



RULE-MAKING ORDER

CR-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Department of Social and Health Services, Economic Services Administration

Permanent Rule Only

Effective date of rule:

Permanent Rules

- 31 days after filing.
- Other (specify) (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes
 - No
- If Yes, explain:

Purpose:

The Department is amending sections under chapter 388-410 WAC "Benefit Error" to clarify how state and federal food assistance overpayments are established, calculated, and recovered. Amendments address and clarify the administrative hearings procedures for reviewing overpayment appeals and procedures for requesting an overpayment write-off, compromise, or termination through the Department. Hardship language is removed. The changes also add reference to the state funded Food Assistance Program (FAP) to clarify that FAP is one of the food assistance programs covered by these rules.

Citation of existing rules affected by this order:

Repealed: None
 Amended: WAC 388-410-0020 "What happens if I receive more Basic Food or WASHCAP benefits than I am supposed to receive?", WAC 388-410-0025, "Am I responsible for an overpayment in my assistance unit?", WAC 388-410-0030, "How does the department calculate and set up my Basic Food or WASHCAP overpayment?", and WAC 388-410-0033 "How and when does the department collect a Basic Food or WASHCAP overpayment?"
 Suspended: None

Statutory authority for adoption: RCW 43.20A.550, RCW 43.20B.630, RCW 74.04.050, RCW 74.04.055, RCW 74.04.057, RCW 74.04.510, RCW 74.08.090, and RCW 74.08A.120

Other authority: 7 CFR §273.18

PERMANENT RULE (Including Expedited Rule Making)

Proposed under notice filed as WSR 15-18-105 on September 1, 2015.
 Describe any changes other than editing from proposed to adopted version: See attachment A

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: _____ phone () _____
 Address: _____ fax () _____
 e-mail _____

Date adopted:

October 27, 2015

NAME (TYPE OR PRINT)

Katherine Vasquez

SIGNATURE

TITLE

DSHS Rules Coordinator

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
 STATE OF WASHINGTON
 FILED

DATE: October 29, 2015

TIME: 11:05 AM

WSR 15-22-051

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed	_____
Federal rules or standards:	New	_____	Amended	<u>4</u>	Repealed	_____
Recently enacted state statutes:	New	_____	Amended	_____	Repealed	_____

The number of sections adopted at the request of a nongovernmental entity:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in the agency's own initiative:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	_____	Amended	_____	Repealed	_____
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The number of sections adopted using:

Negotiated rule making:	New	_____	Amended	_____	Repealed	_____
Pilot rule making:	New	_____	Amended	_____	Repealed	_____
Other alternative rule making:	New	_____	Amended	<u>4</u>	Repealed	_____

Describe any changes other than editing from proposed to adopted version:

1. WAC 388-410-0030:
 - a. The Department added reference to 7 CFR 273.18 after RCW 43.20B.630 and will remove the reference to WAC 388-406-0050 in subsection (10) and instead reference Chapter 388-458 WAC. These changes only provide context; they do not alter the effect of the regulation. WAC 388-271-0030 was not included because the current citations adequately describe translation requirements.
 - b. Moved all examples under subsection for clarity as suggested.
2. WAC 388-410-0033:
 - a. The Treasury Offset Program (TOP) reporting statute, 31 U.S.C. §3716(c)(6)(A), was amended by Public Law No. 113-101, § 5 to require the reporting of past-due SNAP debts to the Secretary of Treasury within 120 days instead of 180 days. The Food and Nutrition Service has updated its TOP Handbook to require State agencies to comply with the statutory deadline.
 - b. Corrected grammatical error.

AMENDATORY SECTION (Amending WSR 14-05-064, filed 2/18/14, effective 3/21/14)

WAC 388-410-0020 What happens if I receive more Basic Food, FAP, or WASHCAP benefits than I am supposed to receive? (1) If you receive more Basic Food, FAP, or WASHCAP benefits than you were supposed to receive, your assistance unit (AU) has an overpayment. There are three types of overpayments:

(a) **Administrative error overpayment:** When you received too many benefits because the department made a mistake.

(b) **Inadvertent household error overpayment:** When you received too many benefits because you made a mistake or didn't understand what you were supposed to do.

(c) **Intentional program violation (IPV) overpayment:** When you received too many benefits because you broke a federal food assistance rule on purpose. If you have an IPV, you could be disqualified from receiving Basic Food or WASHCAP benefits under chapter 388-446 WAC.

