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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2005-06

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Children and Families (AC-CF)

COMMITTEE NOTICES ...

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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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(**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
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* Contents organized for archiving by: Stefanie Rose (LRB) (May 2012)

Assembly

Record of Committee Proceedings

Committee on Children and Families

Clearinghouse Rule 04-123

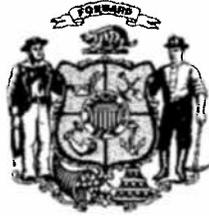
Relating to public assistance overpayment collection and affecting small businesses.

Submitted by Department of Workforce Development.

May 02, 2005 Referred to Committee on Children and Families.

June 1, 2005 No action taken.

David Matzen
Committee Clerk



STATE REPRESENTATIVE
STEVE KESTELL
27TH ASSEMBLY DISTRICT

TO: Members of the Children and Families Committee
Representative Vos Representative Sinicki
Representative Albers Representative Grigsby
Representative Jeskewitz Representative Seidel
Representative Vukmir

FROM: Representative Steve Kestell, Chair

DATE: May 3, 2005

RE: Clearinghouse Rule 04-123

On May 2, 2005 the following clearinghouse rule was submitted by the Department of Workforce Development and was referred to the Assembly Children and Families Committee:

Clearinghouse Rule 04-123, to renumber and amend DWD 56.04 (5) (b); to amend DWD 56.04 (5) (a), (e) and (f); to renumber and amend DWD 56.04 (5) (b); to repeal and recreate DWD 12.23; and to create DWD 56.04 (5) (a) 1. (intro.), a. and b. and 2. and (b) 1. and 2., relating to public assistance overpayment collection and affecting small businesses. The primary purpose of the proposed rule is to implement administrative lien and levy procedures for recovery of overpayments received under the W2, child care, and AFDC programs.

The deadline for committee action on this rule is **JUNE 1, 2005**. If you are interested in obtaining a hard copy of the rule or requesting a hearing, please do so prior to the deadline date. This rule can be accessed online in FOLIO under the "Clearinghouse Rules" InfoBase.

A handwritten signature in cursive script that reads "Steve Kestell".

Steve Kestell
Chair, Assembly Committee on Children and Families



Jim Doyle
Governor

Roberta Gassman
Secretary



State of Wisconsin

Department of Workforce Development

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Rule Analysis for Legislative Review

Proposed Rules Relating to Public Assistance Overpayment Collection DWD 12.23 and 56.04 CR 04-123

Basis and Purpose of the Proposed Rule

The primary purpose of the proposed rule is to implement administrative lien and levy procedures for recovery of overpayments received under the Wisconsin Works (W-2), child care, and Aid to Families with Dependent Children (AFDC) programs. Unpaid debts that will be subject to lien and levy currently total approximately \$25 million.

The lien and levy procedures are in statute and are similar to the lien and levy procedures used by the Unemployment Insurance program to collect benefit overpayments and delinquent taxes. This proposed rule adds required hearings and sets the threshold for collection of public assistance overpayments by lien and levy.

Implementing administrative lien and levy procedures will allow the Department to collect public assistance overpayments through levy of wages, accounts in financial institutions, and other personal property and through a lien on real and personal property in a county where a warrant is entered. The Department expects that collection by creation of a lien on property will occur primarily when the property is sold although s. 49.195 (3m), Stats., does provide authority for execution. A lien on a debtor's property may also be an added incentive for the debtor to make voluntary payments.

Public assistance overpayments are currently collected by tax intercept and voluntary payment for W-2, child care, and AFDC overpayments and by deducting a portion of continuing benefits for W-2 overpayments.

In addition to implementing the administrative lien and levy procedures, the proposed rule also clarifies the determination of child care overpayments. To be eligible to receive child care assistance, a parent must meet the eligibility criteria in statute and rule, including using child care only when the parent is participating in an approved activity under s. 49.155 (1m), Stats. When a child care administrative agency authorizes payment to a child care provider based on a parent's expected stable schedule of approved activities that does not, in fact, remain stable, eligibility must be redetermined. If a parent's schedule changes and the parent is using child care when not in an approved activity, there may be an overpayment. The agency will determine an overpayment if there was an unreported change in family eligibility circumstances that was significant enough that it would have resulted in smaller child care benefit or ineligibility for a child care benefit.

Public Hearing Summary

A hearing was held in Madison on November 29, 2004. A summary of the comments received and the Department's responses is attached. In response to public comments, the Department made the following modifications:

- Withdrew the proposal to require recoupment of a portion of benefits of current W-2 participants to repay child care, custodial parent of an infant, transportation, and AFDC overpayments.
- Limited liability for overpayments caused by administrative error to one year prior to the date that the agency or department discovers the error for overpayments determined on or after the effective date of these rules.
- Clarified that liability for overpayments is limited to individuals who were adults at the time the overpayment occurred.
- Specified fees that the Department is authorized to collect.
- Clarified a parent's obligation to report a change in circumstances that may affect his or her eligibility for child care assistance.

Changes to Rulemaking Order Analysis

- Added and deleted items modified in response to public hearing comments.
- Added multiples of the federal minimum wage for determining wages exempt from levy in the case of earnings for periods other than a week.
- Clarified that existing law allows only recoupment of overpayments of benefits received in W-2 employment positions from current W-2 benefits for all types of overpayments.
- Moved justification for the timing of the notice and hearing requirements from the "summary of the proposed rule" section to the "factual data and analytical methodologies" section.

Changes to Fiscal Estimate

No change was made to the fiscal estimate. The proposed rule has been modified to limit liability for overpayments caused by administrative error to one year prior to discovery of the error for overpayments established after the effective date of these rules. The Department does not currently track overpayments in this manner and is unable to estimate the revenue loss that may be caused by this change.

Response to Legislative Council Recommendations

All Legislative Council recommendations were accepted.

Final Regulatory Flexibility Analysis

A final regulatory flexibility analysis is not required because the rule will not have a significant economic impact on a substantial number of small businesses.

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State of Wisconsin
Department of Workforce Development

DWD 12.23 and DWD 56

PUBLIC ASSISTANCE OVERPAYMENT COLLECTION

The Wisconsin Department of Workforce Development proposes an order to repeal s. DWD 56.02(9); to renumber and amend s. DWD 56.04(5)(a); to amend ss. DWD 56.04(3), 56.04(5)(title), 56.04(5)(b), 56.04(5)(e), and 56.04(5)(f); to repeal and recreate s. DWD 12.23; and to create ss. DWD 56.04(2m), DWD 56.04(5)(a)2., and DWD 56.04(5)(a)3., relating to public assistance overpayment collection and affecting small businesses.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 49.155(1m)(d), 49.161, 49.195, and 227.11, Stats.

Statutes interpreted: Sections 49.155, 49.161, 49.195, and 49.85 Stats.

Relevant federal law: 45 CFR 233.20(a)(13), 45 CFR 98.60, 45 CFR 98.65, 45 CFR 98.66(a)

Explanation of agency authority

- Section 49.195, Stats., directs the Department to promptly recover all overpayments of the following: (a) benefits under the former Aid to Families with Dependent Children (AFDC) program; (b) subsidized employment benefits and custodial parent of infant grants under the Wisconsin Works (W-2) program; (c) child care benefits; and (d) W-2 transportation assistance. Section 49.195, Stats., directs the Department to create rules to collect overpayments that have not already been collected under ss. 49.161, Stats., and 49.19 (17), Stats., and to implement administrative warrant and execution and levy procedures as an additional method of collecting overpayments.
- Section 49.161, Stats., requires the Department to collect overpayment of benefits paid to trial job, community service job (CSJ), and transitional placement (W-2T) participants. For current CSJ and W-2T participants, the overpayment is collected by reducing the amount of the individual's monthly benefit payment by no more than 10% if the overpayment was due to client error or administrative error. For trial job participants, the W-2 agency may not recover more than the amount the W-2 agency or the Department paid in wage subsidies for that participant while the participant was ineligible to participate. If a benefit overpayment is the result of an intentional program violation, the Department may deduct the following from the monthly W-2 employment position benefit: (a) for overpayments of less than \$300, 10% of the amount of the monthly benefit payment; (b) for overpayments of at least \$300 but less than \$1,000, \$75; (c) for overpayments of at least \$1,000 but less than \$2,500, \$100; and (d) for overpayments of \$2,500 or more, \$200.

- Section 49.155 (1m)(d), Stats., provides that an individual must satisfy other eligibility criteria established by the Department by rule to be eligible for child care assistance under s. 49.155, Stats.
- Federal regulations require states to collect any AFDC overpayment.
- Federal policy allows only expenses that benefit the program to be charged against a federal grant. This policy requires overpayments of all types to be recovered because overpayments, whether by fraud or error, do not benefit the program.

