of employees. This rule states the conditions that serve to indicate whether a person is engaging in and operating a business or is an employee.

(2) **Right to control.** While no one factor definitely determines employee status, the most important consideration is the employer's right to control the employee. The right to control is not limited to controlling the result of the work to be accomplished, but includes controlling the details and means by which the work is accomplished. In cases of doubt about employee status (~~all~~) the pertinent facts (~~should~~) may be submitted to the department of revenue for a specific ruling.

(3) **Persons engaging in and operating a business.** A person operating a business is a business entity that is engaging in business. The term "engaging in business" (~~means~~) includes commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business. RCW 82.04.150. Engaging in business also includes the act of transferring, selling or otherwise dealing in real or personal property, or the rendition of services, for consideration except as an employee. The following conditions will serve to indicate that a person is engaging in and operating a business.

If a person is:

(a) Holding oneself out to the public as engaging in business with respect to dealings in real or personal property, or in respect to the rendition of services;

(b) Entitled to receive the gross income of the business or any part thereof;

(c) Liable for business losses or the expense of conducting a business, even though such expenses may ultimately be reimbursed by a principal;

(d) Controlling and supervising others, and being personally liable for their payroll, as a part of engaging in business;

(e) Employing others to carry out duties and responsibilities related to the engaging in business and being personally liable for their pay;

(f) Filing a statement of business income and expenses (Schedule C) for federal income tax purposes;

(g) A party to a written contract, the intent of which establishes the person to be an independent contractor;

(h) Paid a gross amount for the work without deductions for employment taxes (such as Federal Insurance Contributions Act, Federal Unemployment Tax Act, and similar state taxes).

(4) **Employees.** The following conditions indicate that a person is an employee.

If the person:

(a) Receives compensation, which is fixed at a certain rate per day, week, month or year, or at a certain percentage of business obtained, payable in all events;

(b) Is employed to perform services in the affairs of another, subject to the other's control or right to control, and includes hired household employees that may cook, clean, provide nanny-care, or grounds maintenance;

(c) Has no liability for the expenses of maintaining an office or other place of business, or any other overhead expenses or for compensation of employees;

(d) Has no liability for losses or indebtedness incurred in the conduct of the business;

(e) Is generally entitled to fringe benefits normally associated with an employer-employee relationship, e.g., paid vacation, sick leave, insurance, and pension benefits;

(f) Is treated as an employee for federal tax purposes;

(g) Is paid a net amount after deductions for employment taxes, such as those identified in subsection (3)(h) of this ~~(section)~~ rule.

(5) **Full-time life insurance salespersons.** ~~((Chapter 275, Laws of 1991, effective July 1, 1991,))~~ RCW 82.04.360 provides that individuals performing services as full-time life insurance salespersons, as provided in section 3121 (d)(3)~~((+B))~~ (ii) of the Internal Revenue Code, will be considered employees. Treatment as an employee under this subsection (5) applies only to persons engaged in the full-time sale of life insurance. The status of other persons, including others listed in section 3121(d) of the Internal Revenue Code, will be determined according to the provisions of subsections (1) ~~((and (2)))~~ through (4) of this ~~((section (see WAC 458-20-164 for the proper tax treatment of insurance agents, brokers, and solicitors)))~~ rule. For information on the taxability of insurance producers, adjusters, title insurance agents, and surplus line brokers refer to WAC 458-20-164.

(6) **Operators of rented or owned equipment.** Persons who furnish equipment on a rental or other basis for a charge and who also furnish the equipment operators, are engaging in and operating a business and are not employees of their customers. Likewise, persons who furnish materials and the labor necessary to install or apply the materials, or produce something from the materials, are presumed to be engaging in and operating a business and not to be employees of their customers.

(7) **Casual laborers.** Persons regularly performing odd job carpentry, painting or paperhanging, plumbing, bricklaying, electrical work, cleaning, yard work, etc., for the public generally are presumed to be engaging in and operating a business. The burden of proof is ~~((upon))~~ on such persons to show otherwise. ~~((However,))~~ For tax registration and tax reporting requirements refer to WAC 458-20-101 ~~((and 458-20-104 for registration and reporting requirements for such activities))~~. Readers may also want to contact the Washington state employment security department or the Internal Revenue Service for additional information.

(8) **Corporations, joint ventures, or individuals acting as a unit.** A corporation, joint venture, partnership, limited liability corporation, or any other group of individuals acting as a unit, is not an employee.

(9) **Booth renters.** For purposes of the business and occupation tax a "booth renter," as defined in RCW ~~((18.16.020(19)))~~ 82.04.360, is considered ~~((engaged in))~~ to be engaging in and operating a business and not an employee.

(a) A "booth renter" is any person who:

Under no circumstances is this proposed rule to be used to determine tax liability and/or exemptions.

~~((a))~~ (i) Performs cosmetology, barbering, esthetics, or manicuring services for which a license is required pursuant to chapter 18.16 RCW; and

~~((b))~~ (ii) Pays a fee for the use of salon or shop facilities and receives no compensation or other consideration from the owner of the salon or shop for the services performed.

~~((c) See WAC 458-20-118 for the proper treatment))~~ (b) For the taxability of amounts received for the rental or licensing of real estate ~~((and))~~ refer to WAC 458-20-118. Refer to WAC 458-20-200 for the ~~((proper treatment))~~ taxability of amounts received for leased departments.

(10) **Personal chefs.** Personal chefs are engaging in and operating a business as independent contractors. They prepare meals for consumption at their clients' homes. Personal chefs typically serve multiple clients, working with the clients to create personalized meal plans based on the client's specific dietary requirements or requests. The meals may be prepared in the client's home or in a commercial kitchen and delivered to the client's home. Personal chefs may also prepare meals for social events, such as dinner parties, cocktail parties, engagement parties, weddings, or receptions.

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