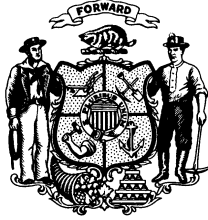


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CLEARINGHOUSE RULE 97-054

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 1994.]

1. Statutory Authority

a. Section DWD 12.09 (2) (n) provides that participation in the Job Opportunities and Basic Skills (JOBS) program begins to count towards the 60-month Wisconsin Works (W-2) time limit as of October 1, 1996. However, s. 49.145 (2) (n), Stats., provides that this participation begins to count on July 1, 1996. Under what authority does the rule propose to delay the statutory date upon which the 60-month time limit commences for JOBS participants?

b. Section DWD 12.09 (3) (b) 2. d. provides that the income and assets of the sponsor and his or her spouse are included in the income of an alien who applies for W-2. Under what statutory authority is someone else’s income deemed to an alien applicant?

c. Section 49.147 (3) (b), Stats., requires the trial job employer to provide worker’s compensation coverage for the trial job participant. Section DWD 12.14 (1) (c) requires the provision of worker’s compensation to the same extent as unsubsidized employees. To the extent that certain employees and employers may be exempt from providing worker’s compensation coverage under current state and federal Worker’s Compensation Law, the rule would be inconsistent with the explicit requirement of s. 49.147 (3) (b), Stats. Accordingly, the provision and the worker’s compensation coverage of trial job participants should be reviewed.

d. Sections DWD 12.16 (3) (c) 2. and (4) (e) 2. authorize a W-2 agency to “aggregate” education and training activity hours in certain situations for community service job and transitional placement participants. However, except for motivational training, the statutes authorize no more than 10 hours per week of education and training activities for community

service job participants and no more than 12 hours per week of education and training activities for transitional placement participants. [See s. 49.147 (4) (as) and (5) (bs), Stats., respectively.] Under what statutory authority may a participant's education and training hours be aggregated?

e. Section 49.147 (6) (b) 3., Stats., requires that the rules relating to job access loans must provide for repayment by performance of in-kind services. Section DWD 12.17 (3) (d) 1. a. provides for repayment of a job access loan through in-kind services, but only in part. A literal reading of the statutory requirement for rules providing for repayment through in-kind services would lead to the conclusion that full repayment should be available through in-kind services. Is there statutory authority for the rule's provision for only allowing partial repayment through in-kind services?

f. Section 49.148, Stats., provides that participants in the various W-2 work components shall receive certain benefits. Under what statutory authority does the rule authorize vendor or protective payments in s. DWD 12.19 (2) (b)?

g. Section DWD 12.22 (3) is confusing. Section 49.21 (1), Stats., relates to fair hearing petitions filed under the Aid to Families with Dependent Children (AFDC) program. It does not apply to the W-2 program. It is not at all clear why a W-2 agency, which is not authorized to administer AFDC, would be receiving a petition for a fair hearing under that program. Is it the rule's intent to change the fair hearing process under AFDC? If so, under what authority is such a change made? If, in the alternative, the rule is imposing a fair hearing process on the W-2 program, the authority for such a change should be carefully reviewed.

The review process for W-2 is specified in s. 49.152, Stats., and appears to be replicated in s. DWD 12.22 (1) and (2). The fair hearing process contemplated under s. 49.21, Stats., though similar to the review process under W-2, generally prohibits AFDC benefits from being suspended or otherwise modified pending the resolution of a timely fair hearing petition. The W-2 review process contains no such provision. Is the rule imposing this requirement on the W-2 program? Section DWD 12.22 (3) should be reviewed and clarified, and its statutory authority better identified. In addition, s. DWD 12.25 (10) (c) appears to provide that a learnfare sanction, i.e., a reduction in a W-2 benefit, may not take place, if the participant requests a review, until after the review has been completed. Is this the rule's intent? It does not appear to be consistent with s. 49.152, Stats.

h. Generally, in Wisconsin, conduct punishable by a fine is classified as a crime. [See s. 939.12, Stats.] Section DWD 12.25 (9) (b) authorizes the imposition of a fine as a learnfare sanction. Under what statutory authority does the rule purport to impose a criminal penalty for a sanction under learnfare?