Summary of proposed rule. A county, tribal governing body, W-2 agency, or the Department shall determine whether a public assistance overpayment has been made and if so, the amount of the overpayment. The county, tribal governing body, W-2 agency, or Department shall send notice of the overpayment at the address of a debtor as it appears on the records of the Department. Documentation that a county, tribal governing body, W-2 agency, or the Department properly mailed the notice to the address of the debtor as it appears on the records of the Department and it was not returned as undeliverable shall be prima facie evidence that notice was delivered and received. The Department shall give the debtor an opportunity for review following the factfinding and review procedure if the debtor received the overpayment under the W-2 program or for a hearing under ch. 227, Stats., if the debtor received an overpayment under the child care or AFDC programs.

Liability shall extend to any parent, nonmarital coparent, or stepparent whose family receives W-2, child care, or AFDC benefits during the period that he or she is an adult member of the same household, but his or her liability is limited to such period. Liability for repayment of the overpayment shall be joint and several. Liability for overpayments caused by administrative error shall be limited to one year prior to the date that the agency or department discovers the error for overpayments determined on or after the effective date of these rules.

The proposed rule duplicates the recoupment procedures in s. 49.161, Stats., and the current s. 12.23 on collecting W-2 employment position overpayments from current W-2 participants.

The proposed rule provides that a debt shall be considered delinquent if the Department does not receive a debtor's payment by the due date 3 times over the life of the debt. A delinquent debt may be subject to warrant and execution, levy, and tax intercept. A delinquent debt retains delinquent status regardless of any future payment on the debt. The department may recover a delinquent debt by more than one means of collection at the same time.

If a debt for repayment of an overpayment is delinquent and no appeal rights are pending, Section 49.195 (3m), Stats., authorizes the Department to issue a warrant that is considered in all respects a final judgment constituting a perfected lien upon the debtor's right, title, and interest in all real and personal property located in the county in which the warrant is entered. The Department shall provide the debtor with notice and an opportunity for a hearing under ch. 227, Stats., when a warrant has been issued, before

property is seized, and before seized property is sold. The debtor may request a hearing under ch. 227, Stats., within 20 days from the date on the notice. The appeal shall be limited to questions of prior payment of the debt that the Department is proceeding against and mistaken identity of the debtor. The Department may not withdraw the warrant based on a hearing request when a warrant is issued or cease enforcement before property is seized based on a hearing request. If a hearing is requested after property is seized, the seized property may not be sold before the hearing decision is issued or the hearing request is withdrawn. When the amount set forth in the warrant and all costs due the Department have been paid, the Department shall issue a satisfaction of the warrant. Statutory exemption rights in ss. 815.18 (3) and 815.20, Stats., apply to this administrative warrant and execution procedure.

If a debt for repayment of an overpayment is delinquent and no appeal rights are pending, Section 49.195 (3n), Stats., authorizes the Department to levy on personal property belonging to the debtor, including wages due and deposits in a financial institution account. The Department shall first send a notice of intent to levy at least 10 days prior to the levy, personally or by any type of mail service that requires a signature of acceptance. Notice prior to levy is not required for a subsequent levy on any debt of the same debtor within one year of the date of service of the original levy. Next, the Department shall serve the levy upon the debtor and 3rd party in possession of property to which the debtor has rights. The debtor may appeal the levy proceeding under ch. 227, Stats., within 20 days from the date on the service of levy. The appeal shall be limited to questions of prior payment and mistaken identity of the debtor. The levy is not stayed pending an appeal where property is secured through the levy.

Within 20 days from the service of the levy upon a 3rd party, the 3rd party shall file an answer with the Department stating whether the 3rd party is in possession of or obligated with respect to property or rights to property of the debtor, including a description of the property or the rights to property and the nature and dollar amount of any such obligation. The 3rd party shall, upon demand of the Department, surrender the personal property or rights or discharge the obligation to the Department, except that part of the personal property or rights which is, at the time of the demand, subject to any prior attachment or execution under any judicial process.

If levied personal property that has been surrendered to the Department is not a liquid asset in the form of cash, check, or an equivalent that can be applied to the debt without a sale of the asset, the Department shall provide the debtor with notice and an opportunity for a hearing under ch. 227, Stats., before surrendered property is sold. The debtor may request a hearing under ch. 227, Stats., within 20 days from the date on the notice. The appeal shall be limited to questions of prior payment of the debt that the Department is proceeding against and mistaken identity of the debtor. If a hearing is requested, surrendered property may not be sold before the hearing decision is issued or the hearing request is withdrawn.

The debtor is entitled to an exemption from levy of the greater of a subsistence allowance of 75% of the debtor's disposable earnings then due and owing or an amount

equal to 30 times the federal minimum hourly wage for each full week of the of the debtor's pay period, an amount equal to 60 times the federal minimum hourly wage for a two-week pay period, or an amount equal to 130 times the federal minimum hourly wage for a monthly pay period. The debtor is entitled to an exemption of the first \$1,000 of an account in a depository institution.

Any appeal based on a notice received in a warrant and execution or levy proceeding or a notice of intent to certify a debt for set-off against a state tax refund shall be limited to questions of prior payment of the debt that the Department is proceeding against and mistaken identity of the debtor. The minimum amount that must be due before warrant and execution and levy procedures may be commenced is \$300. The Department may waive recovery of an overpayment if the Department has made reasonable efforts to recover the overpayment from the debtor and determines it is no longer cost effective to continue overpayment recovery efforts.

The child care administration rules are also amended to incorporate the general public assistance overpayment rules affecting parents in s. DWD 12.23. The proposed rule provides that a child care administrative agency or the Department shall take all reasonable steps necessary to recover from a parent funds when the parent was not eligible for that level of child care benefit and the overpayment benefited the parent by causing the parent to pay less for child care expenses than the parent otherwise would have been required to pay under child care assistance program requirements, regardless of the reason for the overpayment.

An overpayment to a parent includes excess child care funds paid when there was a change in family eligibility circumstances that was significant enough that it would have resulted in a smaller child care benefit or ineligibility for a child care benefit due to any reason, including the parent failed to report a change or the parent was absent from an approved activity without good cause, while the child was in the care of the provider. The child care worker shall determine good cause if the approved activity is unsubsidized employment. A parent's absence from unsubsidized employment shall be considered good cause if the parent is using employer-approved sick time, personal time, or vacation time and the child is in care for no more than the hours authorized.

The proposed rule clarifies that a parent shall report any change in circumstances that may affect his or her eligibility to the child care administrative agency within 10 days after the change. The agency shall redetermine eligibility in a timely manner following receipt of a parent's report of a change in circumstances and shall also redetermine eligibility at least every 6 months.

The rule on collecting overpayments from child care providers is clarified to state that the provider is responsible for the overpayment when the overpayment benefited the provider by causing the provider to receive more child care assistance than otherwise would have been paid on the family's behalf under child care assistance program requirements and the overpayment did not benefit the parent by causing the parent to pay less for child care expenses than the family otherwise would have been required to pay

under child care assistance program requirements. Overpayments from providers are collected by making an offset from current or future funds under the Department's control that are payable to the provider of no more than 50% of each payment.

Summary of related federal law. Federal AFDC regulations require states to collect any overpayment. There is no provision on overpayment collection in the federal TANF statute or regulations. Federal public assistance overpayment collection policy regarding benefits provided under the Aid to Families and Children program and programs funded by Temporary Assistance to Needy Families block grants is in the U.S. Department of Health and Human Services, Administration for Children and Families, Program Instruction Transmittal No. TANF-ACF-PI-2000-2 (<http://www.acf.dhhs.gov/programs/ofa/pi002.htm>). This memo specifies that the requirement for states to recover all remaining AFDC overpayments remains in place and that AFDC overpayments will be recouped from current TANF benefits if the recipient is still receiving cash assistance or through a cash repayment from former recipients. TANF overpayments are also to be recouped from current recipients or through cash repayment from former recipients.

The state child care assistance program receives funding from TANF and the Child Care Development Fund (CCDF). CCDF regulations specifically provide that states shall recover child care payments that are the result of fraud and the payments shall be recovered from the party responsible for committing the fraud. In addition, CCDF regulations provide that any expenditure not made in accordance with statutory provisions, regulatory provisions, or with the approved plan may be disallowed and must be repaid to the federal government. According to staff at the federal Department of Health and Human Services (DHHS), overpayments are not considered to be expended in accordance with the federal CCDF statute or regulations.

