RULEMAKING STAKEHOLDER MEETING

June 6, 2022

Via Zoom Videoconference
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APPEARANCES (Via Zoom):

FOR WASHINGTON
EMPLOYMENT SECURITY
DEPARTMENT:

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MS. JANETTE BENHAM
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BE IT REMEMBERED that on Monday, June 6, 2022, at 9:01 a.m., via Zoom videoconference, before REBECCA S. LINDAUER, Certified Court Reporter, in and for the State of Washington, the following proceedings were had, to wit:

MR. BARRETT: Becky, are you ready?

THE COURT REPORTER: Yes, I am.

MR. BARRETT: Good morning and welcome everyone. My name is Jason Barrett, and I am the lead policy analyst for the Leave and Care Division at the Employment Security Department. There are a few other members from the Leave and Care Policy and Rules team on the call that I'll ask to introduce themselves at this time.

MS. BENHAM: Good morning. I'm Janette Benham. I am the rules coordinator for the Leave and Care Division.

MR. CAIN: Good morning. I'm Brett Cain. I'm a policy analyst for the Leave and Care Division. I'm working in the Rules and Policy team.

MR. BARRETT: Thank you, Janette and Brett.

We are here this morning to review and discuss drafts of rule amendments that the department is considering regarding the Paid Family and Medical Leave Program. The rule changes are associated with the passage of SB 5649 in this year's legislative session. The bill made several changes to the program, but not all of these changes require
rulemaking. The department has determined that only two amendments to the Washington Administrative Code are necessary for implementation. The rest of the changes are codified in statute.

For more information about what changes the bill made that might not require rulemaking, we encourage you to visit the legislature's website at leg.wa.gov. That's leg.wa.gov.

The two proposed rulemaking changes are WAC 192-520-010, parties to collective bargaining agreements, and WAC 192-610-025, documenting the birth or placement of a child.

The drafts that we will be reviewing and discussing can be found at paidleave.wa.gov/rulemaking. Again, that's paidleave.wa.gov/rulemaking.

If you look at current rulemaking, the second subtitle called "Implementation of Second Substitute Senate Bill 5649," you can expand that list and click on "Draft Rules" to see the text of the proposed changes.

If you called in for this meeting, we ask that you please keep your mute on by using the mute function on your phone or by pressing star 6. Please keep in mind that the subject of this call is the draft rules document that I just referenced. We are not discussing other rules, and if you have a question about your claim or application, please hang up and call our customer care team at 833-717-2273.
I also want to ask that if you do provide comments on the proposed rules to please state and spell your name and indicate if you are here on behalf of an organization. And, again, I want to remind everyone that this meeting is being recorded.

Before we open the floor for comments, I want to give folks an opportunity to ask any questions about anything I just discussed, why we're here, where to find the draft rules, or any other housekeeping items before we begin.

I actually see Bryan Mauss has his hand raised. Bryan, you can unmute yourself and ask a question.

MR. MAUSS: No. I apologize. That was just an effort to close a window. Thank you.

MR. BARRETT: No worries, not at all.

So, again, if anybody has any questions about the purpose of this meeting, why we're all here this morning, where to find the rules, please feel free to unmute yourself and ask now.

With that, we will move on to our first rule, which is WAC 192-520-010. Statute currently exempts any party to a collective bargaining agreement from all rights and responsibilities related to the Paid Family and Medical Leave Program as long as that agreement was in effect on October 19, 2017, has not yet expired, and has not been renegotiated or reopened. The passage of SB 5649 has
implemented a sunset date for this exemption. This exemption will now end on December 31, 2023. The proposed change to WAC 192-520-010 implements this sunset date with regard to the rest of the rule.

Are there any questions or comments on this rule? Did somebody wish to provide comment on this draft rule? If not, then we will move on to our next rule.

Before we move on to WAC 192-610-025 documenting the birth or placement of a child, I would like to give a fair warning that this rule features the topic of child death, which is obviously a very distressing and emotional thing to discuss. Before we continue, I want to give anyone on the call who may feel overwhelmed by this subject an opportunity to step off the call at this time.

SB 5649 also introduced a new concept called the postnatal period. This refers to the six-week period after an employee gives birth. Leave taken in the postnatal period by the birthing employee will default to medical leave unless otherwise specified by the employee. Medical leave taken in the postnatal period will not require a medical certification, although other forms of documentation may be required as described in the draft rule.

