



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-039

AN ORDER to amend DWD 128.01 (2) (b) and Note and 128.02 (1) (a); and to create DWD 128.02 (3), relating to the unemployment insurance requirement of ability to work and availability for work.

Submitted by **DEPARTMENT OF WORKFORCE DEVELOPMENT**

04-12-01 RECEIVED BY LEGISLATIVE COUNCIL.

05-10-01 REPORT SENT TO AGENCY.

RS:NZ:jal;rv

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

Comment Attached YES NO



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CLEARINGHOUSE RULE 01-039

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

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

It appears from the analysis to the rule that the overriding goal of the rule-making order is to ensure that a claimant is not considered to be able to work or be available for work, or entitled to any grace period, if the claimant is limited to 0% of the opportunities for suitable work. While this goal is achieved in the amendment to s. DWD 128.02 (1) (a), the inclusion of similar language in s. DWD 128.01 (2) (b) is questionable. As amended, the latter provision states that a claimant is not considered to be able to work or be available for work in any given week if circumstances over which the claimant has no control limit the claimant to less than 15% but more than 0% of the opportunities for suitable work. Thus, as amended, the provision could be interpreted to mean that a claimant who is available for 0% of the opportunities for suitable work will be considered to be able to work or be available for work in any given week. This may be an absurd result, but it can be avoided by not amending s. DWD 128.01 (2) (b) at all.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 108.04(2), 108.14(2), and 227.11, Stats.

Statute interpreted: Sections 108.04(2), Stats.

Federal and state unemployment insurance law requires that a claimant may be eligible for benefits only if the claimant is able to work and available for work. Section DWD 128.02 provides a temporary grace period from the general able and available requirements in s. DWD 128.01 if the claimant has certain uncontrollable restrictions. Claimants are eligible for a grace period as designated in s. DWD 128.02(2) if they have uncontrollable restrictions that limit them to less than 15% of suitable work, their previous employment was terminated for reasons unrelated to those restrictions, and they are able and available for work under the same conditions that applied to their most recent employment.

The department has never intended that s. DWD 128.02 mean that a claimant who was not able and available for any work would be eligible for UI. However, in light of a recent decision by the Labor and Industry Review Commission (LIRC) in *Vuttiphan Z. Honea v. Milwaukee Ballet Company, Inc.*, the federal Department of Labor has expressed concern that s. DWD 128.02 could be read to mean that Wisconsin was not following the federally-mandated able and available requirement for eligibility. The *Honea* decision suggests that if s. DWD 128.02(1)(a) is to be interpreted as requiring a claimant to be available for at least some work, the rule language that currently says "less than 15% of the opportunities for suitable work" should read "less than 15% but more than 0% of the opportunities for suitable work." This proposed rule makes that change in the general able and available requirement in s. DWD 128.01 and the criteria for a temporary grace period in s. DWD 128.02.

Also in response to Department of Labor concerns over the LIRC decision in the *Honea* case, the proposed rule clarifies that the grace period in s. DWD 128.02 does not apply to aliens who are not able and available for work because their authorized work has ended or their work authorization period has expired. There has been some confusion in situations where the authorized work has ended but the work authorization period is not expired. However, since federal immigration law provides that once the authorized work has ended the alien must depart the United States, these claimants cannot be considered able and available for work and are not eligible for unemployment insurance. The *Honea* decision is available on the LIRC web site at <http://www.dwd.state.wi.us/lirc/ucdecsns/654.htm>.

The proposed rule also makes a technical correction to s. DWD 128.01(2)(b). A recent amendment to s. DWD 128.02(1)(a) added "psychological condition" to the description of uncontrollable restrictions that may make a claimant eligible for the grace period. This change was made to reflect court interpretations. The language in DWD 128.01(2)(b) is intended to parallel the language in s. DWD 128.02(1)(a) but the amendment was inadvertently not made in Section DWD 128.01(2)(b). The proposed rule amends s. DWD 128.01(2)(b) to include "psychological condition."

In addition, obsolete references to ILHR are updated to DWD in the note following s. DWD 128.01.

