

CHAPTER 105

EMPLOYMENT AGENTS

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Cross-reference: See definitions in s. 103.001.

Cross Reference: See also ch. DWD 277, Wis. adm. code.

105.01 Definitions. As used in this chapter:

(1) "Employment agent" means all persons who furnish to persons seeking employment, information enabling or tending to enable such persons to secure the same, or who furnish employers seeking laborers or other help of any kind, information enabling or tending to enable such employers to secure such help, or who keep a register of persons seeking employment or help as aforesaid, whether such agents conduct their operations at a fixed place of business, on the streets or as transients, and also whether such operations constitute the principal business of such agents or only a sideline or an incident to another business. Employment agent does not include:

(a) Any employer who procures help for himself or herself only or an employee of such an employer who procures help for the employer and does not act in a similar capacity for any other employer.

(b) Any temporary help service defined as any person employing individuals to render part-time or temporary services to, for or under the direction of a 3rd person, if:

1. The person employing the individuals in addition to wages or salaries pays federal social security taxes, state and federal unemployment contributions or taxes, carries worker's compensation insurance as required by state law and maintains liability insurance covering the acts of its employees while rendering services to, for or under the direction of a 3rd person; and

2. The employer's contracts with its employees do not contain any provision requiring the forfeiture or payment of any amount by the employee as liquidated damages upon the acceptance of permanent employment by an employee with a 3rd person who has received the employee's part-time or temporary services.

(c) Any hiring hall operated by a bona fide labor union.

(d) Any theatrical or booking agent.

(e) An employment counselor.

(f) A person whose fees or charges are paid entirely by an employer.

(2) "Employment counselor" means any placement manager, placement director, interviewer or any other person employed by an employment agency who interviews, counsels or confers with job applicants or employers for the purpose of placing or procuring job applicants. This term does not include employees of an employment agency who are primarily engaged in clerical or administrative occupations.

History: 1973 c. 226; 1975 c. 147 s. 54; 1977 c. 26; 1989 a. 220; 1993 a. 492.

105.02 False statements and representation. A person or the person's employee or agent shall not make any false statement to any person furnishing or seeking employment in regard to any employment, work or situation, its nature, location, duration, wages, salary or placement fee attached thereto, or the circumstances surrounding the employment, work or situation. An employment agent shall not offer or hold himself or herself out as

in a position to secure or furnish employment without having an order therefor from an employer; however, an applicant may be referred to an employer provided a bona fide appointment for the interview has been arranged by the employment agent. An employment agent shall not misrepresent any material matter in connection with any employment, work or situation that the employment agent may offer or hold himself or herself out in a position to secure.

History: 1973 c. 226; 1993 a. 492.

105.03 Inquiry into truth of statements. Every employment agent shall assure himself or herself that any representations whatsoever, whether spoken, written or advertised in printed form, which the employment agent makes with regard to any employment, work or situation, and which leads or may lead persons to seek such employment, work or situation, are true to the best of the employment agent's knowledge and cover all the material facts affecting the employment in question.

History: 1973 c. 226; 1993 a. 492.

105.04 Fee-splitting. No employment agent or any employee or agent thereof, shall divide or offer to divide, or share directly or indirectly, any fee, charge or compensation received from any applicant for employment, with any employer, superintendent, manager, foreman, or any other person who hires help or to whom help is furnished by an employment agent; and it shall be unlawful for any employer, superintendent, manager, foreman, or any other person who hires help to receive any compensation or any valuable consideration from any applicant for employment or from any employment agent for giving employment to said applicant or to any employees furnished by said employment agent.

Employee agreements to repay training costs paid by or received from an employer are subject to reasonableness requirements similar to restrictive covenants and will be scrutinized in terms of amount, duration, schedule of repayment, credit for time worked, and other terms to ensure that the conditions are reasonably necessary to protect the employer's interest and are commensurate with the benefit secured by the employee. *Heder v. City of Two Rivers*, 149 F. Supp. 2d 677 (2001).

