

Clearinghouse Rule 06-138

State of Wisconsin

Department of Workforce Development
Equal Rights Division

Notice to Home Care Consumers and Workers
DWD 277.19

The Wisconsin Department of Workforce Development proposes an order to create s. DWD 277.19, relating to notice to home care consumers and workers and affecting small businesses.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 105.115 (5), Stats., as created by 2005 Wisconsin Act 197, and 227.11 (2) (a), Stats.

Statutes interpreted: Section 105.115, Stats., as created by 2005 Wisconsin Act 197

Explanation of agency authority. Section 105.115, as created by 2005 Wisconsin Act 197, requires a home care placement agency that places a home care worker in the residence of a home care consumer to provide the following notices:

- Notice to the home care consumer of the consumer's duties, responsibilities, and liabilities with respect to the home care worker, unless the worker is temporarily substituting for the consumer's regular home care worker.
- Notice to the home care worker stating the worker's employment status, specifically, whether the worker is an employee of the home care placement agency, an employee of the home care consumer, or an independent contractor.

Section 105.115, Stats., specifies additional information that must be included in each of the notices and requires that the notices be on forms prescribed by the Department. Among other things, the notice to the home care consumer must contain a statement acknowledging that the home care consumer has received and understands the notice and a line for the home care consumer's signature located immediately below that statement. The home care placement agency must give the home care consumer one copy of the notice signed by the home care consumer and retain one copy in its files. Among other things, the notice to the home care worker must contain a statement acknowledging that the home care worker has received and understands the notice and a line for the home care worker's signature located immediately below that statement. The home care

placement agency must also give the home care worker one copy of the notice signed by the home care worker and retain one copy in its files.

Section 105.115 (4), Stats., allows a home care consumer or worker who is not provided with a required notice to either file a complaint with the Department or commence an action in circuit court to recover specified incurred liabilities and damages from the home care placement agency. The complaint must be filed with the Department or the action commenced in circuit court no later than 3 years after the date on which the home care placement agency was required to provide the notice.

If the consumer or worker files a complaint with the Department and the home care placement agency does not pay the amount determined by the Department within 30 days after demand by the Department, the Department may commence an action in circuit court to recover that amount, and the circuit court may order the home care placement agency to pay to the consumer or worker that amount, plus an additional amount equal to 50% of that amount, together with costs and reasonable attorney fees.

Summary of the proposed rules. The proposed rules provide that the home care placement agency must have in its files a copy of the required notice to the home care consumer signed by the consumer and the required notice to the home care worker signed by the worker before the agency refers a home care worker to a home care consumer. “Refer” is defined as to bring to the attention of a potential home care consumer the qualifications of a potential home care worker.

Section 105.115 (2) (intro.), Stats., provides that the agency is not required to provide the notice to the home care consumer when placing a home care worker who is temporarily substituting for the regular home care worker of a home care consumer. The proposed rules define “temporarily substituting” as no more than 2 weeks per incident.

A home care placement agency shall retain the required notices at least 4 years from the date that the home care agency referred the home care worker to the consumer if the home care worker and home care consumer enter into an employment agreement or contract for services.

A “home care placement agency” means a person that is engaged in placing home care workers in the temporary or permanent residences of home care consumers for the purpose of providing home care services to those home care consumers, including an employment agent engaged in the business specified in s. 105.01 (1) (intro.) or a person specified in s. 105.01 (1) (f) whose fees or charges are paid entirely by a home care consumer. “Home care placement agency” does not include a person that places home care workers in the residences of home care consumers for the purpose of providing home care services to those home care consumers if the person employs the individuals and pays wages or salaries, federal social security taxes, and state and federal unemployment contributions or taxes; carries worker’s compensation insurance as required by state law; and maintains liability insurance covering the acts of its employees while providing home care services.

Summary of factual data and analytical methodologies. The proposed rule requires that the home care placement agency provide the required notices and have the

signed copies in its files before the placement agency refers the worker to the consumer because the agency refers potential workers to a potential home care consumer for an interview, but is not generally involved further. The home care consumer and home care worker would not likely have incentive to return the signed notice to the agency after the referral has occurred. The home care placement agency must retain copies of the notices for 4 years to ensure proper record retention until after the 3-year statute of limitations has passed.

Comparison with federal law. There is no comparable federal law on the issues in the proposed rule.

Comparison with adjacent states. Illinois. Before January 1, 2008, the Illinois Department of Public Health must adopt standards for the licensure and operation of home services agencies operated in the state. "Home services agency" is defined as an agency that provides services directly, or acts as a placement agency, for the purpose of placing individuals as workers providing home services for consumers in their personal residences, except agencies licensed under specified other laws or services provided through specified government programs.