Rule Text

SECTION 1. DWD 128.01(2)(b), DWD 128.01(note), and DWD 128.02(1)(a) are amended to read:

DWD 128.01(2)(b) The claimant's physical or psychological condition, or personal circumstances over which the claimant has no control limit the claimant to less than 15%, but more than 0%, of the opportunities for suitable work, including all such jobs whether vacant or filled, in the claimant's labor market area; or

DWD 128.01 Note: Section ~~ILHR~~ DWD 128.01 (2) (a) applies to a claimant whose restrictions on availability for work are within his or her power to change or alter. School attendance is generally a controllable restriction and, therefore, "without good cause" unless the person is enrolled in an approved training program under s. 108.04 (16), Stats. The wage demand of a claimant is also considered a controllable restriction. A claimant obligated to care for minor children is expected to make arrangements which would permit the claimant to accept suitable work. Unwillingness or failure to make such arrangements are controllable restrictions and, normally, without good cause.

Section ~~ILHR~~ DWD 128.01 (2) (b) applies to a claimant whose physical condition or uncontrollable personal circumstances limit the opportunity for suitable work. A claimant may be severely limited in the type of work which he or she could perform because of illness, disability, injury or age, but still be able to perform at least 15% of the suitable jobs in the claimant's labor market area.

DWD 128.02(1)(a) The claimant's physical or psychological condition, or personal circumstances over which the claimant has no control limit the claimant to less than 15%, but more than 0%, of the opportunities for suitable work, as specified under s. DWD 128.01 (2) (b);

SECTION 2. DWD 128.02(3) is created to read:

DWD 128.02(3) This section is not applicable to an alien whose authorized work has ended or whose authorization to work has expired, whichever is earlier.

EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Initial Regulatory Flexibility Analysis

The proposed rule does not affect small business.

Fiscal Impact

There is no fiscal impact.

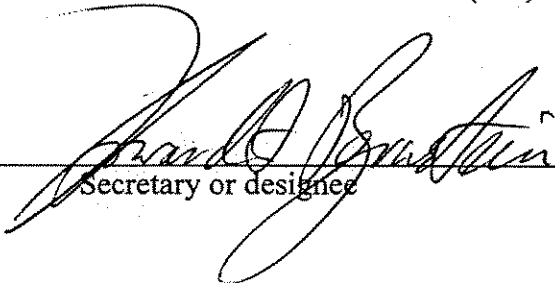
Contact Information

For substantive questions concerning the proposed rule, contact Tom Smith, Research Attorney, UI Bureau of Legal Affairs, 266-9641.

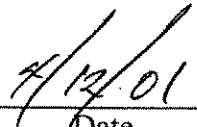
Written Comments

Written comments on the proposed rules received at the following address no later than May 31, 2001, will be given the same consideration as testimony presented at the hearing.

Elaine Pridgen
Office of Legal Counsel
Dept. of Workforce Development
P.O. Box 7946
Madison, WI 53707-7946
(608) 267-9403



Secretary or designee



Date

JUL 09 2001

Scott McCallum
Governor

Jennifer Reinert
Secretary



OFFICE OF THE SECRETARY

201 East Washington Avenue
P.O. Box 7946
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**State of Wisconsin
Department of Workforce Development**

July 5, 2001

President of the Senate
220 South, State Capitol
Madison, Wisconsin 53702

Speaker of the Assembly
211 West, State Capitol
Madison, Wisconsin 53702

Notice of Administrative Rules in Final Draft Form

Clearinghouse rule number: 01-039

Rule number: DWD 128

Relating to: Unemployment insurance requirement of ability to work and availability
for work

Dear Senator Risser and Representative Jensen:

I have enclosed proposed rules in final draft form and a rule report as required by s. 227.19(3), Stats., for referral to the appropriate legislative standing committees. If you have any questions regarding this matter, please do not hesitate to contact us.