105.05 Agent's license. (1) No person may engage in the business of an employment agent for profit, or receive any fee, charge, commission or other compensation, directly or indirectly, for services as an employment agent, including modeling agencies which secure work for persons to act as live models or to model for photography, without first having obtained a license from the department and executing a bond under s. 105.06 (1). No person whose fees or charges are paid directly by employers may engage in the business specified in s. 105.01 (1) (intro.) without registering under s. 105.06 (2). The license constitutes permission from this state to operate as an employment agent for compensation. It is not transferable to or for the benefit of any person other than the licensee. A person licensed under this section shall not transact business as an employment agent at more than one office location or place of business without having first obtained from the department a separate license for each additional office in accordance with this chapter.

(2) If the department receives a complaint and determines that there is probable cause to believe that fraud, misrepresentation or deceit in violation of s. 105.02 were committed by a combination or conspiracy of a temporary help service and an employment agent, the department shall have the right of entry and audit under ss. 105.08 and 105.09 to such temporary help service with respect to such matter.

History: 1973 c. 226; 1989 a. 220.

Cross Reference: See also ss. DWD 277.04, 277.05, 277.06, and 277.08, Wis. adm. code.

Sub. (1) regulates only employment agents “engaged in business” or “doing business” in Wisconsin. *Schroeder v. Ajax Corp.* 71 Wis. 2d 828, 239 N.W.2d 342 (1976).

Employment agency counselors employed by a licensed employment agent must be licensed. 59 Atty. Gen. 142.

105.06 Application; bond. (1) Application for an employment agent’s license shall be made to the department and accompanied by a bond in due form to the state for the penal sum of \$5,000 issued by a surety company licensed to do business in this state to be approved by the department, conditioned that the agent will conform to and not violate this chapter or the rules of the department issued thereunder.

(1m) (a) Except as provided in par. (bm), the department shall require each applicant for a license under sub. (1) who is an individual to provide the department with the applicant’s social security number, and shall require each applicant for a license under sub. (1) who is not an individual to provide the department with the applicant’s federal employer identification number, when initially applying for or applying to renew the license.

(b) If an applicant who is an individual fails to provide the applicant’s social security number to the department or if an applicant who is not an individual fails to provide the applicant’s federal employer identification number to the department, the department may not issue or renew a license under sub. (1) to or for the applicant unless the applicant is an individual who does not have a social security number and the applicant submits a statement made or subscribed under oath or affirmation as required under par. (bm).

(bm) If an applicant who is an individual does not have a social security number, the applicant shall submit a statement made or subscribed under oath or affirmation to the department that the applicant does not have a social security number. The form of the statement shall be prescribed by the department. A license issued under sub. (1) in reliance upon a false statement submitted under this paragraph is invalid.

(c) The subunit of the department that obtains a social security number or a federal employer identification number under par. (a) may not disclose the social security number or the federal employer identification number to any person except to the department of revenue for the sole purpose of requesting certifications under s. 73.0301 or on the request of the subunit of the department that administers the child and spousal support program under s. 49.22 (2m).

(2) Persons whose fees or charges are paid directly by employers shall register annually with the department to engage in the business specified in s. 105.01 (1) (intro.). The fee to register under this subsection is \$5.

History: 1973 c. 226; 1989 a. 220; 1997 a. 191, 237; 1999 a. 9.

Cross Reference: See also s. DWD 277.02, Wis. adm. code.

105.07 Agent’s fees. (1) Each employment agent’s license shall be renewed annually. The license or renewal fee shall be one per cent of all fees, charges, commissions or other compensation actually received during the life of the license or renewal by an employment agent for service as such but in no event less than \$50 nor more than \$300. The original license and annual renewal fee for a branch office or each additional place of business in the same community shall be \$150.

(2) The minimum fee shall be paid before a license or renewal thereof is issued. Each employment agent to whom a license has been issued under this chapter shall file with the department, within 10 days after the previous license has expired, a verified

statement showing the actual fees, charges, commission or other compensation received by the employment agent for services as such agent during the preceding year and with such statement shall pay the balance of such license fee due the state. Such fees shall be paid to the department and deposited in the general fund.

History: 1973 c. 226; 1993 a. 492.

105.08 Authority of department. The department has the power to supervise every employment agency as is necessary to adequately enforce and administer all laws and lawful orders designed to prevent fraud, misrepresentations, false statements, or other unauthorized acts of such employment agent.