In addition, DHHS staff have informed the Department that a similar provision that applies to all federal grant programs also applies to funds received under the CCDF grant. OMB Circular A-87 on Cost Principles for State and Local Governments provides that only costs that benefit a federal grant program may be charged to that program. All overpayments, whether by fraud or error, are not considered to benefit the program and do not meet the federal cost allowability test.

Comparison with rules in adjacent states. Minnesota. All TANF overpayments are recoverable regardless of the reason for the overpayment. All adults are jointly and individually liable. An appeal based on the fact or amount of an overpayment must occur based on the original notice not in an appeal of a recoupment. Recoupment of AFDC and TANF overpayments from current TANF recipients is specifically authorized. AFDC and TANF overpayments, excluding overpayments based on agency error, become judgments by operation of law 90 days following a properly served notice, with the full power of enforcement of a civil judgment. Child care overpayments are recouped from child care assistance or collected through voluntary repayment or civil court action. Child care overpayments are collected regardless of the reason for the overpayment.

Illinois. Recoupment of AFDC and TANF overpayments from current TANF recipients is specifically authorized. Overpayments are collected regardless of reason for

overpayment. Child care overpayments are collected by reductions in future payments or public assistance benefits.

Michigan. Overpayments are recouped from benefits of any adults who were a group member when the overpayment occurred or collected through voluntary repayment agreements or court action. All TANF monthly benefit overpayments must be repaid regardless of the reason for the overpayment. A person who is determined to have received child care benefits as a result of the misrepresentation of his or her circumstances may be required to reimburse the agency for any benefits received for which the person was not eligible. A child care provider who bills the agency for more child care than he or she actually provided may be required to reimburse the agency in cash or from current and future provider payments.

Iowa. Overpayments are collected through voluntary repayment, recoupment, and tax intercept. An appeal is allowed based only on the first notice of overpayment. Overpayments are collected regardless of the reason for the overpayment.

Summary of factual data and analytical methodologies. The initial proposed rules provided that overpayments caused by administrative error be collected in the same manner as any other overpayment because s. 49.195 (3), Stats., directs the Department to collect all public assistance overpayments. An amendment to 1999 Wisconsin Act 9 that would have prohibited the Department from collecting overpayments caused by administrative error was vetoed by the Governor. In addition, federal policy provides that expenditures not in accordance with program requirements may not be charged against a federal grant. In response to public hearing comments, the Department proposes to limit liability for W-2 and child care overpayments caused by administrative error to one year prior to the discovery of the error for overpayments established after the effective dates of these rules. Limiting liability to one year before discovery of the overpayment is also the state policy for collection of food stamp overpayments caused by administrative error.

The warrant and execution and levy procedures are outlined in statute and are similar to the warrant and execution and levy procedures used by the Unemployment Insurance program to collect benefit overpayments and delinquent taxes. The proposed rule adds the required hearings and sets the threshold for use of the procedure. The total receivables that will be subject to warrant and execution and levy procedures is \$25 million, with approximately \$20.4 million in AFDC receivables, \$1.5 million in general W-2 receivables, and \$3.7 million in child care receivables.

The notice and hearing requirements in the warrant and execution and levy sections were designed to comply with s. 49.195 (3s), Stats., which requires a hearing or review (1) after a warrant has been issued and before the warrant has been executed; (2) before property is levied under both the warrant and execution and levy procedures; and (3) after levied property is seized and before it is sold. In addition, Section 49.195 (3), Stats., directs that the Department's collection rules include notification procedures similar to those established for child support collections. According to the Legislative Fiscal Bureau summary for 1999 Wisconsin Act 9 (page 1540), this provision means that notification is required at the following points in the collection process: (a) when the Department first determines that an overpayment has been made; (b) after the Department has issued a

warrant that acts as a lien upon the person's right, title and interest in all real and personal property located in the county in which the warrant is entered; (c) after issuing an execution of a warrant or enforcing a levy upon a financial account or other personal property; (d) prior to levy upon real property; and (e) prior to issuing an execution to sell the property.

The proposed rule states that liability for an overpayment extends to any parent, nonmarital coparent, or stepparent during the period that he or she is a member of the household. This provision clarifies that *Richland County Department of Social Services v. McHone*, 95 Wis.2d 108, 288 N.W.2d 879 (Ct. App. 1980) applies only to recovery of aid when an individual receives a windfall under s. 49.195 (1), Stats. The one sentence note following s. 49.195, Stats., that summarizes the case states that "recovery may be had only from a parent who immediately received aid" or the parent whose name was on the benefit check. A reading of the case shows that this holding was based only on the language in sub. (1) that starts "if any parent at the time of receiving aid." This language does not appear in the overpayment collection sections of s. 49.195, Stats., or the proposed rule. Under the proposed rule, in general a parent whose income must be included in determining financial eligibility is jointly and severally liable for an overpayment.

Effect on small business. The proposed rule will affect small businesses that are a third party in possession of or obligated with respect to property or rights to property of a debtor. Generally, this will be an employer served with a levy to withhold a portion of a debtor's wages. Section 49.195 (3n)(t), Stats., provides that a third party is entitled to a levy fee of \$5 for each levy in any case where property is secured through the levy.

Except as employers of debtors, private W-2 agencies will not be affected by the rule because the additional warrant and execution and levy collection procedures in the rule will be implemented by the Department and not W-2 agencies.

The rule adds clarifying language on collecting overpayments from child care providers but the additional language is based on current policy.

Anticipated costs incurred by private sector. The proposed rule will not have a significant fiscal effect on the private sector.

SECTION 1. DWD 12.23 is repealed and recreated to read:

DWD 12.23 Recovery of overpayments. (1) DEFINITIONS. In this section:

(a) "Administrative error" means an error committed by an agency or the department in determining benefits given under s. 49.148, 49.155, 49.157, or 49.19, Stats., that results in an overpayment.

(b) "Client error" means an error caused by an individual who is a member of a W-2 or AFDC group reporting incorrect information or failing to report information due to misunderstanding or mistake that results in an overpayment under s. 49.148, 49.155, 49.157, or 49.19, Stats.

(c) "Complies with the payment schedule" as used in s. 49.195 (3m)(h), Stats., means the debtor submits each payment due on an overpayment so that it is received by the department by the due date every month over the life of the debt.

(d) "Debtor" means a liable person who received an overpayment of benefits under s. 49.148, 49.155, 49.157, or 49.19, Stats., and has not repaid it in full.

(e) "Disposable earnings" means that part of the earnings of any debtor after the deduction from those earnings of any amounts required by law to be withheld, any life, health, dental or similar type of insurance premiums, union dues, any amount necessary to comply with a court order to contribute to the support of minor children, and any levy, wage assignment, or garnishment executed prior to the date of a levy under this section.

(f) "Intentional program violation" means an individual who is a member of a W-2 or AFDC group intentionally made a false or misleading statement or misrepresented, concealed, or withheld facts that resulted in an overpayment under s. 49.148, 49.155, 49.157, or 49.19, Stats. An intentional program violation may be determined based on an administrative hearing, a court finding, a signed waiver of an administrative hearing for an alleged intentional program violation, or a consent agreement in lieu of prosecution based on the same facts or events as the intentional program violation.

(g) "Overpayment" or "debt" means any benefit or payment received under s. 49.148, 49.155, 49.157, or 49.19, Stats., in an amount greater than the amount that the individual, AFDC assistance group, or W-2 group was eligible to receive under applicable statutes and rules, regardless of the reason for the overpayment. An overpayment may be the result of client error, administrative error, or intentional program violation.

(h) "Recoupment" means the process of repayment of an overpayment by the department withholding a portion of a W-2 participant's grant under s. 49.148, Stats.

(2) OVERPAYMENT DETERMINATION AND NOTICE. (a) A county, tribal governing body, W-2 agency, or the department shall determine whether an overpayment has been made under s. 49.148, 49.155, 49.157, or 49.19, Stats., and if so, the amount of the overpayment.

(b) The county, tribal governing body, W-2 agency, or department shall send notice of the overpayment at the address of a debtor as it appears on the records of the department. Documentation that a county, tribal governing body, W-2 agency, or the department properly mailed the notice to the address of the debtor as it appears on the records of the department and that it was not returned as undeliverable shall be prima facie evidence that notice was delivered and received.

(c) The notice shall include the reason for the overpayment, the time period in which the overpayment occurred, the amount of the overpayment, and notice of the right to appeal the overpayment determination.

(d) The department shall give the debtor an opportunity for review following the procedure specified under s. 49.152 (2), Stats., if the debtor received the overpayment under s. 49.148 or 49.157, Stats., or for a hearing under ch. 227, Stats., if the debtor received an overpayment under s. 49.155 or 49.19, Stats.

