



# EXPEDITED RULE MAKING

## CR-105 (December 2017) (Implements RCW 34.05.353)

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FILED

DATE: September 29, 2022

TIME: 4:59 PM

WSR 22-20-064

**Agency:** Department of Revenue

**Title of rule and other identifying information:** (describe subject) WAC 458-20-267 Annual Tax Performance Reports for Certain Tax Preferences

**Purpose of the proposal and its anticipated effects, including any changes in existing rules:** The Department of Revenue intends to update and amend WAC 458-20-267 to incorporate the 2022 legislation, Chapter 56, Laws of 2022 (Engrossed Senate Bill 5800).

**Reasons supporting proposal:** Washington legislature enacted statutory changes in 2022 to RCW 82.32.534, the statute that WAC 458-20-267 is based on. The rule is updated to provide updated guidance.

**Statutory authority for adoption:** RCW 82.01.060; RCW 82.32.300

**Statute being implemented:** RCW 82.32.534

**Is rule necessary because of a:**

- Federal Law?  Yes  No
- Federal Court Decision?  Yes  No
- State Court Decision?  Yes  No

If yes, CITATION:

**Name of proponent:** (person or organization) Department of Revenue

- Private
- Public
- Governmental

**Name of agency personnel responsible for:**

	Name	Office Location	Phone
Drafting:	Michael Hwang	6400 Linderson Way SW, Tumwater, WA	360-534-1575
Implementation:	Heidi Geathers	6400 Linderson Way SW, Tumwater, WA	360-534-1615
Enforcement:	Heidi Geathers	6400 Linderson Way SW, Tumwater, WA	360-534-1615

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

**Expedited Adoption - Which of the following criteria was used by the agency to file this notice:**

- Relates only to internal governmental operations that are not subject to violation by a person;
- Adopts or incorporates by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule;
- Corrects typographical errors, make address or name changes, or clarify language of a rule without changing its effect;
- Content is explicitly and specifically dictated by statute;
- Have been the subject of negotiated rule making, pilot rule making, or some other process that involved substantial participation by interested parties before the development of the proposed rule; or
- Is being amended after a review under RCW 34.05.328.

**Expedited Repeal - Which of the following criteria was used by the agency to file notice:**

- The statute on which the rule is based has been repealed and has not been replaced by another statute providing statutory authority for the rule;
- The statute on which the rule is based has been declared unconstitutional by a court with jurisdiction, there is a final judgment, and no statute has been enacted to replace the unconstitutional statute;
- The rule is no longer necessary because of changed circumstances; or
- Other rules of the agency or of another agency govern the same activity as the rule, making the rule redundant.

**Explanation of the reason the agency believes the expedited rule-making process is appropriate pursuant to RCW 34.05.353(4):** The expedited rule-making process is appropriate for this rule update because the Department is incorporating changes resulting from 2022 legislation.

**NOTICE**

**THIS RULE IS BEING PROPOSED UNDER AN EXPEDITED RULE-MAKING PROCESS THAT WILL ELIMINATE THE NEED FOR THE AGENCY TO HOLD PUBLIC HEARINGS, PREPARE A SMALL BUSINESS ECONOMIC IMPACT STATEMENT, OR PROVIDE RESPONSES TO THE CRITERIA FOR A SIGNIFICANT LEGISLATIVE RULE. IF YOU OBJECT TO THIS USE OF THE EXPEDITED RULE-MAKING PROCESS, YOU MUST EXPRESS YOUR OBJECTIONS IN WRITING AND THEY MUST BE SENT TO**

Name: Michael Hwang  
Agency: Department of Revenue  
Address: PO BOX 47453  
Phone: 360-534-1575  
Fax:  
Email: MichaelHw@dor.wa.gov  
Other:

**AND RECEIVED BY** (date) December 5, 2022

**Date:** September 29, 2022

**Name:** Atif Aziz

**Title:** Rules Coordinator

**Signature:**



AMENDATORY SECTION (Amending WSR 20-22-089, filed 11/3/20, effective 12/4/20)

**WAC 458-20-267 Annual tax performance reports for certain tax preferences.** (1) **Introduction.** Effective for tax reporting periods beginning January 1, 2018, taxpayers taking certain tax preferences must file an annual tax performance report with the department of revenue (department) providing information about their business. This rule explains how to file a report, the information that must be included in the report, due dates for filing, and other filing requirements.