The bill also creates a new qualifying event when the death of a child occurs when the birth of that child would
have qualified the employee for family or medical leave.

Are there any questions or comments on this draft rule?

MS. CARDI: Hi, this is Marti for Matrix.

MR. BARRETT: Hi, Marti.

MS. CARDI: Hi, there. I would just like to point out that there's a lot of ambiguity in this new leave reason, and employers need really detailed guidance about when it applies and when it doesn't. And, again, to mention some sensitive topics, does it include miscarriage, stillbirth, abortion, in addition to the death of a child that has been born? Employers are just going to need a lot of detail on that in the rules.

MR. BARRETT: Thank you for that comment, Marti, and we appreciate the fact that employers are looking for guidance on this. We are in the process of finalizing our website language as well as FAQs around this new qualifying event; so hopefully that will address all of the questions. It does specifically address the issues of miscarriage and abortion that you referred to. So once that language gets posted, we hope employers will be able to look there for any pending questions that they may have about this new qualifying event.

THE COURT REPORTER: Can you spell your name, please.

MS. CARDI: Sure. It's Marti, M-a-r-t-i, Cardi,
C-a-r-d-i, with Matrix Absence Management.

THE COURT REPORTER: Thank you.

MR. BARRETT: Thank you, Marti.

MS. CARDI: Thank you.

MS. SCHAAFSMA: This is Ali Schaafsma, spelling A-l-i, last name, S-c-h-a-a-f-s-m-a, with Pacific Resources. And concerning this statute, there also needs to be additional information provided as to the coordination of the bereavement component alongside the employer's current bereavement offerings. So whether or not an employer would be allowed to run the time concurrently with their bereavement if employees can access an employer's bereavement as well as Washington's in ensuring that more than 100 percent of average weekly wage is not earned, that information would be beneficial to spell out.

MR. BARRETT: So, Ali, you're just looking for more information from the department about how the benefit runs concurrently with employer-offered benefits?

MS. SCHAAFSMA: Correct. And we don't understand that if it's going to be similar to how the rest of the benefits operate today where an employer doesn't have to offer those additional benefits but should they be made available, it's an employee's choice. Just making sure that it's clear to employers how this -- if this is running similar to that or if there's a difference in how this
benefit will be able to coordinate with any employer benefit.

MR. BARRETT: Ali, I think what you just described is a great way to explain it. This is essentially a new qualifying event that runs identically to any other qualifying event in the program. Preexisting qualifying events include things like the employee's own serious health conditions for medical leave, a family member's serious health condition for family leave. This is simply a new qualifying event that allows employees to take leave. It is not a new entitlement to additional leave. It is still within the confines of the existing leave entitlement duration. It is simply a new reason that the employee is permitted to take leave and, generally speaking, is going to operate identically to any other qualifying event in the program with regard to how it needs to run concurrently with benefits offered by the employer.

MS. SCHAAFSMA: Perfect.

MR. BARRETT: Thank you for that question, though, Ali. I appreciate it.

MS. SCHAAFSMA: Absolutely. One last component to that, will employers have access to information from employees? Will the employee letters call this as the leave reasons so employers know to limit that coordination if the employee asks for it to the seven days rather than a full
benefit year?

    MR. BARRETT: Generally speaking, our letters do
not contain the specific reason for leave. They only
feature the type of leave being taken, whether it's family
or medical. This will run the same as that, I believe, as
far as current bills are concerned. So any information
about the specific reason for leave would not come from the
department. If the employee chooses to share that
information with the employer, then that is perfectly within
their rights to do so.

    As we've said with other employer-offered benefits,
employers can certainly make any additional benefits
contingent upon the employee sharing certain information
points that the employer cannot receive from the department.
What an employee chooses to or not share with employers is
between those two parties.

    MS. SCHAAFSMA: Thank you.

    MR. BARRETT: Are there any questions or comments
on the two draft rules that we are discussing today?

    MS. FREEMAN: Jason, this is Daris Freeman from
Unum.

    MR. BARRETT: Hi, Daris.

    MS. FREEMAN: Hey, how are you doing?

    MR. BARRETT: Doing well.