(3) LIABILITY. (a) Liability shall extend to any parent, nonmarital coparent, or stepparent whose family receives benefits under s. 49.148, 49.155, 49.157, or 49.19, Stats., during the period that he or she is an adult member of the same household, but his or her liability is limited to such period. For the purpose of determining liability for an overpayment of a child care subsidy under s. 49.155, Stats., "parent" has the meaning given in s. 49.155 (1)(c), Stats.

(b) Liability for repayment of an overpayment shall be joint and several.

(c) Liability for overpayments caused by administrative error shall be limited to one year prior to the date that the agency or department discovers the error for overpayments determined on or after "the effective date of this section [revisor inserts date]."

(4) SIMULTANEOUS COLLECTION. A county, tribal governing body, W-2 agency, or the department may recover an overpayment by more than one method of collection at the same time.

(5) RECOUPMENT FROM CURRENT W-2 PARTICIPANTS. (a) *Administrative error and client error.* 1. If any overpayment of benefits paid under s. DWD 12.18 (1)(b) or (c) is due to administrative error or client error, the W-2 agency or the department shall recoup the overpayment from a debtor who continues to receive benefits under s. DWD 12.18 (1)(b) or (c) by reducing the amount of the benefits amount by no more than 10%.

2. The debtor may make a voluntary repayment in addition to the amount withheld from the benefit under subd. 1.

3. The county, tribal governing body, or W-2 agency shall ask a debtor who has received an overpayment to voluntarily repay the overpayment. If the debtor fails to pay voluntarily, the county, tribal governing body, or W-2 agency shall refer the debt to the department for further collection efforts.

(b) *Overpayments caused by intentional program violations.* If an overpayment of benefits under s. DWD 12.18 (1)(a), (b), or (c), is the result of an intentional violation of ss. 49.141 to 49.161, Stats., or this chapter, the W-2 agency or the department shall recoup the overpayment from the debtor by deducting an amount from the debtor's benefits received under s. DWD 12.18 (1)(a), (b), or (c) until the overpayment is recovered. The amount to be deducted each month may not exceed the following:

1. For intentional program violations resulting in an overpayment that is less than \$300, the amount to be deducted may not exceed 10% of the monthly benefit payment.

2. For intentional program violations resulting in an overpayment that is at least \$300 but less than \$1,000, the amount to be deducted may not exceed \$75.

3. For intentional program violations resulting in an overpayment that is at least \$1,000 but less than \$2,500, the amount to be deducted may not exceed \$100.

4. For intentional program violations resulting in an overpayment that is \$2,500 or more, the amount to be deducted may not exceed \$200.

(6) TRIAL JOB OVERPAYMENTS. The W-2 agency shall recover any overpayment of benefits paid under s. DWD 12.18 (1)(a) from the debtor. The W-2

agency may not recover more than the amount that the W-2 agency or the department paid in wage subsidies for the debtor while the debtor was ineligible to participate under s. DWD 12.16 (2). The W-2 agency shall ask a former participant in a trial job who received overpayments to voluntarily repay the overpayment. If a former participant does not voluntarily repay the overpayment, the W-2 agency shall refer the debt to the department for further collection action.

(7) EFFECT OF RESTITUTION PAYMENTS. A debtor's payments to the department as part of a restitution agreement under s. 973.20, Stats., arising out of the facts or events that are the basis for the overpayment owed to the department shall be applied to the liability owed to the department, but a debtor's completion of probation or fulfillment of the restitution agreement shall not limit or impair the ability of the department to collect any remaining balance on the debt.

(8) DELINQUENCY. A debt shall be considered delinquent if the department does not receive a debtor's payment by the due date 3 times over the life of the debt. A delinquent debt may be subject to warrant and execution under s. 49.195 (3m), Stats.; levy under s. 49.195 (3n), Stats.; setoff against a refund under ss. 49.85 and 71.93, Stats.; and other authorized collection methods. The department may recover a delinquent debt by more than one means of collection at the same time. A delinquent debt retains delinquent status regardless of any future payment on the debt.

Note: The limitation on using warrant and execution and levy only when a debtor has not complied with the payment schedule 3 times is not required by statute. Because the department is limiting the use of warrant and execution and levy to debtors who have not complied with a payment schedule, the withdrawal of a warrant when the debtor does comply with the payment schedule under s. 49.195 (3m) (h), Stats., will not occur.

(9) WARRANT AND EXECUTION UNDER SECTION 49.195 (3m), STATS. (a) Creation of lien. 1. If a debt for repayment of an overpayment under s. 49.148, 49.155, 49.157, or 49.19, Stats., is delinquent under sub. (8) and no review or appeal rights under sub. (2) are pending and the time for requesting a review has expired, the department may issue a warrant directed to the clerk of circuit court of any county.

2. The clerk of circuit court shall enter in the judgment and lien docket the name of the debtor named in the warrant, the amount for which the warrant is issued, and the date on which the clerk entered the information.

3. The department shall pay the fees required under s. 814.61 (5), Stats., for entering the warrant and shall collect the fees from the debtor named in the warrant when satisfaction or release is presented for entry.

4. A warrant issued under subd. 2. shall be considered in all respects a final judgment constituting a perfected lien upon the debtor's right, title, and interest in all real and personal property located in the county in which the warrant is entered.

5. The department shall provide the debtor with notice and an opportunity for a hearing under ch. 227, Stats., when a warrant has been issued. The debtor may request a hearing under ch. 227, Stats., within 20 days from the date on the notice. The appeal shall be limited to questions of prior payment of the debt that the department is proceeding against and mistaken identity of the debtor. The department may not withdraw a warrant based on a request for hearing.

(b) *Execution of the warrant.* 1. After the warrant is issued and no review or appeal rights under par. (a)4. are pending and the time for requesting a review has expired, the department may file an execution with the clerk of circuit court for filing with the sheriff of the county, commanding the sheriff to execute the warrant and sell sufficient real and personal property of the debtor to pay the amount stated in the warrant in the same manner as upon an execution against property issued upon the judgment of a court of record, and to return the warrant to the department and pay to it the money collected by virtue of the warrant within 90 days after receipt of the warrant. The execution may not command the sheriff to levy upon or sell any property that is exempt from execution under ss. 815.18 (3) and 815.20 , Stats.

2. The department shall provide the debtor with notice and an opportunity for a hearing under ch. 227, Stats., before property is seized. The debtor may request a hearing under ch. 227, Stats., within 20 days from the date on the notice. The appeal shall be limited to questions of prior payment of the debt that the department is proceeding against and mistaken identity of the debtor. The department may not cease enforcement or seizure based on a request for hearing.

3. The department shall provide the debtor with notice and an opportunity for a hearing under ch. 227, Stats., before seized property is sold. The debtor may request a hearing under ch. 227, Stats., within 20 days from the date on the notice. The appeal shall

be limited to questions of prior payment of the debt that the department is proceeding against and mistaken identity of the debtor. If a hearing is requested, the department shall notify the sheriff that seized property may not be sold before the hearing decision is issued or the hearing request is withdrawn.

(c) *Satisfaction of the warrant.* When the amount set forth in the warrant and all costs due the department have been paid to it, the department shall issue a satisfaction of the warrant and file it with the clerk of circuit court. The clerk of circuit court shall immediately enter a satisfaction of the judgment on the judgment and lien docket. The department shall send a copy of the satisfaction to the person named in the warrant.

(10) LEVY UNDER SECTION 49.195 (3n), STATS. (a) *Definition.* In this subsection, "personal property" means all tangible and intangible property and rights to such property that is not real estate, including compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise; periodic payments received pursuant to a pension or retirement program; rents; proceeds of insurance; contract payments; stock and bonds; and accounts in financial institutions.

(b) *Notice prior to levy.* 1. If a debt for repayment of an overpayment under s. 49.148, 49.155, 49.157, or 49.19, Stats., is delinquent under sub. (8) and no review or appeal rights under sub. (2) are pending and the time for requesting a review has expired, the department shall give notice to the debtor that the department may pursue legal action for collection of the debt.

2. The department shall make the demand for payment and give notice to the debtor at least 10 days prior to the levy, personally or by any type of mail service that requires a signature of acceptance, at the address of the debtor as it appears on the records of the department. The demand for payment and notice shall include a statement of the amount of the debt, including interest and penalties, and the name of the debtor who is liable for the debt.

3. The debtor's refusal or failure to accept or receive the notice does not prevent the department from making the levy.

4. Notice prior to levy is not required for a subsequent levy on any debt of the same debtor within one year of the date of service of the original levy.

(c) *Service of levy and review when property levied.* 1. The department may collect the debt and the expenses of the levy by levy upon any personal property belonging to the debtor.