History: 1973 c. 226.

105.09 Visitorial power. Any deputy may enter any employment office or the place of business of any employment agent for the purpose of collecting facts and statistics, examining the records or registers kept by the employment agent and bringing to the attention of the agent any law or any order of the department, or any failure on the part of an employment agent to comply therewith. No employment agent may refuse to admit any deputy to his or her place of business.

History: 1973 c. 226; 1977 c. 29.

105.10 Department inquiries. Any employment agent receiving from the department any forms calling for information required by the department to administer this chapter and rules promulgated under this chapter, with directions to complete the form, shall cause the form to be properly completed so as to answer fully and correctly each question. The completed form shall be returned to the department at its office within the period fixed by the department.

History: 1973 c. 226; 2001 a. 107.

105.11 Schedule of fees or charges. (1) Every applicant for a license or renewal of a license to engage in the business of an employment agent shall file with the department, within a time fixed by the department, a schedule of the fees or charges made by such employment agent to applicants for employment for any services rendered together with all rules or regulations that may, in any manner, affect the fees charged or to be charged for any service. Fees charged to applicants for employment and such rules or regulations affecting applicants for employment may be changed only with the approval of the department and when changed shall be filed with the department.

(2) The department may, under s. 105.14, fix a schedule of maximum fees charged by employment agents to applicants for employment for services rendered.

(3) An employment agent shall not charge, demand, collect or receive a greater compensation for any service performed by the employment agent than is specified in the schedules filed with the department, and no registration fee may be charged without permission from the department.

(5) No employer shall charge an employee or applicant for employment placed by an agency any amount as a direct or indirect placement fee that is greater than that permitted by departmental rule. If the total charges made by the employer and the employment agent to the employee exceed the allowable maximum set by the department, the department may, under s. 109.09 (1), recover the overcharge from the employer plus a penalty equal to the overcharge.

(6) No private employment agency may charge the applicant for employment a fee for counseling or require the applicant to purchase a counseling service as a condition for accepting the applicant’s application.

History: 1973 c. 226; 1977 c. 26 s. 75; 1989 a. 220; 1993 a. 492.

Cross Reference: See also ss. DWD 277.09 and 277.18, Wis. adm. code.

105.115 Notice to home care consumers and workers.

(1) DEFINITIONS. In this section:

(a) “Companionship services” means services that provide fellowship and protection for a person who, because of advanced age

or physical or mental infirmity, cannot care for his or her own needs.

(b) “Home care consumer” means a person who receives home care services in his or her temporary or permanent residence from a home care worker.

(c) “Home care placement agency” means a person that is engaged in placing home care workers in the temporary or permanent residences of home care consumers for the purpose of providing home care services to those home care consumers, including an employment agent engaged in the business specified in s. 105.01 (1) (intro.) or a person specified in s. 105.01 (1) (f) whose fees or charges are paid entirely by a home care consumer.

(d) “Home care services” means skilled or unskilled care provided to a person in his or her temporary or permanent residence for the purpose of enabling the person to remain safely and comfortably in that residence. “Home care services” include companionship services, homemaker services, nursing services, and personal care services.

(e) “Home care worker” means a person who provides home care services to a home care consumer in the temporary or permanent residence of the home care consumer.

(f) “Homemaker services” means household work, including preparing meals, laundering clothes, making beds, cleaning, performing errands and shopping, completing other miscellaneous chores, and performing any other activities that support the smooth and safe functioning of a home care consumer’s residence.

(g) “Nursing services” means nursing procedures, other than personal care services, that are permitted to be performed by a registered nurse under s. 441.001 (2) or by a licensed practical nurse under s. 441.001 (3).

(h) “Personal care services” means assistance with the activities of daily living, such as eating, dressing, bathing, personal hygiene, and ambulation, but does not include nursing services.