    MS. FREEMAN: So the rule on birth or placement
documentation, just trying to make sure I understand because
I was a little confused. The statute that this is
implementing talks about -- you know, makes the comment that
no documentation of a serious health condition is required
for the postnatal period, and then, of course, the new rules
talk about documentation sufficient to substantiate birth.
So I'm assuming the way those are meant to interplay is that
a medical certification from a healthcare provider may not
be required, but there is still some form of documentation
required in order to take postnatal leave, but I do -- that
would be a point that I don't know if you want to think
about it from a rulemaking perspective or maybe just clarity
on your website, but I had to kind of step back and think
about that for a little while because when I first saw the
statutory amendment I wasn't sure any documentation was
going to be required based on the wording. So...

MR. BARRETT: Yeah, that's a great comment.

THE COURT REPORTER: Spell your name, please. I
just need you to spell your name.

MS. FREEMAN: Sure. First name is Daris,
D-a-r-i-s, last name is Freeman, F-r-e-e-m-a-n.

MR. BARRETT: And thank you for that comment,
Daris. We are obviously working very hard to finalize our
website language to really make clear exactly what these new
changes mean for employees and employers with regard to what
they need to provide to substantiate their claim. So we absolutely hear that feedback, and we are working very hard with our communications team to make sure that there is as little ambiguity as possible on that subject.

MS. CARDI: This is Marti Cardi again. Do you have any prediction or estimate of when those rules are going to be available because employers are going to be having to enforce this and honor it very soon.

MR. BARRETT: I think they are supposed to go online this week, but let me verify that, Marti. I've got your email address, and I'm happy to reach out to you and confirm that, the exact timing that the language will be updated on the website.

MS. CARDI: Thank you. That would be real helpful.

MS. MASIMBI: Hi. This is Jocelyn Masimbi with Liberty Mutual, spelling J-o-c-e-l-y-n. Last name M-, as in Mary, a-s-, as in Sam, i-m-, as in Mary, b-, as in boy, i. And my question -- well, two-part question. If the website is scheduled to be updated this week, you said, but it goes into effect on Thursday, is the thought that it would be before the actual effective date of Thursday is my first question.

And then my second question is is there any notification requirement for employees?
MR. BARRETT: So I'm sorry. I don't have more information about exactly when the website is scheduled to be updated. I do believe it is supposed to be in advance of the effective date; so it should be early this week.

As far as your other question, are you referring to the notification requirement that employees are required to give to their employers?

MS. MASIMBI: No. I'm sorry. I was asking is there a requirement for the employers to notify the employees of these changes or just enforcing them as of the effective date?

MR. BARRETT: I see. There's no requirement that they -- I'm sorry. There's a statutory requirement that they notify them of the changes to the law. It would certainly be helpful if employers were willing to share information about the updates to the program. There is also the requirement that employers post the kind of L&I style poster that, I believe, is required to feature reasons that an employee can take leave as well as the notice that employers are required to send to employees when they take leave for a reason that the employer believes would qualify. Those are still in place and have been in place since the program's implementation.

So updates to that, to those materials, would certainly need to happen from an employer perspective to make sure
that they accurately reflect the reasons that employees can take leave, but there's no specific requirement that employers have to say, hey, there's this new reason. You just need to make sure that the materials that you are otherwise required to publish and post are up to date with the new reasons.

MS. MASIMBI: Thank you. And will there be an updated poster available on the website or -- and, if so, would it be before the effective date?

MR. BARRETT: There will be an updated poster. I need to check in with our communications team to see exactly when that would be available. If it's not available by the effective date, we certainly would not hold employers accountable for that if they are choosing to use our poster. So I can certainly say stay tuned for that, but there won't be any penalties for using an outdated poster that we provided, but I'll check in with my coms team to make sure that that information is updated as soon as possible on the poster that we provide.

MS. MASIMBI: Thank you so much.

MR. BARRETT: Thank you.

Erin Hensley has a hand raised.

MS. HENSLEY: Good morning. This is Erin Hensley, E-r-i-n H-e-n-s-l-e-y. And I have question about the bereavement leave. Specifically, I'm reading the bill 5649
and it says that employees will be entitled to use PFML for seven calendar days following the death of their qualifying member. Is that seven days from the death, or is it seven days within the first 12 months of when they ordinarily, perhaps, would have bonded with the child?