2. The department shall serve the levy upon the debtor and any 3rd party in possession of or obligated with respect to property or rights to property that is subject to levy by personal service or by any type of mail service that requires a signature of acceptance as provided in s. 49.195 (3n) (m), Stats. The debtor or 3rd party's failure to accept or receive service of the levy does not invalidate the levy.

3. Any debtor who is subject to a levy proceeding made by the department has the right to appeal the levy proceeding under ch. 227, Stats., within 20 days from the date on the service of levy. The appeal shall be limited to questions of prior payment of the debt that the department is proceeding against and mistaken identity of the debtor. The levy is not stayed pending an appeal where property is secured through the levy.

(d) *Third-party response.* 1. Within 20 days from the service of the levy upon a 3rd party, the 3rd party shall file an answer with the department stating whether the 3rd party is in possession of or obligated with respect to property or rights to property of the debtor, including a description of the property or the rights to property and the nature and dollar amount of any such obligation.

2. Any person in possession of or obligated with respect to personal property or rights to personal property that is subject to levy and upon which a levy has been made shall, upon demand of the department, surrender the personal property or rights or discharge the obligation to the department, except that part of the personal property or rights which is, at the time of the demand, subject to any prior attachment or execution under any judicial process.

(e) *Appeal rights before surrendered property is sold.* If levied personal property that has been surrendered to the department is not a liquid asset in the form of cash, check, or an equivalent that can be applied to the debt without a sale of the asset, the department shall provide the debtor with notice and an opportunity for a hearing under ch. 227, Stats., before surrendered property is sold. The debtor may request a hearing under ch. 227, Stats., within 20 days from the date on the notice. The appeal shall be limited to questions of prior payment of the debt that the department is proceeding against and

mistaken identity of the debtor. If a hearing is requested, surrendered property may not be sold before the hearing decision is issued or the hearing request is withdrawn.

(f) *Exemption rights.* 1. The debtor is entitled to an exemption from levy of the greater of the following:

- a. A subsistence allowance of 75% of the debtor's disposable earnings then due and owing.
 - b. An amount equal to 30 times the federal minimum hourly wage for each full week of the debtor's pay period.
 - c. An amount equal to 60 times the federal minimum hourly wage for a two-week pay period.
 - d. An amount equal to 130 times the federal minimum hourly wage for a monthly pay period.
2. The first \$1,000 of an account in a depository institution is exempt from any levy to recover a benefit overpayment.

(g) *Proceeds.* 1. The department shall apply all money obtained under this subsection first against the expenses of the proceedings and then against the liability for which the levy was made and any other liability owed to the department by the debtor.

2. Whenever the value of any personal property that has been levied upon under this subsection is not sufficient to satisfy the claim of the department, the department may levy upon any additional personal property of the debtor until the debt and expenses of the levy are fully paid.

3. The department may refund or credit any amount left after the applications under subd. 1., upon submission of a claim for that amount and satisfactory proof of the claim, to the person entitled to that amount.

(11) WARRANT AND EXECUTION, LEVY, AND TAX INTERCEPT APPEAL ISSUES. Any appeal based on a notice in subs. (9) and (10) or a notice of intent to certify a debt for set-off against a state tax refund under s. 49.85, Stats., shall be limited to questions of prior payment of the debt that the department is proceeding against and mistaken identity of the debtor.

(12) THRESHOLD FOR WARRANT AND EXECUTION AND LEVY. The minimum amount that must be due before collection proceedings under subs. (9) and (10) may be commenced is \$300.

(13) WAIVER. The department may waive recovery of an overpayment under this section if the department has made reasonable efforts to recover the overpayment from the debtor and determines it is no longer cost effective to continue overpayment recovery efforts.

SECTION 2. DWD 56.02 (9) is repealed.

SECTION 3. DWD 56.04 (2m) is created to read:

DWD 56.04 (2m) REPORTING CHANGE IN ELIGIBILITY. A parent shall report any change in circumstances that may affect his or her eligibility to the child care administrative agency within 10 days after the change.

SECTION 4. DWD 56.04 (3) is amended to read:

DWD 56.04 (3) A child care administrative agency shall redetermine parent need for service and eligibility at all of the following times:

a. In a timely manner following receipt of a parent's report of a change in circumstances affecting his or her eligibility.

b. at At least every 6 months.

SECTION 5. DWD 56.04 (5) (title) is amended to read:

DWD 56.04 (5) RECOUPMENT OVERPAYMENT RECOVERY AND
SANCTIONS.

SECTION 6. DWD 56.04 (5) (a) is renumbered DWD 56.04 (5)(a)1. and as renumbered is amended to read:

DWD 56.04 (5)(a)1. A child care administrative agency or the department shall take all reasonable steps necessary to ~~recoup~~ or recover from a parent funds paid to a child care provider or to that parent when the parent was not eligible for that level of child care benefit and the overpayment benefited the parent by causing the parent to pay less for child care expenses than the parent otherwise would have been required to pay under

child care assistance program requirements, regardless of whether the overpayment was the result of administrative error, client error, or intentional program violation. Section DWD 12.23 shall apply to overpayment collection from a parent under this section.

SECTION 7. DWD 56.04 (5)(a)2. and DWD 56.04 (5)(a)3. are created to read:

DWD 56.04 (5)(a)2. An overpayment shall include excess child care funds paid when there was a change in family eligibility circumstances that was significant enough that it would have resulted in a smaller child care benefit or ineligibility for a child care benefit due to any reason, including the following:

a. The parent failed to report a change in circumstances that may affect his or her eligibility within 10 days after the change.

b. The parent was absent from an approved activity under s. 49.155 (1m)(a), Stats., without good cause, while the child was in the care of the provider.

DWD 56.04 (5)(a)3. The child care worker shall determine good cause under subd. 2.b. if the approved activity is unsubsidized employment. A parent's absence from unsubsidized employment shall be considered good cause if the parent is using employer-approved sick time, personal time, or vacation time and the child is in care for no more than the hours authorized.

SECTION 8. DWD 56.04 (5) (b) is amended to read:

DWD 56.04 (5) (b) A child care administrative agency shall take all reasonable steps necessary to recoup or recover from a provider any overpayments made for child care services for which the provider was responsible or overpayments caused by administrative error that benefited the provider. A provider shall be responsible for an overpayment if both of the following criteria are satisfied:

1. The overpayment benefited the provider by causing the provider to receive more child care assistance than otherwise would have been paid on the family's behalf under child care assistance program requirements.

2. The overpayment did not benefit the parent by causing the parent to pay less for child care expenses than the family otherwise would have been required to pay under child care assistance program requirements.

SECTION 9. DWD 56.04 (5)(e) is amended to read:

DWD 56.04 (5)(e) If the provider has not repaid an overpayment, the child care administrative agency or department may recover the overpayment by making an offset from current or future funds under its control that are payable to the provider of no more than 50% of each payment.

SECTION 10. DWD 56.04 (5)(f) is amended to read:

DWD 56.04 (5)(f) If the department refuses to issue payment based on a provider's violation of a a requirement in this chapter, the provider may not hold the parent liable for payment other than the copayment and any amount that the parent agreed to above the department's maximum reimbursement rate if the parent relied on an approved authorization for care for his or her child to receive care from the provider.

SECTION 11. 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.

Department of Workforce Development
Proposed Rules Relating to Public Assistance Overpayment Collection
Sections DWD 12.23 and 56.04/CR04-123
Public Hearing Summary

A public hearing was held in Madison on November 29, 2004. Comments were received from the following three people in opposition to the proposed rules:

1. Patricia DeLessio, Attorney at Law (LAW)
Legal Action of Wisconsin, Inc.
Milwaukee
2. Anne L. DeLeo, Attorney at Law (DeLeo)
Wauwatosa
3. Carol W. Medaris, Senior Staff Attorney (WCCF)
Wisconsin Council on Children and Families
Madison

Comment Summary and Department Response

DWD 12.23 Recovery of Overpayments

Definitions, DWD 12.23 (1)

LAW: The definition of administrative error should be re-written as follows: when the worker fails to act upon reported information or enters incorrect information into the computer system that results in a parent receiving a benefit that she would not have otherwise received.

Department response: The Department does not agree that the specific method by which an administrative error may be made should be in the definition. An administrative error means that an agency or the department commits an error in determining benefits given that results in an overpayment.

Overpayment determination and notice, DWD 12.23 (2)

LAW: The notice of overpayment should be written in clear understandable language (no greater than a sixth grade level) in the person's primary language, the notice should

explain how the overpayment occurred, whose fault it was, the evidence relied upon to determine the overpayment, the time period of the overpayment, the amount of the overpayment, how it was calculated and the consequences of establishing the overpayment (collection methods). Appeal information should be clearly stated, the address, fax and telephone number of DHA should be provided, the date by which the appeal must be received by DHA should be stated, and a reference to the legal services offices that can assist in an appeal (similar to the food stamp program) should be included. The consequences of not filing an appeal within the time limits specified should be fully and clearly explained.