(2) NOTICE TO HOME CARE CONSUMERS. Whenever a home care placement agency places a home care worker in the temporary or permanent residence of a home care consumer, the home care placement agency shall provide the home care consumer with a notice of the duties, responsibilities, and liabilities of the home care consumer with respect to the home care worker, except that a home care placement agency is not required to provide that notice when placing a home care worker who is temporarily substituting for the regular home care worker of a home care consumer. The notice shall be on a form prescribed by the department and shall include, at a minimum, all of the following:

(a) A statement specifying the duties, responsibilities, and liabilities of the home care placement agency with respect to the home care consumer and the home care worker and the duties, responsibilities, and liabilities of the home care consumer with respect to the home care worker. The statement shall clearly specify the home care consumer’s responsibility, if any, for all of the following:

1. Day-to-day supervision of the home care worker.
2. Assigning duties to the home care worker.
3. Hiring, firing, and discipline of the home care worker.
4. Providing equipment or materials for use by the home care worker.
5. Performing a background investigation of the home care worker.
6. Ensuring that the home care worker has any credential, as defined in s. 440.01 (2) (a), or any other license, registration, certification, permit, or approval that is required for the home care worker to provide adequate home care services for the home care consumer.

(b) A statement of the employment status of the home care worker, specifically, whether the home care worker is an employee of the home care placement agency or of the home care consumer or is an independent contractor and a statement identi-

fying which party is responsible for paying the wages or salary of the home care worker, paying federal social security taxes and state and federal unemployment contributions or taxes with respect to the home care worker, and procuring worker’s compensation or liability insurance covering injury to the home care worker.

(c) A statement that, notwithstanding the employment status of the home care worker specified in the notice, the home care consumer may be determined to be the employer of the home care worker for purposes of certain state and federal labor laws and that, if that is the case, the home care consumer may be held responsible for paying the wages or salary of the home care worker, paying federal social security taxes and state and federal unemployment contributions or taxes with respect to the home care worker, procuring worker’s compensation or liability insurance covering injury to the home care worker, and complying with various other state and federal labor laws.

(cm) A list, by county, of the telephone numbers provided under s. 46.90 (3) (c) that a person may call to report suspected cases of abuse, material abuse, neglect, or self-neglect under the elder abuse reporting system.

(cn) A telephone number at the department of health and family services that a person may call to report suspected cases of abuse or neglect of a client or of misappropriation of a client’s property under s. 146.40 (4r) (a).

(d) A telephone number and address at which the home care consumer may contact the department if he or she has any questions about the contents of the notice.

(e) A statement acknowledging that the home care consumer has received and understands the notice provided under this subsection and a line for the home care consumer’s signature located immediately below that statement. The home care placement agency shall give the home care consumer one copy of the notice signed by the home care consumer and shall retain one copy in its files.

(3) NOTICE TO HOME CARE WORKERS. Whenever a home care placement agency places a home care worker in the temporary or permanent residence of a home care consumer, the home care placement agency shall provide the home care worker with a notice stating the employment status of the home care worker, specifically, whether the home care worker is an employee of the home care placement agency or of the home care consumer or is an independent contractor. The notice shall be on a form prescribed by the department and shall include, at a minimum, all of the following:

(a) A statement that, notwithstanding the employment status of the home care worker specified in the notice, the home care worker may be determined to be an independent contractor for purposes of certain state and federal labor laws and, if that is the case, a description of the duties, responsibilities, and liabilities of the home care placement agency and the home care consumer with respect to the home care worker and the duties, responsibilities, and liabilities of the home care worker as a result of that independent contractor status. That description shall include, at a minimum, all of the following information:

1. A statement identifying which party is responsible for paying the wages or salary of the home care worker, paying federal social security taxes and state and federal unemployment contributions or taxes with respect to the home care worker, and procuring worker’s compensation or liability insurance covering injury to the home care worker.

2. A statement identifying which party is responsible for the day-to-day supervision of the home care worker, assigning duties to the home care worker, hiring, firing, and discipline of the home care worker, and providing equipment or materials for use by the home care worker.

(b) A telephone number and address at which the home care worker may contact the department if he or she has any questions about the contents of the notice.

(c) A statement acknowledging that the home care worker has received and understands the notice provided under this subsection and a line for the home care worker's signature located immediately below that statement. The home care placement agency shall give the home care worker one copy of the notice signed by the home care worker and shall retain one copy in its files.