(a) **References to related rules.** For tax reporting periods through December 31, 2017, readers may want to refer to the following rules:

- (i) WAC 458-20-267A Annual reports for certain tax preferences;
- (ii) WAC 458-20-268 Annual surveys for certain tax preferences.

(b) **Definitions.** For purposes of this rule the following definitions apply:

(i) **Person.** "Person" has the meaning under RCW 82.04.030 and also includes the state and its departments and institutions.

(ii) **Tax preference.** As defined under RCW 43.136.021, "tax preference" means:

(A) An exemption, exclusion, or deduction from the base of a state tax; a credit against a state tax; a deferral of a state tax; or a preferential state tax rate; and

(B) For purposes of this rule, tax preference includes only the tax preferences requiring an annual tax performance report under RCW 82.32.534.

(c) **Elimination of annual survey.** For tax preferences claimed for tax reporting periods beginning in January 2018 and later, taxpayers are no longer required to complete both an annual report and an annual survey.

(d) **Examples.** This rule includes examples that identify a set of facts and then state a conclusion. These examples should only be used as a general guide. The department will evaluate each case on its particular facts and circumstances.

(2) **Tax preferences requiring an annual tax performance report.** Taxpayers may refer to the department's website at [dor.wa.gov](http://dor.wa.gov) for the "Annual Tax Performance Report for Preferential Tax Rates/Credits/Exemptions/Deferrals Worksheet." This worksheet lists tax preferences that require an annual tax performance report. Taxpayers may also contact the telephone information center at ((800-647-7706)) 360-705-6210 to determine whether they must file an annual tax performance report.

(3) **How to file annual tax performance reports.**

(a) **Electronic filing.** Annual tax performance reports must be filed electronically unless the department waives this requirement upon a showing of good cause. A report is filed electronically when the department receives the report in an electronic format through the "MyDOR" system at [dor.wa.gov](http://dor.wa.gov).

(b) **Required paper form.** If the department waives the electronic filing requirement for a person who shows good cause, that person must use the annual tax performance report form developed by the department unless that person obtains prior written approval from the department to file an annual tax performance report in an alternative format.

(c) **How to obtain the form.** Persons who have received a waiver of the electronic filing requirement from the department or who otherwise

would like a paper copy of the report may obtain the annual tax performance report form from the department's website at dor.wa.gov. It may also be obtained by calling the ~~((telephone information center))~~ department at 360-705-6705, or by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476  
Olympia, WA 98504-7476

(d) **Special requirement for persons who did not file an annual tax performance report during the previous calendar year.** If a person is a first-time filer or otherwise did not file an annual tax performance report with the department during the previous calendar year, or prior to 2019 did not file an annual report or annual survey, the annual tax performance report must include information on employment and wages for the two calendar years immediately preceding the due date of the report.

(e) **Due date of annual tax performance report for tax preferences other than deferrals.** Every person claiming a tax preference that requires an annual tax performance report under RCW 82.32.534 must file the report annually with the department in the year following the calendar year in which the person becomes eligible to claim the tax preference. The due date for filing the report is May 31st.

(f) **Due date of annual tax performance report for tax preferences that are deferrals.** If the tax preference is a deferral of tax, an annual tax performance report must be filed by May 31st in the year following the calendar year in which the investment project is certified by the department as operationally complete, and by May 31st ~~((of each of the seven succeeding calendar years))~~ succeeding calendar year through the calendar year in which the deferred taxes are fully repaid or are immediately due and payable because the recipient of the deferral is no longer eligible for the deferral.

(g) **Due date extensions.** The department may extend the due date for filing annual tax performance reports as provided in subsection (15) of this rule.