As one of the requirements for licensure, a home services agency must provide notification, in a form and manner established by the Department of Public Health by rule, to home services workers and consumers as to the party or parties responsible under state and federal laws for payment of employment taxes, Social Security taxes, and workers' compensation, liability, the day-to-day supervision of workers, and the hiring, firing, and discipline of workers with the placement arrangement for home services.

The department is not aware of comparable requirements in other adjacent states.

Effect on small business. The proposed rule may affect small businesses. The rule is designed to assist home care placement agencies in fulfilling their statutory obligation to have signed copies of the required notices in their files and to retain the notices long enough that they are available as a defense to a complaint or action in circuit court filed alleging a violation of s. 105.115, Stats. The DWD Small Business Regulatory Coordinator is Jennifer Jirschele, (608) 266-1023, jennifer.jirschele@dwd.state.wi.us.

Agency contact person. Bob Anderson, Labor Standards Bureau Director, Equal Rights Division, Dept. of Workforce Development, bob.anderson@dwd.state.wi.us, (608) 266-3345.

Place where comments are to be submitted and deadline for submission. Comments may be submitted to Elaine Pridgen, Office of Legal Counsel, Dept. of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946 or elaine.pridgen@dwd.state.wi.us. The comment deadline is January 25, 2007.

SECTION 1. DWD 277.19 is created to read:

DWD 277.19 Notice to home care consumers and workers. (1) DEFINITIONS.

In this section:

(a) “Home care consumer” or “consumer” has the meaning given in s. 105.115 (1)

(b), Stats.

Note: Section 105.115 (1) (b), Stats., provides that “home care consumer” means “a person who receives home care services in his or her temporary or permanent residence from a home care worker.”

(b) “Home care placement agency” means a person that is engaged in placing home care workers in the temporary or permanent residences of home care consumers for the purpose of providing home care services to those home care consumers, including an employment agent engaged in the business specified in s. 105.01 (1) (intro.), Stats., or a person specified in s. 105.01 (1) (f), Stats., whose fees or charges are paid entirely by a home care consumer. “Home care placement agency” does not include a person that places home care workers in the residences of home care consumers for the purpose of providing home care services to those home care consumers if the person employs the individuals and pays wages or salaries, federal social security taxes, and state and federal unemployment contributions or taxes; carries worker’s compensation insurance as required by state law; and maintains liability insurance covering the acts of its employees while providing home care services.

(c) “Home care worker” has the meaning given in s. 105.115 (1) (e), Stats.

Note: Section 105.115 (1) (e), Stats., provides that “home care worker” means “a person who provides home care services to a home care consumer in the temporary or permanent residence of the home care consumer.”

(d) “Refer” means to bring to the attention of a potential home care consumer the qualifications of a potential home care worker.

(2) NOTICE TO HOME CARE CONSUMER. (a) A home care placement agency shall have in its files a copy of the notice required under s. 105.115 (2), Stats., signed by a home care consumer, before the home care placement agency refers a home care worker to the consumer.

Note: Section 105.115 (2) (intro.), Stats., provides that the notice shall be on a form prescribed by the department. A copy of the required form is available by contacting the Equal Rights Division, 201 East Washington Avenue, P.O. Box 8928, Madison WI 53708; phone (608) 266-6861; or by following the link to Equal Rights on the department’s website at <http://www.dwd.state.wi.us/>.

(b) “Temporarily substituting” as used in s. 105.115 (2) (intro.), Stats., means no more than 2 weeks per incident.

Note: Section 105.115 (2) (intro.), Stats., provides that “a home care placement agency is not required to provide that notice [the notice to home care consumers] when placing a home care worker who is temporarily substituting for the regular home care worker of a home care consumer.”

(3) NOTICE TO HOME CARE WORKER. A home care placement agency shall have in its files a copy of the notice required under s. 105.115 (3), Stats., signed by a home care worker, before the home care placement agency refers the potential home care worker to a consumer.

Note: Section 105.115 (3) (intro.), Stats., provides that the notice shall be on a form prescribed by the department. A copy of the required form is available by contacting the Equal Rights Division, 201 East Washington Avenue, P.O. Box 8928, Madison WI 53708; phone (608) 266-6861; or by following the link to Equal Rights on the department’s website at <http://www.dwd.state.wi.us/>.

(4) RECORD RETENTION. A home care placement agency shall retain the notices required under s. 105.115 (2) and (3), Stats., at least 4 years from the date that the home care agency referred the home care worker to the consumer if the home care worker and home care consumer enter into an employment agreement or contract for services.

SECTION 2. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Administrative Register as provided in s. 227.22 (2) (intro.), Stats.