(4) INVESTIGATIONS, REMEDIES, AND PENALTIES. (a) A home care consumer who is not provided with the notice required under sub. (2) or a home care worker who is not provided with the notice required under sub. (3) may either file a complaint with the department or commence an action in circuit court to recover from the home care placement agency the payment under par. (b) or (c) no later than 3 years after the date on which the home care placement agency was required to provide the notice. If the department receives a complaint that is timely filed, the department shall investigate the complaint and attempt, on behalf of the home care consumer or home care worker, to recover the payment under par. (b) or (c). In investigating a complaint filed under this paragraph, the department shall have the right of entry and audit under ss. 105.08 and 105.09 as to the home care placement agency.

(b) 1. If the department finds that a home care placement agency has failed to provide a home care consumer with the notice required under sub. (2) and that the home care consumer is liable for the payment of federal social security taxes or state or federal unemployment contributions or taxes with respect to the home care worker, for the provision of worker's compensation or liability insurance covering injury to the home care worker, for the payment of any fine or penalty imposed on the home care consumer for noncompliance with any state or federal labor law with respect to the home care worker, or for any injury to the home care worker, the department may recover from the home care placement agency, on behalf of the home care consumer, an amount equal to the total cost of those liabilities.

2. If the home care placement agency does not pay the amount specified in subd. 1. within 30 days after demand by the department, the department may commence a civil action on behalf of the home care consumer to collect that amount, and the circuit court may order the home care placement agency to pay to the home care consumer that amount, plus an additional amount equal to 50 percent of that amount, together with costs under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

3. In the case of a home care consumer who commences an action in circuit court under par. (a), if the circuit court finds that the home care placement agency has failed to provide the home care consumer with the notice required under sub. (2) and that the home care consumer is liable for the payment of federal social security taxes or state or federal unemployment contributions or taxes with respect to the home care worker, for the provision of worker's compensation or liability insurance covering injury to the home care worker, for the payment of any fine or penalty imposed on the home care consumer for noncompliance with any state or federal labor law with respect to the home care worker, or for any injury to the home care worker, the court may order the home care placement agency to pay to the home care consumer an amount equal to the total cost of those liabilities, together with costs under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

(c) 1. If the department finds that a home care placement agency has failed to provide a home care worker with the notice required under sub. (3), that the home care worker is an independent contractor, and that the home care worker is liable for the payment of federal self-employment social security taxes or has sustained an injury as a result of performing home care services, the department may recover from the home care placement agency, on behalf of the home care worker, an amount equal to the total cost of that liability or the total amount of damages sustained as a result of that injury.

2. If the home care placement agency does not pay the amount specified in subd. 1. within 30 days after demand by the department, the department may commence a civil action on behalf of

the home care worker to collect that amount, and the circuit court may order the home care placement agency to pay to the home care worker that amount, plus an additional amount equal to 50 percent of that amount, together with costs under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

3. In the case of a home care worker who commences an action in circuit court under par. (a), if the circuit court finds that the home care placement agency has failed to provide the home care worker with the notice required under sub. (3), that the home care worker is an independent contractor, and that the home care worker is liable for the payment of federal self-employment social security taxes or has sustained an injury as a result of performing home care services, the court may order the home care placement agency to pay to the home care worker an amount equal to the total cost of that liability or the total amount of damages sustained as a result of that injury, together with costs under ch. 814 and, notwithstanding s. 814.04 (1), reasonable attorney fees.

(5) RULES. The department shall promulgate rules to implement this section.

NOTE: This section is created eff. 4–1–07 by 2005 Wis. Act 197.

History: 2005 a. 197.

105.12 Prohibited practices. No applicant shall be placed in any employment by an employment agent in violation of any statute, order or rule of the department. Examinations given by a private employment agency may be for job-related skills only.

History: 1973 c. 226.