MR. BARRETT: It's seven days from the death of the child. The idea behind this particular change was that, among other reasons, an employee who was out on bonding leave with a new child, if that child were to pass away, the legislature recognized that by the letter of the law that employee would immediately lose their access to --

MS. HENSLEY: Right.

MR. BARRETT: -- leave because the family member for whom bonding leave was being taken has passed away.

MS. HENSLEY: Okay.

MR. BARRETT: So the kind of impetus was that we didn't want to -- the State did not want to create the burden on these employees who now suddenly, in addition to dealing with their horrible tragedy --

MS. HENSLEY: Yes.

MR. BARRETT: -- now have to be back to work the next day. So that's why this additional seven days following the death was implemented to allow at least some time to, you know, grieve the death of that family member --

MS. HENSLEY: Certainly.
MR. BARRETT: -- and not require them to return to work immediately the next day.

MS. HENSLEY: Understandable. I am following the nature and the intent. I just was unclear about when the calendar days started. You've been very specific on that, and I assume that the website and the other materials will be specific as well.

MR. BARRETT: You're absolutely right. Thank you, Erin. Are you here with an organization or just on behalf of yourself?

MS. HENSLEY: A little bit of both. I'm at Moss Adams, M-o-s-s A-d-a-m-s, just an employer in Puget Sound.

MR. BARRETT: Great. Thank you very much. Are there any other questions or comments on these two draft rules today?

MS. BAIRD: Hi. This is Laurie Baird, L-a-u-r-i-e B-a-i-r-d. I just wanted to clarify as the leave is available for up to seven calendar days from the date of the child's death or delivery of a deceased child, is that extended if there's a stillbirth and someone qualifies for the medical leave for this --

MR. BARRETT: They --

MS. BAIRD: -- the leave they would get for the postnatal?

MR. BARRETT: The seven calendar days related to
the passing of the child is limited to the seven-day period following the death of the child. Once that seven days is past, then that particular qualifying event is no longer available to the employee. Obviously, if the employee is eligible for leave for another reason such as medical leave, they are certainly entitled to that leave, but if they do intend to take this leave associated with this new qualifying event within seven days, it does need to be within seven calendar days of the death of the child.

MS. BAIRD: So would they be eligible to take the seven days of bereavement leave and then take postnatal leave following those seven days?

MR. BARRETT: So they would be eligible for leave within that seven-day period, and then once that seven-day period is over, they are certainly still eligible for any other type of leave to which they may be entitled. If they are still experiencing a medical need related to the birth or death of the child, then as long as they have the appropriate substantiating evidence of the need for leave, then they would certainly be granted that leave.

The use of this new qualifying event doesn't impact eligibility for any other type of leave that they may be entitled to. It does still draw from their bank of hours of 12 weeks of family leave or 12 weeks of medical leave, but as long as they still have leave available to them and they
do have a different qualifying event, they would still be
granted that leave following the seven-day period.

MS. BAIRD: Great. Thank you.

MR. BARRETT: Maggie Humphreys from our advisory
commitee has her hand raised.

MS. HUMPHREYS: Hi, there. Thank you. Maggie
Humphreys, M-a-g-g-i-e, Humphreys, H-u-m-p-h-r-e-y-s,
representing MomsRising with the Paid Family Medical Leave
Advisory Committee. On the last part, just following up on
the conversation that you all were just having, so this
might be in the coming web updates, but I was wondering,
Jason, if a family is on family leave and experiences the
death of a child, will they be required to submit another
application in order to access these seven days, or will
they be able to notify ESD and have the days added to their
current leave while their other family leave is -- I don't
know -- adjusted?

So can you -- will that, the kind of the process for
which families would navigate this, be part of the updates
coming, and if you have any information to share here, that
would be really helpful.

MR. BARRETT: Sure. So, generally speaking, if an
employee is already on family leave and they apply for this
bereavement leave for the death of the child, that would
also fall under family leave, and so as long as it's the
same type of leave, we generally do not request an additional application. If it switches between family and medical we may, depending on the circumstances, but, I believe, our current bill is to simply extend the family leave. So they would generally not be required to submit a brand new application.

MS. HUMPHREYS: Okay. Thank you for that clarification.

MR. BARRETT: Victoria Farnum has her hand raised.