AMENDATORY SECTION (Amending WSR 14-05-062, filed 2/18/14, effective 3/21/14)

WAC 388-410-0025 Am I responsible for ((an)) a food benefits overpayment in my assistance unit? If your assistance unit (AU) received more Basic Food, FAP, or WASHCAP benefits than it was supposed to receive, your AU has an overpayment. If you have an overpayment, we determine the amount you were overpaid and set up a claim to recover this overpayment.

(1) We set up an overpayment for the full amount your AU was overpaid for every adult AU member at the time your AU was overpaid.

(2) ~~((Each))~~ Except as provided in WAC 388-410-0030 and 388-410-0033, each adult member is responsible for the whole overpayment until we recover the entire amount of the overpayment. We do not collect more than the amount your AU was overpaid.

(3) If we determine you are responsible for an overpayment, you are responsible for the overpayment even if you are now in a different AU than you were when you had the overpayment.

(4) You may be responsible for a Basic Food, FAP, or WASHCAP overpayment even if it was the department's fault you were overpaid.

(5) ~~((We do not apply))~~ Equitable estoppel, ((as)) described under WAC 388-02-0495, does not apply to Basic Food, FAP, or WASHCAP overpayments. Federal law provides that your AU is responsible for repaying any overpayment of benefits, as stated in 7 U.S.C. §2022(a)(4) and 7 C.F.R. §273.18(a). Federal law does not permit states to make exceptions based on equitable estoppel, as stated in the Federal Register at volume 63, page 29307 and volume 65, page 41765. This also applies to FAP overpayments because under RCW 74.08A.120, FAP rules must follow federal food assistance rules.

~~((6) We may reduce all or part of an overpayment if we determine you are unable to repay the balance or that doing so would be a hardship. See WAC 388-410-0033.))~~

WAC 388-410-0030 How does the department calculate and set up my Basic Food, FAP, or WASHCAP overpayment? (1) We calculate the amount of your Basic Food or WASHCAP overpayment by counting the difference between:

- (a) The benefits your assistance unit (AU) received; and
- (b) The benefits your AU should have received.

(2) To calculate the benefits your AU should have received, we determine what we would have authorized if we:

- (a) Had correct and complete information; and
- (b) Followed all the necessary procedures to determine your AU's eligibility and benefits.

(3) If you did not report your earned income as required under WAC 388-418-0005 and 388-418-0007, you do not receive the earned income deduction under WAC 388-450-0185 when we calculate your overpayment amount.

~~(4) ((If we paid you too few Basic Food or WASHCAP benefits for a period of time, we will use the amount we underpaid your AU to reduce your overpayment if:~~

- ~~(a) We have **not** already issued you benefits to replace what you were underpaid; and~~
- ~~(b) We have **not** used this amount to reduce another overpayment.~~

~~(5)) We **must** set up an inadvertent household error or administrative error overpayment if:~~

- ~~(a) We discovered the overpayment through the federal quality control process;~~
- ~~(b) You currently receive Basic Food, FAP, or WASHCAP benefits;~~

~~or~~

- ~~(c) The overpayment is over one hundred twenty-five dollars and you do not currently receive Basic Food, FAP, or WASHCAP benefits.~~

(5) We **do not** set up an inadvertent household error or administrative error overpayment if all of the following are true:

- (a) We did not discover the overpayment through the federal quality control process;
- (b) You do not currently receive Basic Food, FAP, or WASHCAP benefits; and
- (c) The total amount your household was overpaid was one hundred twenty-five dollars or less.

(6) If you have an inadvertent household error that we referred for prosecution or an administrative disqualification hearing, we will not set up and start collecting the overpayment if doing so could negatively impact this process.

(7) We set up an intentional program violation overpayment based on the results of an administrative disqualification hearing (chapter 388-02 WAC) unless:

- (a) Your AU has repaid the overpayment; or
- (b) We have referred your inadvertent household error for prosecution and collecting the overpayment could negatively impact this process.