Department response: The overpayment notice and worksheet explaining the calculation of the overpayment does already contain most of the information requested in this comment. The notice is in clear, understandable language and is sent in Spanish if that is the recipient's primary language. The notice and worksheet state how the overpayment occurred, the amount due, the dates of the overpayment, and possible collection methods. Appeal information is clearly stated, including the 45-day limit for filing an appeal from the date of the notice. It would take significant resources for the automated system to calculate the deadline, and participants are generally able to count out the 45 days.

A hearing request must be in writing and the address of DHA is provided to submit this request. The notice does not include DHA's fax and phone numbers because DHA does not have the staff to handle a large volume of phone calls on the hearing process. The notice includes the phone number of the local agency, and agencies regularly provide the DHA phone number upon request. The notice states that participants may be able to receive free legal services but does not provide specific references to avoid the need to regularly update notices as this information changes. The food stamp notice referred to provides outdated and incorrect information on legal resources.

LAW: Review for W-2 (§49.148) and transportation assistance (§49.157) overpayments should be before DHA in the first instance. The consequences of establishing overpayments of these benefits is the loss of property-wages, tax refunds, cash assets etc-and, thus, full due process protections must be afforded. The fact-finding process does not offer sufficient due process protections and is not equipped to deal with burden of proof and other issues that may arise. The fact-finding process is often conducted by untrained agency personnel that are not familiar with these protections and not trained to provide such protections.

Department response: DHA review is currently available as a review of a W-2 agency decision. The Department will examine whether the fact-finding process for W-2 should be replaced by a fair hearing process. Eliminating the fact-finding process would require a statutory change.

LAW: The standards for establishing intentional program violations should be the same as those used in the food stamp program. The hearing should be initiated by the agency who has the burden of establishing its case by clear and convincing evidence. See 7 C.F.R. §273.16.

Department response: The proposed definition of intentional program violation does require that an intentional program violation be determined by an administrative hearing, a court finding, a signed waiver of an administrative hearing for an alleged intentional program violation, or a consent agreement in lieu of prosecution based on the same facts or events as the intentional program violation.

Liability, DWD 12.23 (3)

LAW: Liability of parents should be limited to overpayments that are the result of client error. A new section should be added establishing liability against agencies that cause overpayments. Alternatively, parent liability for agency error cases should be limited to those in which it can be shown that the parent was unjustly enriched by the overpayment error.

Department response: The Department will compromise by limiting claims against parents who received an overpayment due to administrative error to 12 months preceding discovery of the error for debts established after the effective date of these rules. Limiting liability to one year before discovery of the overpayment is also the state policy for collection of food stamp overpayments caused by administrative error.

LAW: Liability should be limited to parents, co-parents and stepparents who were 18 years of age or older at the time the overpayment occurred.

Department response: It has been Department policy since July 2000 that liability extends only to members of an assistance group who were adults at the time of the overpayment. The rule language has been amended to include this provision.

LAW: An amendment should be added to this section that limits parents' liability to overpayments established within 30 days of discovery; that limits liability to non-intentional program violation overpayments to the 12 months preceding the discovery of the overpayment (similar to the food stamp program); and that limits liability to overpayments established after the effective date of these rules.

Department response: The Department gives local agencies time guidelines for establishing claims, but these guidelines are to encourage accountability and efficiency not to limit liability.

The commenter is incorrect in stating that the food stamp program limits liability in all nonintentional program violations to the 12 months preceding discovery of the overpayment. The

federal food stamp regulations *require* that states calculate a claim back to at least 12 months prior to when the state became aware of the overpayment but do not *limit* a claim in this manner. In Wisconsin, the food stamp program limits administrative error claims to the 12 months preceding the discovery of the overpayment but does not limit client error in this manner, just as the Department is proposing for future W-2 and child care overpayments.

There is no justification for limiting liability to overpayments established after the effective date of these rules. The primary focus of these rules is implementing administrative warrant and execution and levy procedures for collection of properly established unpaid debts. The current total established receivables that will be subject to the administrative warrant and execution and levy procedures is approximately \$25 million.

Simultaneous collection, DWD 12.23 (4)

LAW & DeLeo: This provision allows DWD to recover an overpayment by any means even if the debtor is voluntarily repaying the amount owed. This is an unduly harsh and punitive provision which will discourage voluntary repayments. The rule should be amended to provide that if the debtor signs a repayment agreement and is making payments pursuant to that agreement, the department cannot collect by other means.

Department response: The proposed rule does allow a debtor to sign a repayment agreement, make payments pursuant to the agreement, and prevent the Department from collecting by any other means. If a debtor fails to keep this agreement 3 times over the life of the debt, the debt is considered delinquent and the Department will then proceed with further collection action.

LAW: The proposed rule provides that the total amount that can be collected may not exceed the amount of the overpayment plus fees and authorized costs associated with collection. Except for the provisions of §49.195 (3m) and (3n) regarding garnishment and seizure of property, there is no statutory provision allowing for recovery of fees and costs. In addition, neither of these terms are defined.

Department response: The Department agrees that the authority to recover fees is limited to the fees associated with the warrant and execution and levy procedures. The rule has been amended to clarify this issue.

Recoupment from current W-2 participants, DWD 12.23 (5)

LAW & DeLeo: There is no statutory authority to recoup overpayments of child care, transportation, WCCF, custodial parent of infants, or AFDC benefits from W-2 work program benefits. The department relies on the Court of Appeal's decision in *Mack v. DHFS* to support this rule. This reliance is misplaced. The issue presented in *Mack* was whether DHFS' policy for establishing and collecting state SSI supplemental payments operated as a

rule that was not properly promulgated. The Court did not hold that DHFS or any other agency can promulgate rules for the collection of overpayments without statutory authorization. A state agency can only promulgate rules that are expressly or fairly implied by state statute. Sections 49.161 and 49.195, Stats., are the methods that the legislature has provided for collection of public assistance overpayments. Providing new means to further reduce W-2 benefit levels is against public policy and devastating for families who must already find the means to sustain themselves at about 50% of the poverty level.

Department response: While the Department does not concede that it lacks authority to promulgate a rule allowing recoupment, the Department has decided to withdraw this proposal. The Department will use methods of collection that are expressly provided for in statute.

In some cases, debtors may be subject to involuntary collection of larger amounts than they would with mandatory recoupment. Mandatory recoupment of a newly-established debt ensures regular payments that prevent the debt from becoming delinquent. If a debtor does not make timely, voluntary payments that prevent the debt from becoming delinquent, the Department's automation system will refer it for collection through set-off against a tax refund, warrant and execution, and levy. The Department will monitor the effects of this decision and may revisit the issue.

WCCF: The Department implies that federal law requires the Department's recovery of AFDC benefits out of W-2 payments even in the absence of state statutory authority, but that is simply not the case.

Department response: The commenter is incorrect. There is no provision on overpayment collection in the federal TANF statute or regulations. The Department does provide citations to the related law that does exist as required by Chapter 227, Stats., but the "summary of related federal law" section of the analysis to the proposed rule clearly states that the primary federal directive on collection law affecting AFDC and TANF overpayments is in a Program Instruction Transmittal issued by the U.S. Department of Health and Human Services, Administration for Children and Families. This program instruction transmittal specifies that the requirement for states to recover all remaining AFDC overpayments remains in place and that AFDC overpayments will be recouped from current TANF benefits if the recipient is still receiving cash assistance or through a cash repayment from former recipients. The Department is not currently recouping AFDC overpayments from W-2 benefits and has withdrawn the rulemaking proposal. Of \$20.4 million in AFDC receivables, approximately \$500,000 is owed by current W-2 participants.

WCCF: The Department argues that authority exists in sec. 49.161 (3) to recoup overpayments of child care, transportation and custodial parent of infants benefits from work program benefits in cases of IPVs in any W-2 programs, but that is an improper reading of that statutory section. Section 49.161(3) by its terms applies only “[i]f an overpayment under sub. (1) or (2)” results from an IPV in any W-2 program set forth in ss. 49.141 to 49.161, Stats.

Department response: Department agrees.

When is a debt delinquent, DWD 12.23 (8)

LAW: This section should be amended to provide that a debt should be considered delinquent if the debtor misses three payments in a row. Alternatively, a debtor should be able to cure a delinquency and forestall other collection methods by resuming payments and making regular payments for at least a six month period.