2. Form, Style and Placement in Administrative Code

a. Because the rule renumbers ch. HSS 215 as ch. DWD 15, the relating clause of the rule should reflect that renumbering.

b. The treatment of portions of ch. DWD 15 should follow the creation of ch. DWD 12. In addition, the renumbering of ch. HSS 215 should follow all of the rules with a DWD prefix. [s. 1.04 (1), Manual.]

c. Current law requires rules submitted to the Legislative Council Staff to include a fiscal estimate. [See ss. 227.14 (4) and 227.15 (1), Stats.] The rule does not.

d. In the treatment clause of SECTION 2, “to read” should replace “as follows.”

e. Because the term “W-2 agency” is used throughout the rule interchangeably with “Wisconsin works agency,” the definition in s. DWD 12.03 (38) should also include the phrase “or “W-2 agency””. Also, where the defined term is used in the last sentence, it should appear in quotation marks.

f. In s. DWD 12.05 (intro.), the phrase “do all of the following” should be inserted before the colon.

g. In s. DWD 12.09 (2) (n) 2. (intro.), the phrase “any of the following:” should immediately precede the colon.

h. In s. DWD 12.09 (2) (n) 3., the reference to “paragraph” should, it appears, be changed to “subdivision.” Also, should the phrase “no less than the” be inserted before the term “minimum wage”?

i. Section DWD 12.16 (1) (a) 2. provides that certain activities may be considered satisfactory search efforts for unsubsidized employment. The list of activities does not appear to be exhaustive and appears to leave considerable discretion to the financial and employment planner (FEP) to determine other activities that may be considered satisfactory search efforts. However, it is noted that s. 49.147 (2) (a) 1., Stats., requires the department to define by rule satisfactory search efforts. Accordingly, because the department is charged with defining what constitutes satisfactory search efforts, the rule should be modified to make it clear that the list of satisfactory search efforts provided is exhaustive.

j. Section 49.147 (2) (a) 2., Stats., authorizes W-2 agencies to require participants to engage in training activities in accordance with rules promulgated by the department. It would appear that s. DWD 12.16 (1) (a) 4. authorizes the same thing. However, the rule does not provide the guidance on training activity participation required by the statutes. The mere reference to the activities in the employability plan only begs the question. How is it that the W-2 agency, or the FEP, determines the participation in the training activities? This guidance is required to be provided by rule.

k. Section 49.147 (4) (am), Stats., requires the department to establish by rule permissible education and training for community service job participants. The statute sets forth certain types of education and training that must qualify as permissible. Since it appears that s. DWD 12.16 (3) (b) is promulgated pursuant to that statutory directive, the phrase “only the following” should be inserted immediately before the colon in the (intro.).

l. In s. DWD 12.16 (4) (d) 2. (intro.), the word “only” should be inserted after the word “include.”

m. Section DWD 12.19 (2) redefines “protective payment” and “vendor payment.” Those terms are also defined in s. DWD 12.03. They need not be defined in both places since the definitions are the same.

n. Section DWD 12.21 (1) (c) authorizes an FEP to determine other behavior or action that demonstrates a refusal to participate in a W-2 employment position. Section 49.151 (1) (e), Stats., however, provides that the department, by rule, is supposed to specify this other behavior or action demonstrating a refusal to participate. The rule does not appear to do this. Accordingly, the rule should be modified to specify the other behavior or action that would demonstrate a refusal to participate. In addition, par. (c) is incorrectly drafted as an incomplete sentence; it appears that it should instead be numbered par. (b) 6.

o. Section DWD 12.25 (4) (b) (intro.) indicates that the material in the following subdivisions constitute a failure to meet the school attendance requirements. However, subs. 3., 4. and 5. appear to be exceptions or special conditions applicable to the school attendance requirements. Accordingly, those subdivisions should be moved to separate paragraphs under sub. (4).

p. In s. DWD 12.25 (7) (a) 2. (intro.), the phrase “all of the following conditions exist” should be inserted immediately before the colon.

q. In s. DWD 12.25 (7) (a) 8. (intro.), the phrase “any of the following conditions exist” should be inserted immediately before the colon.

r. How will additional “good cause criteria” be defined by the department in the review process as provided for in s. DWD 12.25 (7) (b)? Will this be done by rule? Is the rule’s intent to allow the department to determine, on a case-by-case basis, other good cause criteria? If so, will those determinations be binding on the department in future cases? By providing that the department will “define” other good cause criteria, it appears that the subsequent definitions are intended to be binding on other cases. Is this the rule’s intent?

s. Section DWD 12.25 (9) (b) and (10) (d), relating to the duration of a sanction, appear to conflict. Subsection (9) (b) seems to allow the sanction to end when good cause is verified. Subsection (10) (d) does not appear to do so.

t. In s. DWD 12.25 (10) (a), the phrase “all of the following” should be inserted immediately before the colon. In addition, the term “agency” should be modified to refer to a W-2 agency.

u. What is the effective date for the rule? The effective date should be specified. [See s. 1.02 (4), Manual.]