(8) We must calculate the overpayment amount:

- (a) For an administrative error overpayment - Up to twelve months prior to when we became aware of the overpayment;
- (b) For an inadvertent household error overpayment - For no more than twenty-four months before we became aware of the overpayment; and

(9) We must calculate the overpayment amount:

- (a) For an administrative error overpayment - Up to twelve months prior to when we became aware of the overpayment;
- (b) For an inadvertent household error overpayment - For no more than twenty-four months before we became aware of the overpayment; and

(10) We must calculate the overpayment amount:

- (a) For an administrative error overpayment - Up to twelve months prior to when we became aware of the overpayment;
- (b) For an inadvertent household error overpayment - For no more than twenty-four months before we became aware of the overpayment; and

(11) We must calculate the overpayment amount:

- (a) For an administrative error overpayment - Up to twelve months prior to when we became aware of the overpayment;
- (b) For an inadvertent household error overpayment - For no more than twenty-four months before we became aware of the overpayment; and

(c) For intentional program violation (IPV) overpayments - From the month the act of IPV first occurred as determined under WAC 388-446-0015, but no more than six years before we became aware of the overpayment.

(9) If we paid you too few Basic Food, FAP, or WASHCAP benefits for a period of time, we will use the amount we underpaid your AU to reduce your overpayment if:

(a) We have **not** already issued you benefits to replace what you were underpaid; and

(b) We have **not** used this amount to reduce another overpayment.

(10) We will send you an overpayment notice under RCW 43.20B.630 and 7 C.F.R. 273.18. We send notices as required under chapter 388-458 WAC. If all adult AU members live at the same address, we serve an overpayment notice on the head of household.

(11) The overpayment becomes an established (set-up) debt in one of the following ways:

(a) By operation of law if you do not respond within ninety days of service of the overpayment notice;

(b) By administrative order if you timely request a hearing; or

(c) By written agreement.

(12) You may request a hearing to contest an overpayment of your Basic Food, FAP, or WASHCAP benefits.

(a) The hearing can include issues such as whether you were overpaid, whether we calculated the amount of the overpayment correctly, and the type of the overpayment.

(b) The administrative law judge (ALJ) does not have the authority to compromise, terminate, write-off, defer, or otherwise waive the overpayment claim or recovery of the claim.

(13) If the overpayment has been referred for prosecution (in accordance with WAC 388-446-0001(4)), you may request that the administrative hearing related to the overpayment be postponed.

AMENDATORY SECTION (Amending WSR 14-05-062, filed 2/18/14, effective 3/21/14)

WAC 388-410-0033 How and when does the department collect a Basic Food, FAP, or WASHCAP overpayment? (1) ((When)) After we set up ((an)) a Basic Food, FAP, WASHCAP overpayment ((because you received more Basic Food or WASHCAP benefits than you were supposed to receive)) under WAC 388-410-0030, we ((start to)) collect the ((benefits)) amount you were overpaid even when the total is less than \$125 as discussed in WAC 388-410-0030 (4). This includes when we:

(a) Modify an established overpayment to an amount we would not have to set up under WAC 388-410-0030(5); or

(b) Set up an overpayment that we do not have to set up under WAC 388-410-0030(((5)) 4).

(2) You can repay your overpayment by:

(a) Paying the entire amount at once;

(b) Having us take the amount of your overpayment out of your EBT account;

(c) Making regular payments under a scheduled repayment agreement as described in subsection (4) of this section; or

(d) Having your current Basic Food, FAP, or WASHCAP benefits reduced.

(3) If you have an inactive EBT account and we cancelled Basic Food, FAP, or WASHCAP benefits in the account under WAC 388-412-0025, we use the cancelled benefits to reduce the amount of your overpayment.

~~(4) ((If your AU currently receives Basic Food or WASHCAP benefits, you can repay your overpayment by making monthly payments. The payments must be more than we would recover through us reducing your benefits. Your AU or the department can request a change to the agreement if necessary.~~

~~(5))~~ If you are responsible for repaying an administrative or inadvertent household error overpayment, we ~~((automatically))~~ reduce your monthly benefits unless you:

(a) Pay the overpayment all at once;

(b) Set up a repayment agreement with us; or

(c) Arrange with us to compromise (reduce) ~~((or waive))~~ all or part of your overpayment under section (13) below; or

(d) Request a hearing and continued benefits ~~((within ninety days of the date you received your collection action notice))~~ under WAC 388-458-0040.

~~((6))~~ (5) If you are responsible for an intentional program violation (IPV) overpayment, you must tell us how you want to repay this overpayment within ten days of the date ~~((you receive))~~ we sent your collection action notice. If you do not do this, we ~~((will))~~ reduce your current monthly benefits.

~~((7))~~ (6) If your AU currently receives Basic Food, FAP, or WASHCAP benefits, you can choose to repay your overpayment by making monthly payments. The payments must be more than we would recover by reducing your benefits. Your AU or the department can request a change to the agreement if necessary.