(h) **Example 1.** A manufacturer of commercial airplanes begins construction on a new facility in Washington. This facility will be used to manufacture fuselages of commercial airplanes. This firm first claimed the sales and use tax exemption provided by RCW 82.08.980 for construction of new facilities used to manufacture commercial airplanes, fuselages, or wings of commercial airplanes in 2020. By May 31, 2021, the aerospace firm was required to submit an annual tax performance report covering calendar years 2019 and 2020. If the aerospace firm continues to utilize the exemption provided by RCW 82.08.980 during calendar year 2021, an annual tax performance report is due by May 31, 2022, covering calendar year 2021.

(i) **Example 2.** An aluminum smelter first claimed the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters on July 31, 2017. By May 31, 2018, the aluminum smelter must provide an annual report covering calendar years 2016 and 2017. If the aluminum smelter continues to claim the B&O tax rate provided by RCW 82.04.2909 during calendar year 2018, an annual tax performance report is due by May 31, 2019, covering calendar year 2018.

(4) **Amount of tax preference.** The annual tax performance report must include the amount of the tax preference claimed for the calendar year covered by the report.

(5) **What employment positions are included in the annual tax performance report?**

(a) **General rule.** Except as provided in (a)(i), (ii), or (b) of this subsection, the report must include information detailing employment positions in the state of Washington.

(i) **Alternative to reporting employment and wage data.** A person may elect to allow, on their behalf, the employment security department to release wage and employment data to the department and the joint legislative audit and review committee. Each taxpayer electing this option must affirm that election in accordance with procedures approved by the employment security department.

(ii) **Additional reporting requirements for public research institutions claiming an exemption for machinery and equipment.** For a person that claimed an exemption provided in RCW 82.08.025651 or RCW 82.12.025651, the report must include the amount of tax exempted under those sections in the prior calendar year for each general area or category of research and development for which exempt machinery and equipment and labor and services were acquired in the prior calendar year.

(b) **Alternative method.** Persons engaged in manufacturing commercial airplanes or their components may report employment positions per job at the manufacturing site.

(i) **What is a "manufacturing site"?** For purposes of the annual tax performance report, a "manufacturing site" is one or more immediately adjacent parcels of real property located in Washington state on which manufacturing occurs that support activities qualifying for a tax preference. Adjacent parcels of real property separated only by a public road comprise a single site. A manufacturing site may include real property that supports the qualifying activity, such as administration offices, test facilities, warehouses, design facilities, and shipping and receiving facilities. It may also include portions of the manufacturing site that support nonqualifying activities.

(ii) **If the person files per job at the manufacturing site, which manufacturing site is included in the annual tax performance report for the aerospace manufacturing industry tax preferences?** The location(s) where a person is manufacturing commercial airplanes or components of such airplanes within this state is the manufacturing site(s) included in the annual tax performance report. A "commercial airplane" has its ordinary meaning, which is an airplane certified by the Federal Aviation Administration (FAA) for transporting persons or property, and any military derivative of such an airplane. A "component" means a part or system certified by the FAA for installation or assembly into a commercial airplane.

(iii) **Are there alternative methods for reporting separately for each manufacturing site?** For purposes of completing the annual tax performance report, the department may agree to allow a person whose manufacturing sites are within close geographic proximity to consolidate its manufacturing sites onto a single annual tax performance report provided that the jobs located at the manufacturing sites have equivalent employment positions, and wages. A person may request written approval to consolidate manufacturing sites by contacting the department at:

Attn: Tax Incentive Team  
Taxpayer Account Administration  
Department of Revenue  
Post Office Box 47476

Olympia, WA 98504-7476

(c) **Example 3.** ABC Airplanes, a company manufacturing FAA certified airplane landing gear, conducts activities at three locations in Washington state. ABC Airplanes claims the Aerospace Property and Leasehold Excise Tax B&O credit provided by RCW 82.04.4463 for property taxes paid on qualified buildings used exclusively in manufacturing commercial airplanes or component parts. In Seattle, WA, ABC Airplanes maintains its corporate headquarters and administrative offices. In Spokane, WA, ABC Airplanes manufactures the brake systems for the landing gear. In Vancouver, WA, ABC Airplanes assembles the landing gear using the components manufactured in Spokane, WA. If filing per manufacturing site, ABC Airplanes must file separate annual tax performance reports for employment positions at its manufacturing sites in Spokane and Vancouver because these are the Washington state locations in which manufacturing occurs that supports activities qualifying for a tax preference.