3. Conflict With or Duplication of Existing Rules

The rule renumbers ch. HSS 215 to be ch. DWD 15. There are current cross-references to provisions of ch. HSS 215 that should be amended to reflect this change. For example, see ss. HSS 108.03 (4) and 201.18 (2).

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

a. The reference in s. DWD 15.03 (1) (d) to s. 765.62, Stats., should, it appears, be to s. 767.62, Stats.

b. Section DWD 12.04 (2) requires the department to determine the geographical areas in which a W-2 agency will administer W-2. Because applicants for W-2 must apply with the W-2 agency in the geographical area in which they live, the rule should, at a minimum, indicate in a note how persons can obtain a listing or other information on how to determine the geographical area in which they live.

c. Section DWD 12.04 (6) requires FEPs to meet certain certification and training requirements established by the department. Section 49.143 (2) (c), Stats., requires these certification and training requirements to be established by rule. This rule does not appear to do so. Nevertheless, the rule should contain an adequate cross-reference to the rule provision in which those requirements are set forth so that prospective FEPs will know the requirements they can be expected to meet.

d. Section DWD 12.05 (1) refers to “related program procedures.” What are these? Where can they be located? The rule should identify better what these procedures are and where they are located, perhaps through a cross-reference to the appropriate rule. However, if these related procedures are not rules, they should, at a minimum, be better identified in a note to the rule.

e. In s. DWD 12.09 (2) (c), the appropriate U.S. Code citation for the Immigration and Nationality Act should be provided. [See s. 1.07 (3) (a), Manual.]

f. Section DWD 12.09 (2) (f) authorizes a W-2 agency to request relevant information that the W-2 agency determines is necessary from an individual applying for W-2. Section 49.145 (2) (g), Stats., provides that the determination of what is necessary must be consistent with rules promulgated by the department. Thus, the rule should contain an appropriate cross-reference to those rules required by s. 49.145 (2) (g), Stats., to assist W-2 agencies to determine which information is necessary.

g. In s. DWD 12.09 (2) (intro.) and (3) (intro.), the rule provides that a person is eligible for W-2 benefits only if he or she meets certain enumerated requirements. Conspicuous by its absence, however, is any reference to s. 49.141 (4), Stats., which provides that no person is entitled to W-2 benefits or services even if the person meets the eligibility criteria. Since a rule generally implements, makes or interprets law which the agency is charged with administering, the department may wish to consider making the rule clear that the same limitation applies with respect to the entitlement nature of the benefit.

h. Section DWD 12.14 (intro.) refers to sub. (3). There is no sub. (3) in s. DWD 12.14. In addition, the (intro.) is incorrectly drafted as introductory material since it does not end with a colon and lead into subs. (1) and (2). [s. 1.03 (8), Manual.] Therefore, the (intro.) should be sub. (1) and subs. (1) and (2) should be subs. (2) and (3).

i. Section DWD 12.17 (1) (c) refers to the overpayment of any grants and wages “under this section.” The “section” relates primarily to job access loans and not grants and wages. A more appropriate cross-reference should be provided.

j. In s. DWD 12.19 (1) (c), “Wisconsin works” should be deleted since “participant” is defined.

k. In s. DWD 12.21 (1) (b) 3., is the “good cause” determined under s. DWD 12.20? If so, an appropriate cross-reference should be provided.

l. Section DWD 12.22 (1) refers to applications for W-2 under s. 49.147 (1) to (5), Stats. This provision should also contain an appropriate cross-reference to the rule provision governing applications for W-2.

m. Section DWD 12.22 (2) (a) 2. refers to good cause under s. DWD 12.22. It appears that the appropriate cross-reference should be to s. DWD 12.20.

n. Section DWD 12.24 (4) relates to eligibility under s. 49.145, Stats. A similar cross-reference should be provided for that statutory section’s rule counterpart. Also, the provision should be clarified to provide that the eligibility being referred to is eligibility for W-2.

o. Section DWD 12.25 (1) refers to s. 49.26 (1) (h) 1. as. and 1m. c., Stats., as its authority to promulgate rules for learnfare. Those statutory provisions appear to provide authority for rules relating to good cause. In addition, s. 49.26 (1) (h) 1s. a., Stats., requires rules for determining sanctions under learnfare. The rule’s references to its authority for the promulgation of the rules should be clarified.

p. In s. DWD 12.25 (5) (f), it would be helpful to identify by appropriate cross-reference where the “appropriate co-payment” is found in the administrative code, statutes or other source. In addition, is the copayment for transportation or the child care? If it is for the transportation, the statutory authority for requiring a copayment should be better identified. If it is not for transportation, the rule should be clarified accordingly.