(7) If you receive ongoing Basic Food, FAP, or WASHCAP benefits, we ~~((can))~~ reduce your monthly benefits to repay the overpayment. We do not reduce your first Basic Food, FAP, or WASHCAP allotment when we first approve your application for benefits.

(a) If you have an administrative or inadvertent household error overpayment, we reduce your benefits by the greater of:

(i) Ten percent of your monthly benefits; or

(ii) Ten dollars per month.

(b) If you have an IPV overpayment, we reduce your benefits by the greater of:

(i) Twenty percent of your monthly benefits; or

(ii) Twenty dollars per month.

(8) We send you a change letter under WAC 388-458-0025 before we reduce your Basic Food, FAP, or WASHCAP benefits.

(a) You may request a hearing on the change letter, for instance, if you do not feel the amount of the overpayment was calculated correctly making the reduction incorrect.

(b) The administrative law judge (ALJ) does not have authority to compromise, terminate, write-off, defer or otherwise waive the overpayment claim or recovery thereunder.

(9) If you do not meet the terms of a repayment agreement ~~((with the department))~~, we ~~((automatically))~~ reduce your current benefits unless you:

(a) Pay all overdue payments to bring your repayment agreement current; or

(b) Ask us to consider a change to the repayment schedule.

(10) We may also collect overpaid food benefits with an order to withhold and deliver property under RCW 43.20B.635.

~~((9))~~ (11) If your overpayment claim is past due for one hundred ~~((eighty))~~ twenty or more days, we refer your overpayment for federal collection. A federal collection includes reducing your income tax refund, Social Security benefits, or federal wages. We do not count your overpayment as past due if you:

- (a) Repay the entire overpayment by the due date;
- (b) Have your monthly benefits reduced to repay the overpayment;

or

- (c) Arrange with us to compromise (reduce) ~~((or waive))~~ all or part of your overpayment under section (13) below; or
- (d) Meet the requirements of your scheduled repayment agreement.

~~((10))~~ (12) If you no longer receive Basic Food, FAP, or WASH-CAP benefits, we can garnish your wages, file a lien against your personal or real property, attach other benefits, or otherwise access your property to collect the overpayment amount.

~~((11) We suspend collection on an overpayment if:~~

- ~~(a) We cannot find the responsible AU members; or~~
- ~~(b) The cost of collecting the overpayment would likely be more than the amount we would recover.~~

~~(12) We can))~~ (13) At anytime based on your request or our own, we may compromise (reduce) all or part of ~~((any unpaid claim when:))~~ your overpayment.

~~(a) ((The amount you offer to repay is close to what we could expect to receive from you before we can no longer legally collect the overpayment from you; or~~

~~(b) We determine that you are unable to repay the balance or that doing so would be a hardship))~~ We may, at our discretion, compromise a claim or any portion of a claim if we determine that your household's economic circumstances dictate that you will not be able to pay the claim in three years.

(b) If you disagree with our decision not to compromise all or part of a food benefits overpayment, you may ask for a review of that decision.

(i) The review will be heard by someone other than the person who made the decision you disagree with.

(ii) You do not have a right to an administrative hearing to contest our decision not to compromise all or part of a food benefits overpayment.

(c) If your claim becomes delinquent (you have failed to follow a written repayment agreement entered with the Office of Financial Recovery (OFR)), we may reinstate the compromised portion of your claim.

~~((13))~~ (14) We write off unpaid overpayments and release any related liens when:

- (a) The claim is invalid;
- (b) All adult household members die;
- (c) The claim balance is less than twenty-five dollars and has been delinquent for ninety days or more;
- (d) We determine it is not cost effective to pursue the claim further;
- (e) We agreed to accept a partial payment that left an unpaid balance after this payment;

(f) You have paid ten percent of your monthly benefits or ten dollars, whichever is greater, on an administrative or inadvertent household error overpayment for at least thirty-six months; or

(g) The claim has been delinquent for three years or more unless we plan to pursue the claim through the treasury offset program(~~(; or~~

~~(h) An administrative law judge orders us to do so)).~~

~~((14))~~ (15) If your AU has an overpayment from another state, we can collect this overpayment if the state where you were overpaid does not plan to collect it and they give us the following:

(a) A copy of the overpayment calculation and overpayment notice made for the client; and

(b) Proof that you received the overpayment notice.

~~((15) You can ask for a hearing to contest whether you owe an overpayment, whether we calculated the overpayment correctly, or whether we should have waived an overpayment.))~~