Department response: The Department does not have the resources to consider a different definition of delinquency. The current definition was built into the CARES automation system when it was developed in the mid-1990s and has been used to determine when debts are referred for tax intercept for years. In addition, the Department’s public assistance collection unit has very few staff and is unable to monitor individual cases as the commenter suggests.

Warrant and execution under s. 49.195 (3m), Stats., DWD 12.23 (9)

LAW: DWD 12.23 (9) (a)5. The notice provided at the time the warrant is issued should be in clear understandable language in the individual’s primary language. It should describe the effect of the warrant and the underlying reason for the warrant’s issuance. The notice should include the information discussed above in response to proposed rule s. DWD 12.23(2)(c). At the time the warrant is issued the individual should be given the opportunity for a hearing on the merits of the claim if she did not have the prior opportunity because she did not receive the notice of overpayment, she did not understand the prior notice because it was not in her primary language, she cannot read or she has comprehension problems due to a learning, cognitive or other disability, she was dissuaded from requesting a hearing by the agency, or for any other good reason as determined at the hearing.

Department response: The notice will be in clear, understandable language and will describe the effect of the issuance of the warrant. The notice will be issued in Spanish where appropriate. DHA does determine whether the debtor had a prior opportunity for a hearing. The criteria listed by the commenter do not necessarily mean there was no prior opportunity for hearing. For example, if a debtor’s allegation that she did not receive notice was sufficient to stop collection, the door would be open for all debtors to claim they did not receive a notice. The Department is required to send the notice to the debtor’s last known address. Documentation that the notice was

properly mailed to the address of the person as it appears on the records of the Department and it was not returned as undeliverable is prima facie evidence that the notice was delivered and received. The Department's public assistance collection unit does not dissuade individuals from requesting a hearing and routinely explains legal rights.

DeLeo: The parent should be able to request a hearing to question the merits of the overpayment at any stage in the collection process, including issuance of a warrant, seizure of the property, and sale of the property.

Department response: It is unreasonable to expect liability to be determined and then relitigated 3 more times, with the relitigation potentially occurring years after liability was already determined. Once liability is determined, further appeals are limited to questions of prior payment that the Department is proceeding against and mistaken identity of the debtor.

LAW: The rule should be amended to provide that property should not be seized if a hearing has been requested.

Department response: The Department does not agree. The commenter's proposal would allow a debtor to request a hearing, regardless of the merits, and hide personal property to prevent seizure. Seizure of property occurs after liability has already been determined. The only issues at this stage are questions of prior payment of the debt and mistaken identity of the debtor. It is unlikely that a hearing will determine that seizure was improper.

WCCF: A debtor who complies with the payment schedule is due by statute the withdrawal of the warrant. Should the debtor later fail to comply with the payment schedule, another warrant may be issued.

Department response: The statute provides that the warrant must be withdrawn "if the Department arranges a payment schedule with the debtor and the debtor complies with the payment schedule." The only payment schedule that the Department "arranges" occurs before a debt is delinquent. The proposed rule defines "complies with the payment schedule" as the Department has received a debtor's payment by the due date every month over the life of the debt. Voluntary payments are accepted at any time but that is not the same thing as "complying with the payment schedule."

LAW: A section should be added to provide that if a payment schedule is arranged and the debtor makes payments in accord with the schedule the warrant should be withdrawn. While the department plans to issue a warrant only in those cases in which the debtor has not entered into a payment agreement given the complicated nature of the overpayment process and the potentially devastating consequences to individuals, debtors should be given a second opportunity to avoid the loss of property.

Department response: A warrant is issued only after a debtor has not complied with the payment schedule and the debt is delinquent. The warrant creates a lien on the debtor's property. A lien does not mean that the property will necessarily be seized. A lien on the property allows the Department to recover the debt if the debtor sells the property and is an incentive to the debtor to make voluntary payments. If the Department withdrew the lien based solely on an agreement to pay, the debtor would be able to sell the property free and clear of the lien and avoid paying the debt. In addition, the Department does not have the staff to repeatedly withdraw and reinstate liens based on delinquent debts, renegotiated payment agreements, and debtors' failure to comply with the renegotiated agreements. There are also costs associated with each warrant action, and these costs are passed onto the debtor.

Levy under s. 49.195 (3n), Stats., DWD 12.23 (10)

LAW: DWD 12.23(10)(b) and (e) - The notice requirements and opportunity for a hearing should be the same as discussed for warrant and execution in s. DWD 12.23 (9).

Department response: The notice will contain the information discussed in the response to the comment regarding s. DWD 12.23 (9). The proposed rule language tracks statutory language in s. 49.195 (3n)(s), Stats., limiting appeal issues to questions of prior payment of the debt that the Department is proceeding against and mistaken identity of the debtor.

Warrant and execution, levy, and tax intercept appeal issues, DWD 12.23 (11)

LAW: A new section should be added limiting recovery by use of set-off against state tax refunds to amounts that do not include the EITC or homestead credit because low income families rely on these benefits for basic necessities.

Department response: Set-off against a refund is a statutory procedure. The Department certifies that a public assistance debt is owed and submits this information to the Department of Revenue. DOR sets off the debt against a debtor's refund. DWD does not know whether a debt is set off against a tax payment or a tax credit, and this issue is not within DWD's rulemaking authority.

Warrant and execution and levy threshold, DWD 12.23 (12)

LAW: DWD12.23 (12) - The rule should be amended to provide that the minimum amount due before collection by warrant and execution or levy is \$1500.

Department response: A comprehensive analysis was done to determine that the appropriate threshold is \$300. A significant amount of debt is under \$500, and the Department has the responsibility to collect the debt. The unemployment insurance program uses similar administrative warrant and execution and levy procedures and has eliminated any threshold because the state has few other cost-effective means to collect a debt.

Waiver, DWD 12.23 (13)

LAW: The waiver provision should be broadened to include a provision similar to the SSI program. Individual debtors should have the opportunity at any point in the process of establishing and collecting the overpayment to submit a waiver request to the agency or department on the grounds that (a) the overpaid individual was without fault in connection with an overpayment and (b) adjustment or recovery of the overpayment would either defeat the purpose of §49.148, §49.155 or §49.157, be against equity and good conscience or impede efficient and effective administration of the affected programs due to the small amount involved. Collection is against equity and good conscience if an individual changed her position for the worse or relinquished a valuable right because of reliance upon a notice that the payment would be made or upon the incorrect payment itself.

Department response: The proposed waiver policy allows the Department to waive recovery of an overpayment if the Department has made reasonable efforts to recover the debt and determines it is no longer cost effective to continue overpayment recovery efforts. The Department must collect debt owed regardless of who made the error or whether an individual relied on receiving an incorrect payment. The suggested criterion of “defeating the purpose of the program” is overly broad and could not be fairly and evenly administered. The Department acknowledges that individuals who owe public assistance debts are often in poverty, but that does not absolve the Department’s responsibility to maintain program integrity.

DWD 56.04 Child care overpayments

LAW & WCCF: DWD 56.04 (5) - In this section regarding recoupments, the phrase “regardless of whether the overpayment was the result of administrative error, client error or intentional program violation” should be eliminated.

Department response: Overpayments must be collected regardless of the reason for the overpayment. The Department proposes to limit liability to 12 months preceding discovery of the error for debts established after the effective date of these rules in cases of administrative error. Limiting liability to one year before discovery of the overpayment is also the state policy for collection of food stamp overpayments caused by administrative error.

- LAW & WCCF: DWD 56.04 (5)(a)1. - This section, defining what constitutes an overpayment, should be clarified and expanded. An overpayment should be defined as a payment to a child care provider on a parent's behalf in an amount greater than the parent was eligible to receive due to the following reasons:
- a. The parent's failure to correctly report income, assets, or household composition.
 - b. The worker's failure to act upon reported information or when the worker enters incorrect information into the computer system (if parents are charged with agency errors).
 - c. The parent is absent from approved activities without good cause while the child was in care and the provider would not have otherwise been paid.

An overpayment should not be determined in the following circumstances:

- a. The provider would have been paid the same amount even if the parent was absent from activities.
- b. The provider was paid on an enrollment basis as determined by the agency and the agency later determines that payment should have been made on an attendance basis.
- c. For the period of time the parent is on vacation, medical leave, using sick or personal time, or laid off from employment if she is expected to return to that employment.
- d. For the first 30 days after the parent loses employment so long as she looks for employment.

Department response: An overpayment is a benefit or payment received in an amount greater than the individual was eligible to receive. It is impracticable for the overpayment section of the rule to repeat eligibility criteria included elsewhere in statute and rule. This is unnecessary and may lead to confusion.