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

a. The definition in s. DWD 12.03 (3) is awkward. It is suggested that the beginning of the definition be rewritten as follows: ““CARES” means the department’s automated client assistance for re-employment and economic support system” In addition, generally, definitions should not contain substantive provisions. Thus, the material beginning with the word “which” and ending with the period should be deleted. [See s. 1.01 (7), Manual.] If this material is important in further describing the defined term, it could be included in a note to the rule.

b. There appears to be some inconsistency between the definitions of community service jobs, transitional placements and trial jobs, which are described as “work components of” W-2, and the term “component of Wisconsin works” as defined in s. DWD 12.03 (7). Perhaps the rule should define “work component of Wisconsin works” instead of just “component of Wisconsin works.”

c. In s. DWD 12.03 (15), it is not clear what is a “similar agency or business” to the division of vocational rehabilitation. Can examples be given? Would an individual physician qualify? Also see s. DWD 12.16 (4) (a) 2.

d. In s. DWD 12.03 (30), the term “payee” is vague and adds little understanding to the rule. Perhaps that term could be replaced by the phrase “person or entity other than the participant.”

e. In s. DWD 12.04 (1), what are the “contracted administrative agencies”? Are these W-2 agencies? If so, consistent terminology should be employed when referring to these agencies.

f. In s. DWD 12.05 (10), W-2 agencies are required to refer eligible individuals for child care assistance. Under s. 49.143 (2) (em), Stats., W-2 agencies must also determine eligibility for child care assistance. The rule should be made consistent with the statute. In addition, while it is probably intended to be implicit in the rule, s. DWD 12.05, which relates to duties of W-2 agencies, does not explicitly require, or identify as a duty of a W-2 agency, the hiring of FEPs and the determination of eligibility for and payment of W-2 benefits. Is this omission intended?

g. In s. DWD 12.06 (3), what does it mean for someone to be “acting responsibly for the applicant”? Is this different than the “legal guardian or authorized representative” referred to earlier in the sentence?

h. In s. DWD 12.07 (1) and (2), the term “W-2” should be inserted immediately before the word “agency” in the last sentence.

i. In s. DWD 12.07 (3), because a representative of the individual may also review the individual’s case record, the phrase “his or her” after “review” in the first sentence should be changed to “the individual’s.” Also, the use of the term “agency” should be modified by the term “W-2.” The word “seeing” should be changed to “reviewing.” Finally, is the W-2 agency supposed to make a determination of whether the reason stated for the review requires the full record so that the effect is that the W-2 agency can decide how much to disclose? Or, in the alternative, is the intent to allow an individual to request only a review of part of his or her record and thus the W-2 agency would not need to disclose the entire record? The W-2 agency’s responsibility in this regard should be clarified.

j. In s. DWD 12.09 (2) (s), what information constitutes “eligibility information” relating to other members of the W-2 group? The rule should attempt to identify this information better.

k. In s. DWD 12.09 (3) (b) 2. d., it is not clear how assets can be used to calculate income.

l. Although the theory behind s. DWD 12.10 is contemplated by the statutes in that an eligible individual must be a custodial parent, it seems that the section is drafted in such a way as to unnecessarily complicate the matter. There is no requirement in the statutes or the rule which requires a child to be “under the care of a custodial parent.” Thus, without further explanation, sub. (1) seems to be surplusage. Also, is sub. (2) intended to render ineligible a custodial parent who fails to notify a W-2 agency of the absence of one dependent child even if there are more in the home?

m. Section DWD 12.11 (2) contains two substantive provisions. The clarity of the rule would be enhanced if the second sentence were separated into a sub. (3). In addition, that sentence should be rewritten in a manner substantially as follows: “No individual is eligible for W-2 if he or she fails, without good cause, to provide verification of the individual’s eligibility.” Good cause could then be defined to identify better the phrase “power to produce verification.”

n. The phrase “do all of the following” should be inserted immediately before the colon in s. DWD 12.14 (1) (intro.) and (2) (intro.).

o. For purposes of clarity, the phrase “of the employer” should be inserted in s. DWD 12.14 (1) (c) and (e) and (2) (b), after the word “employees.”

p. In s. DWD 12.14 (2) (b), the term “barriers” is vague. It appears that the term could be clarified by inserting immediately thereafter the phrase “to unsubsidized employment.”

q. It would seem that the nature of an “initial assessment” required by s. DWD 12.15 (1) would make it inapplicable to participants. At what point does the initial assessment take place? Have participants not already gone through an initial assessment? Perhaps the provision could be modified so as to provide that the initial assessment either takes place at the time of application, or after the application has been accepted but before placement in a work component of W-2, whichever is consistent with the department’s intent.