MS. FARNUM: Hi, yes. My name is Victoria. The first name is V-i-c-t-o-r-i-a, last name Farnum, F-a-r-n-u-m. I just wanted to kind of see if we were going to get clarification. You know, the bonding leave is used whenever -- not only when an employee has a new child, gives birth to a new child, but when they have new child placed with them, whether there's adoption, foster care, or they're acting in loco parentis. If in the case there was the death of a child that wasn't born but was placed and they are taking a bonding leave because they adopted a new child, would they also be covered under these seven days?

MR. BARRETT: So I just want to make sure I understand your question. You're asking if the child in question was placed with the family rather than directly born to the family, would this type of leave still be available to them?
MS. FARNUM: Yes.

MR. BARRETT: That's a good question. Let me just take a moment to -- I think I know the answer to that question, but I want to make sure I have the right answer so --

MS. FARNUM: Okay, yes.

MR. BARRETT: -- let me ask my colleagues about that question, and I will get you an answer very shortly.

MS. FARNUM: Okay. Thank you.

MR. BARRETT: Erin Hensley, I see your hand is still raised. Is that just from before, or do you have a new comment or question?

MS. HENSLEY: Apologies. That's from before.

MR. BARRETT: No problem. Just wanted to make sure.

Are there any other questions or comments at this time?

MS. BAIRD: Can you answer the question prior? I apologize. This Laurie Baird again, L-a-u-r-i-e B-a-i-r-d. When you answer the question that was just asked, will we all get access to the answer?

MR. BARRETT: I have the question out to a few of my colleagues in my chat window right now; so I'll have an answer before this call is over.

MS. BAIRD: Excellent. Thank you.

MR. BARRETT: Lori Welty, I see your hand is
raised.

MS. WELTY: Yeah. This is Lori Welty. I'm here on behalf of FINEOS. My last name is W-e-l-t-y and Lori is spelled L-o-r-i.

This is just -- you mentioned just a moment ago that we were going to find out the answer to this on this call; so I raised my hand before I heard that, but I guess I was just going to make the point -- excuse me -- that by the statutory language, it seems to indicate that bereavement leave is available to anybody who would have qualified for family leave under Section B of the statute, and Section B of the statute appears to cover the first 12 months after placement of a child under 18 with the employee whether that's a foster or an adoption placement. So if, for some reason, the answer comes back that it is not covered, I feel like we're going to need more information about that because --

MR. BARRETT: Sure. And, Lori, that was my initial read as well. I was 99 percent sure --

MS. WELTY: Okay.

MR. BARRETT: -- but I didn't want to give a 99 percent answer.

MS. WELTY: Okay. Sounds good.

MR. BARRETT: That's why I punted it to my incredibly intelligent colleagues to make sure that they
agree with me because I like it when smart people agree with me before I give an answer.

MS. WELTY: No worries at all --

MR. BARRETT: Thank you.

MS. WELTY: -- if you were going to find out on this call, I wanted to say.

MR. BARRETT: Sure, sure. Those very intelligent colleagues are agreeing with your interpretation, Lori, as well as mine. So I think I can comfortably say at this point that if the child was placed rather than born, then the employee would still be eligible for leave under the 5649 bereavement expansion.

MS. WELTY: Thank you for that.

MS. FREEMAN: Jason, this is Daris Freeman with Unum again. D-a-r-i-s. Freeman, F-r-e-e-m-a-n.

MR. BARRETT: Yes.

MS. FREEMAN: Hey. So the proposed reg, WAC 192-610-025, birth or placement of a child and required documentation, just a comment that if I were looking for a -- if I were looking for guidance on how to take bereavement leave, that is not where I would look, and yet that is where the reg has been placed around eligibility for seven calendar days of leave. The proposed reg, that Subsection 6 about bereavement, does not even talk about what documentation would be required. I think you've
answered that question, but when I think about the
regulatory structure to place the entitlement to bereavement
leave within a regulation that's about documentation of
birth or placement, I just don't know that people would
naturally go there, number one.

Number two, if they do, they're looking for required
documentation, which is not what it would address. So you
may want to think about, you know, whether it makes sense to
have a regulation specific to bereavement.

MR. BARRETT: That's a great comment. Thank you, Daris. We'll discuss that for sure. Thank you.