**(6) What jobs are included in the annual tax performance report?**

The annual tax performance report covers all full-time, part-time, and temporary jobs in this state or, for persons filing as provided in subsection (5)(b) of this rule, at the manufacturing site as of December 31st of the calendar year for which an applicable tax preference is claimed. Jobs that support nonqualifying activities or support both nonqualifying and qualifying activities for a tax preference are included in the report if the job is located in Washington state or, for persons filing as provided in subsection (5)(b) of this rule, at the manufacturing site.

**Example 4.** XYZ Aluminum, an aluminum smelter company, manufactures aluminum in Tacoma, WA. The company is reporting tax under the B&O tax rate provided by RCW 82.04.2909 for aluminum smelters. XYZ Aluminum's annual tax performance report for its Tacoma, WA location will include all of its employment positions in this state, including its nonmanufacturing employment positions.

**(7) How is employment detailed in the annual tax performance report?** The annual tax performance report requires reporting of the total hours and wages for employees in Washington for each quarter or for the calendar year, as determined by the department.

**(8) What is total employment?** The annual tax performance report must provide information on all full-time, part-time, and temporary employment positions located in Washington. Total employment includes employees who are on authorized leaves of absences such as sick leave, vacation, disability leave, jury duty, military leave, regardless of whether those employees are receiving wages. Leaves of absences do not include separations of employment such as layoffs or reductions in force. Vacant positions are not included in total employment.

**(9) What are full-time, part-time, and temporary employment positions?** An employer must provide information on the total number of employees that are employed in full-time, part-time, or temporary employment positions on December 31st of the calendar year for which an applicable tax preference is claimed.

**(a) Full-time and part-time employment positions.** For a position to be treated as full time or part time, the employer must intend for the position to be filled for at least (~~fifty-two~~) 52 consecutive weeks or (~~twelve~~) 12 consecutive months. A full-time position is a position that satisfies any one of the following minimum thresholds:

(i) Works (~~thirty-five~~) 35 hours per week for (~~fifty-two~~) 52 consecutive weeks;

(ii) Works (~~four hundred fifty-five~~) 455 hours, excluding overtime, each quarter for four consecutive quarters; or

(iii) Works (~~one thousand eight hundred twenty~~) 1,820 hours, excluding overtime, during a period of (~~twelve~~) 12 consecutive months.

A part-time position is a position in which the employee works less than the hours required for a full-time position. In some instances, an employee may not be required to work the hours required for full-time employment because of paid rest and meal breaks, health and safety laws, disability laws, shift differentials, or collective bargaining agreements, but receives wages equivalent to a full-time job. If, in the absence of these factors, the employee would be required to work the number of hours for a full-time position to receive full-time wages, the position should be reported as a full-time employment position.

(b) **Temporary positions.** A temporary position is a position that is intended to be filled for period of less than (~~twelve~~) 12 consecutive months. Positions in seasonal employment are temporary positions. Temporary positions include workers furnished by staffing companies regardless of the duration of the placement with the person required to file the annual tax performance report.