r. The phrase “required activities” in s. DWD 12.15 (2) should be clarified.

s. In s. DWD 12.16 (3) (c) 2., should “month” replace “months”? If not, how many months constitute “the first months”? Also see sub. (4) (e) 2.

t. In s. DWD 12.16 (4) (b) 2. b., who is included in the term “mental health professional”? Who is included in the term “health professional”?

u. In s. DWD 12.17 (2) (c), how is the applicant supposed to determine the maximum level of cash repayment and shortest repayment period that the W-2 agency determines is feasible? Would it not be more expeditious simply to have the W-2 agency propose an appropriate repayment schedule and require the participant to accept it? In any event, the practical application of this provision should be reviewed.

v. In s. DWD 12.17 (4) (a) 4., what is an “adult supervised independent living arrangement”? Section 49.147 (6) (d) 1., Stats., requires the department to define that term. The rule does not. Accordingly, the rule should be amended to provide a definition of that term or, in the alternative, provide a cross-reference to a provision of the statutes or administrative code in which that term is defined.

w. Section DWD 12.20 (1) appears to be redundant. Are there required court appearances that do not constitute good cause? If not, why is only one type of court appearance listed?

x. In s. DWD 12.20 (2), the word “in” should be inserted after the word “participate.”

y. In s. DWD 12.20 (3), the phrase “but only” is unnecessary and should be deleted.

z. In s. DWD 12.23 (1), the third sentence should be modified so that the phrase “who received overpayments” is inserted after the term “trial job.” A similar change should also be made in sub. (2) (c). In addition, both subs. (1) and (2) should be clarified to identify better the entity to whom the former participant is referred in the event of a refusal to pay voluntarily.

aa. Section DWD 12.24 (1) should be clarified by inserting the phrase “for W-2,” or a similar phrase, after the first occurrence of the word “eligible” in the first sentence.

ab. Section DWD 12.25 (2) (a) refers to “county, tribal, and W-2 agencies.” What county and tribal agencies are being referred to? The rule should be clarified.

ac. Section DWD 12.25 (3) (j) 1. to 4. are redundant because s. 49.26 (1) (a) 2., Stats., provides the same definition of “school.” Once that definition has been identified in the (intro.), there is no need to repeat it. Similarly, in s. DWD 12.25 (3) (k), all the material beginning with “namely” is redundant and should be deleted because the reference to s. 118.16 (1) (b), Stats., adequately defines the term. In both instances, the redundant material could be placed in a note if it is considered essential.

ad. In s. DWD 12.25 (3) (m), “is either” should be inserted before “a parent.”

ae. The last clause of the second sentence of s. DWD 12.25 (4) (c) should be rewritten to make it clear that the W-2 participant loses eligibility for a W-2 employment position since the participant has already been determined eligible for an employment position.

af. Section DWD 12.25 (6) (b) is awkward. Perhaps it could be rewritten in substantially the following form: “The signature of an applicant on an application for W-2 benefits shall constitute consent under s. 118.125 (2), Stats., for a school district to make available the attendance records of a pupil in a W-2 group to the W-2 agency.”

ag. In s. DWD 12.25 (7) (a) 2. c. and 3., the term “physician’s excuse” is vague. What is the excuse for?

ah. In s. DWD 12.25 (7) (a) 4., from what must the child care be “within reasonable travel time and distance”? A school? The pupil’s home? The W-2 agency? Public transportation? The rule should be clarified.

ai. In s. DWD 12.25 (7) (a) 9. a., by the use of the phrase “or other dependent relative,” it appears that the preteen or teenager’s parent must be a dependent of the preteen or teenager. Is this the rule’s intent?

aj. In s. DWD 12.25 (9) (b), it appears that the word “until” should be inserted after the word “or” and before the phrase “a good cause.”

ak. Is the per-child sanction identified in s. DWD 12.25 (10) (a) 1. applicable only to the children who have not met the school attendance requirement? The rule should be clarified.

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

a. The rule, in s. DWD 12.14 (1) (f) and (2) (d), requires trial job, community service job and transitional placement employers to provide a grievance procedure to deal with complaints of displacement activities. It is noted that P.L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, requires a state with a Temporary Assistance

to Needy Families-funded program to establish and maintain a grievance procedure for resolving complaints regarding alleged violations of displacement prohibitions. The rule, in contrast, requires an employer established and maintained grievance procedure. The rule does not appear to meet the federal directive. The rule should be reviewed and modified, if necessary, to ensure that it does.