A child care administrative agency determines an overpayment if there was an unreported change in family eligibility circumstances that was significant enough that it would have resulted in a smaller child care benefit paid on behalf of the parent or ineligibility for a child care benefit. Conversely, there would not be an overpayment due to an unreported change that would have resulted in the same child care benefit paid on behalf of the parent.

The commenters suggest that an overpayment should not be determined for the first 30 days after the parent loses employment so long as she looks for employment. The approved activities for subsidized child care are determined by statute and are found at s. 49.155 (1m)(a), Stats. Looking for employment is not an approved activity unless the parent is enrolled in a W-2 employment position. The Department will remind counties to advise newly-unemployed parents that they may be eligible to enroll in a W-2 case management employment position and receive subsidized child care while they search for a new job.

The commenters also suggest that an overpayment should not be determined if the provider was paid on an enrollment basis and the agency later determines payments should have been made on

an attendance basis. The Department does not agree. Current rules allow child care administrative agencies to authorize weekly payments to a licensed child care provider if the parent's schedule and need for child care is expected to be stable and to authorize hourly payments based on attendance if the parent's schedule is expected to vary widely. If there was an authorization for weekly payments based on a parent's schedule that was expected to remain stable but did not, there must be a redetermination of eligibility and authorization for payment. If the eligibility redetermination is not done in a timely manner, there may be an overpayment. In determining whether there was an overpayment the agency will compare what should have been paid to what was paid. It is possible that what should have been paid was an hourly rate based on attendance.

The commenters' other suggestions are already included in statute and current or proposed rules.

LAW: In addition, a child care overpayment may only be determined if the activities the parent was assigned to are clearly stated in an employability plan drafted in accordance with state policy and after appropriate screening and assessment.

Department response: Screening, assessment, and employability plans are done for applicants prior to placement in a W-2 employment position. Eighty percent of parents receiving child care assistance are employed in an unsubsidized job, not in a W-2 employment position, and do not need an employability plan.

WCCF: DWD 56.04(5)(a)1.a. The Department lacks authority to claim an overpayment due to failure to report a change within 10 days. There is no statutory or regulatory provision that authorizes this new requirement or penalty.

Department response: The proposed s. DWD 56.04 (2m) requires an individual to report any change in circumstances that may affect his or her eligibility to the agency within 10 days after the change.

Child care provider overpayments

LAW, DWD 56.04(5)(b)(intro) - Agency error overpayments should be recovered
WCCF, against the agency causing the overpayment not the provider.

and

DeLeo:

Department response: The Department will study methods for increasing agency accountability and will consider incorporating these methods into the county contracts. One issue with the commenter's suggestion is that the provider likely received a financial benefit from the overpayment while the agency did not.

LAW & WCCF: DWD 56.04 (5)(e) - There is no statutory authority that allows the Department to recover overpayments from current payments owed providers. Withholding payments that providers count on to maintain services may force providers to close.

Department response: The legislature has already approved the Department's authority to set-off excess funds paid to a provider from payments due to the provider in approving the existing s. DWD 56.04 (5)(e). The proposed rule merely sets a limit of 50% percent that the Department will set-off from a particular payment.

The payment to the provider is for services provided as a business and is not a governmental benefit to the provider. Set-off is a well-established legal concept. The fact that the excess payment occurs as compensation for providing child care for families who receive subsidies under s. 49.155, Stats., is not significant.

The Department has been setting-off debts owed by the provider against Department payments to the provider for years with no indication that any provider has been forced out of business.

DeLeo: The child care overpayment rules must be put in the context of recent developments in welfare reform and its effect on the child care market. Low-income parents of very young children are required to work full-time to support their children. Subsidized child care is an essential element of becoming and staying employed. In Milwaukee's central city the number of child care providers has grown exponentially and fees charged by subsidized providers have increased far beyond the rate of inflation. According to a study by the UWM Employment and Training Institute dated May 2002, the highest rates of child care are found in the central city of Milwaukee. In this inflated market, child care rates often will equal or exceed half the parent's gross earnings for one child and will exceed a parent's total earnings if there are two or more children. A child care overpayment is a huge financial burden on a low-income parent and is particularly unfair if the child care agency made a mistake.

Department response: The Department agrees that the current rate-setting method has resulted in higher rates being charged by providers who care for subsidized children. The Department attempted to address this issue in March 2003 by excluding from the rate-setting survey providers at which more than 75% of the children's care is subsidized. The problem of providers who care for subsidized children charging higher rates persists, and the Department is reviewing options for changing the manner in which payment amounts are determined.

The Department acknowledges that child care overpayments can be a large financial burden for parents. The Department attempts to treat parents fairly while maintaining program integrity and spending funds in compliance with federal and state law and the terms of federal grants. The Department proposes to limit liability for child care payments caused by administrative error to one year prior to discovery to cap unreasonably high overpayment claims in cases of administrative error.





WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

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 04-123

AN ORDER to renumber and amend DWD 56.04 (5) (b); to amend DWD 56.04 (5) (a), (e) and (f); to renumber and amend DWD 56.04 (5) (b); to repeal and recreate DWD 12.23; and to create DWD 56.04 (5) (a) 1. (intro.), a. and b. and 2. and (b) 1. and 2, relating to public assistance overpayment collection and affecting small businesses.

Submitted by **DEPARTMENT OF WORKFORCE DEVELOPMENT**

10-29-2004 RECEIVED BY LEGISLATIVE COUNCIL.

11-22-2004 REPORT SENT TO AGENCY.

RS:AS

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



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 04-123

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 October 2002.]

2. Form, Style and Placement in Administrative Code

a. Section DWD 12.23 (8) appears to define the term "delinquent" for at least the purposes of that subsection and for sub. (9). The term should be defined in sub. (1).

b. In s. DWD 56.04 (5) (a), the introductory material does not grammatically lead into the following subdivisions. Consequently, the introductory material should be renumbered as subdivision 1. and the remaining subdivisions should be renumbered accordingly.

4. Adequacy of References to Related Statutes, Rules and Forms

a. In s. DWD 12.23 (1) (a) and (b), "ss." should be replaced with "s."

b. In s. DWD 12.23 (5) (a) 3., a period and comma should be inserted after "Stats."

c. In s. DWD 12.23 (9) (a) 4., a period should be inserted after "subd. 2."

d. In s. DWD 12.23 (9) (a) 5., a period should be inserted after the first instance of "Stats."

e. In s. DWD 12.23 (10) (g) 3., a period should be inserted following "subd. 1."

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

a. In the sixth paragraph of the summary of the rule, it appears that the word "be" in the second sentence should be replaced by the word "by."

- b. In s. DWD 12.23 (1), the introduction should simply state, "In this section:".
- c. In s. DWD 12.23 (1), several of the definitions for nouns define a verb. Paragraphs (a), (b), (e) and (f) should be reviewed for use of consistent terminology.
- d. In s. DWD 12.23 (1) (c), "notice of" should be inserted before "the right of appeal."
- e. In s. DWD 12.23 (2) (b), "that" should be inserted before "it was not returned as undeliverable."
- f. In s. DWD 12.23 (3) (b), it appears that "recovery" in the first sentence should be deleted.
- g. In s. DWD 12.23 (4) (a), it appears that the intent of this provision is that more than one method of collection may be used at the same time. This should be clarified. The comment also applies to sub. (8).
- h. In s. DWD 12.23 (5) (b) (intro.), is the intent to withhold the listed amounts from each benefit payment?
- i. Section DWD 12.23 (5) (a) 1. and 3. and (6) make use of the term "liable person." Subsection (5) (a) 2. also makes use of the term "W-2 participant." It appears in all of these instances that the defined term "debtor" should be used. The entire rule should be reviewed for the consistent use of this term.
- j. In s. DWD 12.23 (6), "The value of the benefit liable for recovery under this subsection may not exceed" should be replaced with "The W-2 agency may not recover more than...under this subsection." Also, "with respect to" should be replaced with "for" or "to."
- k. In s. DWD 12.23 (9) (a) 2., "mentioned" should be replaced with "named."
- l. In s. DWD 12.23 (9) (a) 5., in the last sentence, "shall" should be replaced with "may."
- m. In s. DWD 12.23 (9) (b) 2. and 3., it is not clear how opportunities for hearings may be afforded once the sheriff is commanded to execute the warrant. Also in subd. 2., in the last sentence, "shall" should be replaced with "may."
- n. In s. DWD 12.23 (10) (f) 1. b., it is unclear what the "pay period" is. In s. 49.195 (3n) (q) 1. b., Stats., calculation of earnings for a period other than a week is addressed. This language should be included in the rule as well.
- o. In s. DWD 12.23 (10) (g) 1., "in respect to" should be replaced with "for."
- p. In s. DWD 56.04 (5) (e), it appears that "per" should be replaced with "of each."