(c) **The following facts apply to the examples in (c) of this subsection.** National Airplane Inc. manufactures wings for commercial airplanes. National Airplane Inc. begins construction of a new facility to store raw materials used in manufacturing wings for commercial planes in Tacoma, WA, and claims the Aerospace Manufacturing Site Sales and Use Tax Exemption in RCW 82.08.980 and 82.12.980. National Airplane Inc. employs (~~one hundred~~) 100 people. Seventy-five of the employees work directly in the manufacturing operation and are classified as (U.S. Department of Labor Standard Occupation Code) SOC Production Occupations. Five employees work in the engineering and design division and are classified as SOC Architect and Engineering Occupations. Five employees are sales representatives and are classified as SOC Sales and Related Occupations. Five employees are service technicians and are classified as SOC Installation, Maintenance, and Repair Occupations. Five employees are administrative assistants and are classified as SOC Office and Administrative Support. Five executives are classified as SOC Management Occupations.

(i) **Example 5.** Through a college work-study program, National Airplane Inc. employs six interns from September through June in its engineering department. The interns each work (~~twenty~~) 20 hours a week. The six interns are reported as temporary employees, and not as part-time employees, because the intern positions are intended to be filled for a period of less than (~~twelve~~) 12 consecutive months. Assuming the five employees classified as SOC Architect and Engineering Occupations are full-time employees, National Airplane Inc. will report a total of (~~eleven~~) 11 employment positions in SOC Architect and Engineering Occupations with five in full-time employment positions and six in temporary employment positions.

(ii) **Example 6.** National Airplane Inc. manufactures navigation systems in two shifts of production. The first shift works eight hours from 8:00 a.m. to 5:00 p.m. Monday through Friday. The second shift works six hours from 6:00 p.m. to midnight Monday through Friday. The second shift works fewer hours per week (~~thirty~~) 30 hours) than the first shift (~~forty~~) 40 hours) as a pay differential for working in the evening. If a second shift employee transferred to the first shift, the employee would be required to work (~~forty~~) 40 hours with

no overall increase in wages. The second shift employees should be reported as full-time employment positions, rather than part-time employment positions.

(iii) **Example 7.** On December 1st, (~~ten~~) 10 National Airplane Inc. full-time employees classified as SOC Production Occupations take family and medical leave for (~~twelve~~) 12 weeks. National Airplane Inc. hires five people to perform the work of the employees on leave. Because the (~~ten~~) 10 employees classified as SOC Production Occupations are on authorized leave, National Airplane Inc. will include those employees in the annual tax performance report as full-time employment positions. The five people hired to replace the absent employees classified as SOC Production Occupations will be included in the report as temporary employees. National Airplane Inc. will report a total of (~~eighty~~) 80 employment positions in SOC Production Occupations with (~~seventy-five~~) 75 in full-time employment positions and five in temporary employment positions.

(iv) **Example 8.** On December 1st, one full-time employee classified as SOC Sales and Related Occupations resigns from her position. National Airplane Inc. contracts with Jane Smith d/b/a Creative Enterprises, Inc. to finish an advertising project assigned to the employee who resigned. Because Jane Smith is an independent contractor, National Airplane Inc. will not include her employment in the annual tax performance report. Because the resignation has resulted in a vacant position, the total number of employment positions National Airplane Inc. will report in SOC Sales and Related Occupations is reduced to four employment positions.

(v) **Example 9.** All National Airplane Inc. employees classified as SOC Office and Administrative Support Occupations work (~~forty~~) 40 hours a week, (~~fifty-two~~) 52 weeks a year. On November 1st, one employee must limit the number of hours worked to (~~thirty~~) 30 hours each week to accommodate a disability. The employee receives wages based on the actual hours worked each week. Because the employee works less than (~~thirty-five~~) 35 hours a week and is not paid a wage equivalent to a full-time position, the employee's position is a part-time employment position. National Airplane Inc. will report a total of five employment positions in SOC Office and Administrative Support Occupations with four in full-time employment positions and one in part-time employment positions.

(10) **What are wages?** For the purposes of the annual tax performance report, "wages" means the base compensation paid to an individual for personal services rendered to an employer, whether denominated as wages, salary, commission, or otherwise. Generally, compensation in the form of overtime, tips, bonuses, benefits (insurance, paid leave, meals, etc.), stock options, and severance pay are not "wages." For employees that earn an annual salary, hourly wages are determined by dividing annual salary by 2080. If an employee is paid by commission, hourly wages are determined by dividing the total amount of commissions paid during the calendar year by 2080.