Respectfully submitted,


Jennifer Reinert
Secretary

Scott McCallum
Governor

Jennifer Reinert
Secretary



State of Wisconsin

Department of Workforce Development

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Rule Analysis for Legislative Review

Proposed rules relating to the unemployment insurance
requirement of ability to work and availability for work

DWD 128
CR 01-039

Need for rules

Federal and state unemployment insurance law requires that a claimant may be eligible for benefits only if the claimant is able to work and available for work. Section DWD 128.02 allows a grace period from the general able and available restrictions for claimants who have certain uncontrollable restrictions. Claimants are eligible for a grace period if they have uncontrollable restrictions that limit them to less than 15% of suitable work, their previous employment was terminated for reasons unrelated to those restrictions, and they are able and available for work under the same conditions that applied to their most recent employment. The proposed rule clarifies that claimants must be able and available for at least some work to qualify for this grace period. The proposed rule also clarifies that the grace period does not apply to aliens who are not able and available for work because their authorized work has ended or their work authorization has expired.

Public hearing response

Public hearings were held in Milwaukee, Madison, and Stevens Point on May 21, 23, and 29, 2001. No comments were received.

Response to Legislative Council staff recommendations

Accepted

Final regulatory flexibility analysis

The proposed rule does not have a significant economic impact on small business as defined in s. 227.114, Stats.

Department contacts

Tom Smith, Research Attorney
Bureau of Legal Affairs
Unemployment Insurance Division
266-9641

Elaine Pridgen
Administrative Rules Coordinator
Office of Legal Counsel
267-9403

State of Wisconsin
Department of Workforce Development
Unemployment Insurance Division

DWD 128

Unemployment Insurance Requirement of Ability to Work and Availability for Work

The Wisconsin Department of Workforce Development proposes an order to amend ss. 128.01(2)(b), 128.01(note), and 128.02(1)(a); and to create s. DWD 128.02(3), relating to the unemployment insurance requirement of ability to work and availability for work.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 108.04(2), 108.14(2), and 227.11, Stats.
Statute interpreted: Sections 108.04(2), Stats.

Federal and state unemployment insurance law requires that a claimant may be eligible for benefits only if the claimant is able to work and available for work. Section DWD 128.02 provides a temporary grace period from the general able and available requirements in s. DWD 128.01 if the claimant has certain uncontrollable restrictions. Claimants are eligible for a grace period as designated in s. DWD 128.02(2) if they have uncontrollable restrictions that limit them to less than 15% of suitable work, their previous employment was terminated for reasons unrelated to those restrictions, and they are able and available for work under the same conditions that applied to their most recent employment.

The department has never intended that s. DWD 128.02 mean that a claimant who was not able and available for any work would be eligible for UI. However, in light of a recent decision by the Labor and Industry Review Commission (LIRC) in *Vuttiphan Z. Honea v. Milwaukee Ballet Company, Inc.*, the federal Department of Labor has expressed concern that s. DWD 128.02 could be read to mean that Wisconsin was not following the federally-mandated able and available requirement for eligibility. The *Honea* decision suggests that if s. DWD 128.02(1)(a) is to be interpreted as requiring a claimant to be available for at least some work, the rule language that currently says "less than 15% of the opportunities for suitable work" should read "less than 15% but more than 0% of the opportunities for suitable work." The proposed rule makes that change.

Also in response to Department of Labor concerns over the LIRC decision in the *Honea* case, the proposed rule clarifies that the grace period in s. DWD 128.02 does not apply to aliens who are not able and available for work because their authorized work has ended or their work authorization period has expired. There has been some confusion in situations where the authorized work has ended but the work authorization period is not expired. However, since federal immigration law provides that once the authorized work has ended the alien must depart the United States, these claimants cannot be considered

able and available for work and are not eligible for unemployment insurance. The *Honea* decision is available on the LIRC web site at <http://www.dwd.state.wi.us/lirc/ucdecsns/654.htm>.

The proposed rule also makes a technical correction to s. DWD 128.01(2)(b). A recent amendment to s. DWD 128.02(1)(a) added "psychological condition" to the description of uncontrollable restrictions that may make a claimant eligible for the grace period. This change was made to reflect court interpretations. The language in DWD 128.01(2)(b) is intended to parallel the language in s. DWD 128.02(1)(a) but the amendment was inadvertently not made in Section DWD 128.01(2)(b). The proposed rule amends s. DWD 128.01(2)(b) to include "psychological condition."

In addition, obsolete references to ILHR are updated to DWD in the note following s. DWD 128.01.