105.13 Refusal to issue; suspension or revocation of license. (1) The department may issue licenses to employment agents, and refuse to issue a license whenever, after investigation, the department finds that the character of the applicant makes the applicant unfit to be an employment agent, that the applicant has failed to pay court-ordered payments as provided in sub. (2) or that the applicant is liable for delinquent taxes as provided in sub. (3), or when the premises for conducting the business of an employment agent is found upon investigation to be unfit for such use. Any license granted by the department may be suspended or revoked by it upon notice to the licensee and good cause. Failure to comply with this chapter and rules promulgated thereunder, or with any lawful orders of the department, is cause to suspend or revoke a license. Failure to pay court-ordered payments as provided in sub. (2) is cause to deny, suspend, restrict, refuse to renew or otherwise withhold a license. Liability for delinquent taxes as provided in sub. (3) is cause to deny or revoke a license.

(2) The department shall deny, suspend, restrict, refuse to renew or otherwise withhold an employment agent's license for failure of the applicant or licensee to pay court-ordered payments of child or family support, maintenance, birth expenses, medical expenses or other expenses related to the support of a child or former spouse or for failure of the applicant or licensee to comply, after appropriate notice, with a subpoena or warrant issued by the department or a county child support agency under s. 59.53 (5) and related to paternity or child support proceedings, as provided in a memorandum of understanding entered into under s. 49.857. Notwithstanding s. 103.005 (10), any action taken under this subsection is subject to review only as provided in the memorandum of understanding entered into under s. 49.857 and not as provided in ch. 227.

(3) The department shall deny an application for the issuance or renewal of an employment agent's license, or revoke such a license already issued, if the department of revenue certifies under s. 73.0301 that the applicant or licensee is liable for delinquent taxes. Notwithstanding s. 103.005 (10), an action taken under this subsection is subject to review only as provided under s. 73.0301 (5) and not as provided in ch. 227.

History: 1973 c. 226; 1993 a. 492; 1997 a. 191, 237.

Cross Reference: See also ss. DWD 277.03 and 277.07, Wis. adm. code.

105.14 Regulations; records; reports. The department may fix reasonable rules for the conduct of the business of any employment agent or employment agency as are necessary to

carry out this chapter. The department may fix reasonable classifications of employments or positions and fix a reasonable scale of fees to be charged by employment agents to applicants for employment for each classification within the restrictions contained in this chapter, and may fix reasonable classifications of the business of employment agents, and make its rules and orders conform to these classifications. It may prescribe the form of books, registers or records to be kept by the employment agent, the receipts or copies of contracts to be handed to persons referred to employment, the reports to be made to the department, the refunds to be made to applicants who failed to secure employment; and it may order any other measures reasonably necessary to protect the public and persons seeking employment against fraud, misrepresentation or any other unauthorized act of any employment agent.

History: 1973 c. 226; 1989 a. 220.

105.15 General powers of department applicable; penalties. Such investigations, classifications, and orders shall be made as provided in s. 103.005 and the penalties specified in s. 103.005 (12) shall apply to and be imposed for any violation of ss. 105.01 to 105.115 or 105.13 to 105.15. The department may also order a person who operates an employment agency in violation of s. 105.05 (1) to make refunds as provided under s. 105.16 (2).

Orders issued under this section are subject to review in the manner provided in ch. 227.

NOTE: This section is shown as amended eff. 4–1–07 by 2005 Wis. Act 197. Prior to 4–1–07 it reads:

105.15 General powers of department applicable; penalties. Such investigations, classifications and orders shall be made as provided in s. 103.005 and the penalties specified in s. 103.005 (12) shall apply to and be imposed for any violation of ss. 105.01 to 105.11 or 105.13 to 105.15. The department may also order a person who operates an employment agency in violation of s. 105.05 (1) to make refunds as provided under s. 105.16 (2). Orders issued under this section are subject to review in the manner provided in ch. 227.

History: 1971 c. 228 s. 43; 1989 a. 220; 1991 a. 32; 1995 a. 27; 2005 a. 197.

105.16 Late fees and reports; failure to obtain license; refund. (1) Every employment agent shall submit all fees, license renewal applications and reports within the time limitations or due dates specified by the department. A penalty fee of \$5 per day for each day such fee, application or report is overdue may be levied by the department.

(2) If a person acts as an employment agent without the license required under s. 105.05 or after the person's license is suspended or revoked under s. 105.13, the department may order the person to refund all fees and charges that the person collected while unlicensed.

History: 1973 c. 226; 1989 a. 220.