(11) **How are wages detailed for the annual tax performance report?**

(a) An employer must report the total wages for employees in Washington for each quarter or for the calendar year, as determined by the department.

(b) For purposes of the annual tax performance report, wages are measured on December 31st of the calendar year for which an applicable tax preference is claimed.



(12) **Reporting workers furnished by staffing companies.** For temporary positions filled by workers that are furnished by staffing companies, the person filling out the annual tax performance report must provide the following information:

- (a) Total number of staffing company employees furnished by staffing companies;
- (b) Average duration of all staffing company employees.

(13) **Additional reporting for aluminum smelters and electrolytic processing businesses.** For an aluminum smelter or electrolytic processing business, the annual tax performance report must indicate the quantity of product produced in this state during the time period covered by the report.

(14) **Are annual tax performance reports confidential?** Except for the additional information that the department and the joint legislative audit and review committee may request which it deems necessary to measure the results of, or to determine eligibility for the tax preference, annual tax performance reports are not subject to the confidentiality provisions of RCW 82.32.330 and may be disclosed to the public upon request.

(15) **What are the consequences for failing to file a complete annual tax performance report?**

(a) **What is a "complete annual tax performance report"?** An annual tax performance report is complete if:

- (i) The annual tax performance report is filed on the form required by this rule or in an electronic format as required by law; and
- (ii) The person makes a good faith effort to substantially respond to all report questions required by this rule.

Responses such as "varied," "various," or "please contact for information" are not considered good faith responses to a question.

(b) **Amounts due for late filing.** Except for deferrals, if a person does not timely file a required annual tax performance report, then the following amounts are immediately due and payable:

For reports due on or after July 1, 2017 or annual tax performance reports due on or after May 31, 2019:

- (i) Thirty-five percent of the amount of the tax preference claimed for the previous calendar year; and
- (ii) An additional ~~((fifteen))~~ 15 percent of the amount of the tax preference claimed for the previous calendar year if the person has previously been assessed under (b) of this subsection for failure to timely submit a report for the same tax preference.

(c) **Tax deferrals.** If the tax preference is a deferral of tax, ~~((twelve and one-half percent of the deferred tax))~~ an amount equal to the deferred tax divided by the number of years in the waiver/repayment period is immediately due. If the economic benefits of the deferral are passed to a lessee, the lessee is responsible for payment to the extent the lessee has received the economic benefit.

(d) **Interest and penalties.** The department may not assess interest or penalties on amounts due under (b) and (c) of this subsection.

(e) **Extension for circumstances beyond the control of the taxpayer.** If the department finds the failure of a taxpayer to file an annual tax performance report by the due date was the result of circumstances beyond the control of the taxpayer, the department will extend the time for filing the report. The extension will be for a period of ~~((thirty))~~ 30 days from the date the department issues its written notification to the taxpayer that it qualifies for an extension under this rule. The department may grant additional extensions as it deems proper under RCW 82.32.590.

In determining whether the failure of a taxpayer to file an annual tax performance report by the due date was the result of circumstances beyond the control of the taxpayer, the department will apply the provisions in WAC 458-20-228 for the waiver or cancellation of penalties when the underpayment or untimely payment of any tax was due to circumstances beyond the control of the taxpayer.

(f) **One-time only extension.** A taxpayer that fails to file an annual tax performance report, as required under this rule, by the due date of the report is entitled to an extension of the due date. A request for an extension under this subsection must be made in writing to the department.

(i) To qualify for an extension, a taxpayer must have filed all annual tax performance reports, annual reports and annual surveys, if any, due in prior years by their respective due dates, beginning with annual reports and annual surveys due in the calendar year 2010.

(ii) The extension is for ~~((ninety))~~ 90 days from the original due date of the annual tax performance report.

(iii) No taxpayer may be granted more than one ~~((ninety-day))~~ 90-day extension.