Maggie, I see your hand raised.

MS. HUMPHREYS: Yeah. I just wanted to generally
share a comment of appreciation to you and your people for
this work and for MomsRising's behalf. We're really happy
to see the documentation expansion availability to ensure
that a variety of documentation that testifies to a birth
and postnatal period entitlement will be accepted by the
department. We know that families navigating this
application process are doing so in a time of -- where their
time is limited and so appreciate the expansion there and
flexibility.

And also just appreciate the work around streamlining
the postnatal period leave for birth parents and trying to
maximize -- ensure that workers are able to take their
maximum entitlement of leave of both medical and family
leave and in the work around inclusion of compassionate
leave as well for families who have experienced a loss. So
we are very much in support of these draft rules and
appreciate the work that's been put into them. Thank you.

MR. BARRETT: Thank you, Maggie. We appreciate
that comment.

Erin, back to you.

MS. HENSLEY: Thank you, Jason. Erin Hensley,
E-r-i-n H-e-n-s-l-e-y. I just wondered on -- since the
seven days of bereavement leave doesn't extend the benefit,
can you confirm that means if the employee has used all
12 weeks of PFML for bonding, then the qualifying child
sadly passes away, that there's not an additional seven days
of PFML?

MR. BARRETT: That is correct. It is not a leave
extension. It is simply a new qualifying event, and the
employee would still need to have the requisite number of
hours in their bank to take the leave. And if they've
already used their leave, then this particular type of leave
would not be available to them.

MS. HENSLEY: Thank you. Very clear.

MR. BARRETT: Are there any other questions or
comments on the two draft rules we are discussing today?

MS. FREEMAN: Jason, this is Daris Freeman with
Unum again.

MR. BARRETT: Hey, Daris.

MS. FREEMAN: I can't consolidate my comments very well. The other is -- because I'm going back and forth between existing regs and the proposed regs. The only other thing I would say is because you're no longer requiring actual documentation of a serious health condition for the postnatal period, although it is medical leave, you may want to think about in WAC 192-610-020 what is required on the certification for medical leave -- right? -- or in the -- you know, that there's an exception because what it says is when leave is taken because of an employee's own serious health condition, which postnatal is -- right? -- certification from a healthcare provider will be required and must include the following. So you've just got a conflict since that's not actually going to be required for postnatal leave, which is a serious health condition.

MR. BARRETT: Right. Thank you for that, Daris.

Any other questions or comments on today's rules? Last call for questions or comments on the rules today before we close out. All right. With that, we will go ahead and close this meeting.

Thank you all so much for the comments and discussion this morning. I recognize that this is a difficult topic in many ways. I can say that for the conversations that we've
had here at the department, they have oftentimes resulted in some very emotional conversations; so thank you all for joining us for what I'm sure for many is an extremely difficult and sensitive topic.

Regarding next steps, we will gather all the comments that we've received on these amendments to determine which to be incorporated, then draft paperwork to formally propose rule language. Once the proposed rules and paperwork are filed, individuals will have an opportunity to participate in the public hearing and provide written comments up to and through the day of the hearing.

Following the hearing, if no substantive changes to the amended rules are necessary, we will file paperwork providing a response to each comment received during the comment period and hearing and then adopt the rules.

For a timeline of these events, please visit paidleave.wa.gov/rulemaking. We will provide timelines as soon as they become available.

If you have any additional comments or questions, please feel free to send us an email at rules@esd.wa.gov. That's rules@esd.wa.gov.

Thank you all so much for joining us this morning, and we hope you enjoy the rest of your day.

(Concluded at 9:42 a.m.)
CERTIFICATE

I, REBECCA S. LINDAUER, a Certified Court Reporter in and for the State of Washington, residing at Lacey, do hereby certify:

That the foregoing Zoom public hearing was taken before me and completed on the 6th day of June 2022, and thereafter transcribed by me by means of computer-aided transcription; that the public hearing is a full, true, and complete transcript of the proceedings;

That I am not a relative, employee, attorney, or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That I am herewith emailing the public hearing to MR. JASON BARRETT.

IN WITNESS HEREOF, I have hereunto set my hand this 15th day of June 2022.

[Signature]

Rebecca S. Lindauer, CSR#2402
Certified Court Reporter, in and for the State of Washington, residing at Lacey.
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