

October 13, 2016

**TO:** The Honorable Mary Lazich  
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The Honorable Robin Vos  
Speaker, Wisconsin State Assembly  
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**FROM:** Ray Allen, Secretary  
Department of Workforce Development

**SUBJECT:** **Ch. DWD 131: Pre-employment drug testing, substance abuse treatment program, and job skills assessment (Clearinghouse Rules No. 16-036)**

### *Introduction*

The Department of Workforce Development (“DWD”) submits this rule for legislative committee review as provided in Wis. Stat. § 227.19 (2) and (3). DWD will publish notice of this referral in the Wisconsin Administrative Register as required by Wis. Stat. § 227.19 (2).

### *Rule Content*

This rule implements the requirements specified under Act 55, relating to pre-employment drug testing, substance abuse treatment program and job skills assessment. Act 55 created Wis. Stat. § 108.04 (8) (b), which provides the following:

- There is a rebuttable presumption that an individual failed, without good cause, to accept suitable work if DWD determines, based on a report submitted by an employing unit, that an employing unit required the individual to submit to a test for the presence of controlled substances as a conditional offer of employment and withdrew the conditional offer after the individual declined to submit to the test, or tested positive for one or more controlled substances without providing evidence of a valid prescription for each controlled substance.
- For an individual that declines to submit to a test, the individual shall be ineligible for benefits until the individual qualifies for benefits in accordance with the rules promulgated by DWD.

- For an individual that tests positive for the presence of controlled substances without providing evidence of a valid prescription, the individual shall be ineligible for benefits until the individual qualifies for benefits in accordance with the rules promulgated by DWD or the individual may maintain eligibility for benefits if the individual enrolls in and complies with the requirements of a substance abuse treatment program and completes a job skills assessment.

In addition, Act 55 provides that DWD shall:

- Create and provide a substance abuse treatment program for individuals who engage in the unlawful use controlled substances.
- Specify criteria that a claimant must satisfy in order to be considered in full compliance with the substance abuse treatment program.
- Create and conduct a job skills assessment for claimants who engage in the unlawful use of controlled substances.
- Identify criteria that an individual must satisfy to be considered in full compliance with the requirements of the job skills assessment.

This rule implements the requirements specified under Act 55 and creates a process for an employing unit to voluntarily submit the positive results of a test conducted on an individual to DWD, if the following requirements are satisfied: the test was required as a condition of an offer of employment; the individual was informed that the results may be submitted to DWD; the test was conducted or confirmed by a laboratory certified by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services; and the individual tested positive for one or more controlled substances without evidence of a valid prescription. DWD is relying on standards enforced by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services to ensure that prescription information is collected and evaluated by the laboratory and presented in the laboratory report. In addition, the rule identifies the process by which the employing unit may report the positive results of a test to DWD.

An employing unit may voluntarily notify DWD that an individual declined to submit to a test for the presence of controlled substances as a condition of an offer of employment and the individual was informed before testing, that the employing unit may notify DWD if the individual declined to submit to the test.

When an employing unit submits a report showing a failed or refused pre-employment drug test, DWD shall determine whether the individual who failed or refused the test is receiving unemployment insurance benefits. If DWD determines that the individual is receiving unemployment insurance benefits, there is a rebuttable presumption that the individual failed to accept suitable work. This rule provides the individual may overcome the presumption by proving certain facts by a preponderance of the evidence.

Under this rule, an individual that fails a pre-employment drug test without presenting evidence of a valid prescription or declines to submit to a test is ineligible for benefits until the individual earns wages of at least 6 times the individual's weekly benefit rate beginning after the week in which the individual tests positive or declines to submit to the test.

An individual that tests positive for controlled substances without presenting evidence of a valid prescription may maintain benefit eligibility by enrolling in and complying with a substance abuse treatment program, and completing a job skills assessment.

This rule also identifies the parameters for a substance abuse treatment program for individuals that test positive for the presence of one or more controlled substances (without a valid prescription). In addition, this rule does all of the following:

- Requires an individual to schedule an assessment with a substance abuse treatment provider within 5 working days as directed by DWD.
- Requires an individual to comply with all conditions of a treatment plan developed by a substance abuse treatment provider.
- Specifies that the substance abuse treatment provider will determine if an individual is in compliance with the substance abuse treatment program requirements, and inform DWD on a weekly basis of the individual's compliance.
- Provides that DWD will pay the reasonable costs associated with the substance abuse treatment plan requirements for each week that the individual is otherwise eligible for unemployment insurance benefits under Chapter 108.
- Requires an individual to complete a job skills assessment as directed by DWD.

The substance abuse treatment and job skills assessment provisions under this chapter only apply to circumstances of pre-employment drug testing.

### ***Public Hearing***

DWD held one public hearing in Madison, WI on July 7, 2016. No one provided oral testimony at the hearing.

One person, Genie Ogden, submitted written comments on the rule. Ms. Ogden's comments do not provide specific feedback on the text of the rule, but suggest that the rule should not be implemented due to the cost to the state. Ms. Ogden also disagrees with requiring individuals to be drug tested as a condition for receiving unemployment benefits. In response to Ms. Ogden's comments, DWD is required by statute to promulgate a rule on pre-employment drug testing, substance abuse treatment program and job skills assessment. In addition, this rule does not permit DWD to test individuals as a condition of receiving unemployment insurance benefits.