SECTION 1. DWD 128.01(2)(b), 128.01(note), and DWD 128.02(1)(a) are amended to read:

DWD 128.01(2)(b) The claimant's physical or psychological condition or personal circumstances over which the claimant has no control limit the claimant to less than 15% of the opportunities for suitable work, including all such jobs whether vacant or filled, in the claimant's labor market area; or

DWD 128.01(note): Section ~~ILHR~~ DWD 128.01 (2) (a) applies to a claimant whose restrictions on availability for work are within his or her power to change or alter. School attendance is generally a controllable restriction and, therefore, "without good cause" unless the person is enrolled in an approved training program under s. 108.04 (16), Stats. The wage demand of a claimant is also considered a controllable restriction. A claimant obligated to care for minor children is expected to make arrangements which would permit the claimant to accept suitable work. Unwillingness or failure to make such arrangements are controllable restrictions and, normally, without good cause.

Section ~~ILHR~~ DWD 128.01 (2) (b) applies to a claimant whose physical condition or uncontrollable personal circumstances limit the opportunity for suitable work. A claimant may be severely limited in the type of work which he or she could perform because of illness, disability, injury or age, but still be able to perform at least 15% of the suitable jobs in the claimant's labor market area.

DWD 128.02(1)(a) The claimant's physical or psychological condition, or personal circumstances over which the claimant has no control limit the claimant to less than 15%, but more than 0%, of the opportunities for suitable work, as specified under s. DWD 128.01 (2) (b);

SECTION 2. DWD 128.02(3) is created to read:

DWD 128.02(3) This section is not applicable to an alien whose authorized work has ended or whose authorization to work has expired, whichever is earlier.

EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

FISCAL ESTIMATE
DOA-2048 N(R03/97)

- ORIGINAL
- UPDATED
- CORRECTED
- SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
DWD 128
Amendment No. if Applicable

Subject
Unemployment insurance requirement of ability to work and availability for work

Fiscal Effect

State: No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

Increase Costs - May be possible to Absorb Within Agency's Budget Yes No

- Increase Existing Appropriation
- Decrease Existing Appropriation
- Create New Appropriation
- Increase Existing Revenues
- Decrease Existing Revenues

Decrease Costs

Local: No local government costs

- 1. Increase Costs
 - Permissive
 - Mandatory
- 2. Decrease Costs
 - Permissive
 - Mandatory

- 3. Increase Revenues
 - Permissive
 - Mandatory
- 4. Decrease Revenues
 - Permissive
 - Mandatory

5. Types of Local Governmental Units Affected:
- Towns
 - Villages
 - Cities
 - Counties
 - Others _____
 - School Districts
 - WTCS Districts

Fund Sources Affected

- GPR
- FED
- PRO
- PRS
- SEG
- SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The rule changes do not have a fiscal effect.

Long-Range Fiscal Implications

Agency/Prepared by: (Name & Phone No.)
Elaine Pridgen 267-9403

Authorized Signature/Telephone No.

Handwritten Signature
267-9427

Date

4/12/01

FISCAL ESTIMATE WORKSHEET

1999 Session

Detailed Estimate of Annual Fiscal Effect
DOA-2047 (R10/94)

ORIGINAL UPDATED
 CORRECTED
SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
DWD 128

Amendment No.

Subject
Unemployment insurance requirement of ability to work and availability for work

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

0

II. Annualized Costs:

Annualized Fiscal impact on State funds from:

A. State Costs by Category	Increased Costs	Decreased Costs
	State Operations - Salaries and Fringes	\$0
(FTE Position Changes)	0 (FTE)	(- FTE)
State Operations - Other Costs	0	0
Local Assistance	0	0
Aids to Individuals or Organizations	0	0
TOTAL State Costs by Category	\$0	\$ -
B. State Costs by Source of Funds	Increased Costs	Decreased Costs
GPR	\$0	\$0-
FED	0	0
PRO/PRS	0	0
SEG/SEG-S	0	0
III. State Revenues -	Increased Rev.	Decreased Rev.
Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)		
GPR Taxes	\$	\$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues	\$0	\$0-

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	\$0	\$0
NET CHANGE IN REVENUES	\$0	\$0

Agency/Prepared by: (Name & Phone No.)
DWD/ Elaine Pridgen 267-9403

Authorized Signature/Telephone No. *Elaine Pridgen* 267-9427

Date 4/12/01