***DWD's Rule Changes in Response to Comments by Rules Clearinghouse, Public Hearing,  
and Unemployment Insurance Advisory Council Comments***

The Wisconsin Legislative Council Rules Clearinghouse made a number of comments on the proposed hearing draft rule. DWD implemented all of the Clearinghouse suggestions in the proposed final draft with the exception of the following:

**1. Statutory Authority**

Section DWD 131.30 (1) (b) provides that an individual may enroll in a substance abuse treatment program one time per benefit year. DWD could consider specifying the conditions under which this requirement does or does not apply. This requirement could, in certain circumstances, be interpreted as being more restrictive than ss. 108.04 (8) (b) and 108.133 (3) (d), Stats., which do not limit eligibility to the first claim an individual files within a single benefit year. For example, if an individual remains in full compliance with a treatment program and job skills assessment but obtains employment or completes the program and subsequently files a second claim within the same benefit year, the proposed rule would prohibit the individual from maintaining his or her eligibility as provided under s. 108.133 (3) (d), Stats. That section specifies that an individual remains eligible “for each week” that the individual is in full compliance, if otherwise eligible.

- **DWD has authority under s. 108.133 (2) (a) 2. to “identify the parameters for a substance abuse treatment program for claimants who engage in the unlawful use of controlled substances...”**

**5. Clarity, Grammar, Punctuation and Use of Plain Language**

- a. In s. DWD 131.001 (1) (c), the definition of “substance abuse treatment provider” means an individual or organization that is licensed by a state agency. The department could consider specifying whether the individual or organization must be licensed by a particular state agency.
  - **DWD changed “state agency” to “government unit” in s. DWD 131.001(1)(c) in order to include substance abuse programs licensed by another state. DWD may need to contract with an out-of-state provider for an out-of-state claimant. The term “government unit” is defined in Chapter 108 to include all states.**
- e. Section DWD 131.30 (1) (b) provides that an individual may enroll in a substance abuse treatment program one time per benefit year. Section DWD 131.30 (5) provides that an individual is considered to be enrolled in a substance abuse treatment program if the individual schedules an assessment or requests placement on a waitlist for an assessment. It is unclear whether s. DWD 131.30 (1) (b) prohibits an individual from requesting placement on more than one waitlist, or prohibits an individual from changing to a different provider after initially beginning treatment with another provider.

- **DWD implemented this change with language that the waitlist is “maintained by the department.”**
  - **DWD added s. DWD 131.30(7) (b), which states: “An individual may complete a substance abuse treatment program with an alternate substance abuse treatment provider with advance department approval.”**
- f. Section DWD 131.10 (5) provides what the department must do with information submitted by an employing unit if the department determines that an individual is receiving benefits. The department could consider specifying what the department must do with information submitted by an employing unit if the department determines that the individual is not receiving benefits.
- **DWD did not modify the rule in response to this comment. DWD intends to treat such information under its normal records retention policy.**

#### *Small Business Regulatory Review Board Report*

On June 9, 2016, DWD appeared before the Small Business Regulatory Review Board regarding this rule. The Board did not issue a report on the rule.

#### *Environmental Impact*

This rule will not have any negative environmental impact.

#### *Summary of, and comparison with, existing or proposed federal statutes and regulations*

No existing or proposed federal statutes or regulations relate to voluntary reporting of pre-employment drug testing results to states for the purpose of determining unemployment insurance benefit eligibility.

The U.S. Department of Labor informally reviewed the proposed permanent rule and indicated in writing that the rule conforms to federal law.

#### *Comparison with rules in adjacent states*

Michigan law previously provided that an individual would be disqualified from receiving unemployment insurance benefits if an employer withdrew a conditional offer of employment after the individual failed or refused to take a pre-employment drug test. Mich. Comp. Laws Ann. § 421.29(1)(e). The failed or refused pre-employment drug test would be considered a failure to accept suitable work. Michigan law did not provide drug treatment as an option for claimants to maintain benefit eligibility. Michigan’s law was in effect from October 29, 2013 until October 29, 2014.

DWD is not aware of any unemployment insurance disqualification for a failed pre-employment drug test in Illinois, Minnesota or Iowa.

***Summary of Factual Data and Analytical Methodologies***

DWD consulted with the Unemployment Insurance Advisory Council and the Departments of Health Services, Corrections, and Children and Families to identify the parameters of a substance abuse treatment program for claimants who engage in the unlawful use of controlled substances.

***Analysis and supporting document used to determine effect on small business or in preparation of an economic impact analysis***

Because employer participation in the pre-employment drug test reporting program is voluntary, the proposed rule does not have an economic impact on small businesses as defined in Wis. Stat. § 227.114(1); therefore, no analysis is required. DWD posted the proposed rule online for 14 days to solicit public comment on the economic impact. DWD received no public comments on the economic impact.

***Effect on Small Business***

This rule does not have an economic impact on small businesses as defined in Wis. Stat. § 227.114 (1).

***Unemployment Insurance Advisory Council Approval***

The Unemployment Insurance Advisory Council unanimously approved this rule on September 15, 2016.

***Governor's Approval***

Under Wis. Stat. §§ 227.19(2) and 227.185, the Governor approved this rule in writing on October 12, 2016.