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State of Wisconsin
Labor and Industry Review Commission

Clearinghouse Rule 09-014

February 5, 2009

Legislative Council
Rules Clearinghouse
One East Main Street, Suite 401
P. O. Box 536
Madison, WI 53701-2536

Enclosed please find a copy of proposed rule amendments of the Labor and Industry Review Commission. These rules are being sent to you as required by Wis. Stat. § 227.15. The Commission will proceed without a public hearing under the 30-day notice procedure.

Sincerely,

James T. Flynn
Chairperson

Enc.

Analysis prepared by Wisconsin Labor and Industry Review Commission

The Wisconsin Labor and Industry Review Commission proposes an order to amend LIRC 1.025(3), 1.025(4), 2.05, 3.05 and 4.04, relating to the rules of practice and procedure before the commission.

Rule Summary

Statutes Interpreted - Wis. Stat. secs. 40.65(2), 102.18(3) and (4), 106.52(4), 106.56(4), 108.09(6), 108.10(2) and (3), 111.39(5)(a), 303.07(7) and 303.21, allow parties to file petitions for commission review and describe the process by which the commission conducts such review. The proposed rule amendments provide minor clarifications and updates.

Statutory Authority - Wisconsin Stat. sec. 103.04(2) gives the commission authority to promulgate its rules of procedure.

Explanation of Agency Authority - The Labor and Industry Review commission reviews and decides appeals of decisions of administrative law judges of the Department of Workforce Development in cases arising under Wisconsin's unemployment insurance, workers compensation, employment discrimination and public accommodations discrimination laws. The commission's rules govern procedure in such appeals.

Related Statute or Rule - No federal statute or regulation requires adoption of the proposed rules or are relevant to the substance of the proposed rules.

Plain Language Analysis - Current rules allow petition for commission review from decisions by administrative law judges of the Department of Workforce Development to be filed by facsimile transmission. Under the rule, petitions faxed and received on a given day are considered to have been received on that day, for purposes of determining timeliness, even if they are received after regular office hours. The LIRC rule conflicts with the rule of the DWD Equal Rights Division (ERD), which treats faxed documents received after regular office hours as having been received on the next business day. The ERD rule applies, because ERD is the only authorized entity to accept petitions for commission review from ERD decisions. This proposal amends the LIRC rule to clarify the special timeliness circumstances applicable to petitions from ERD decisions.

Current LIRC 1.025(4) contains a reference to the internet page for filing a LIRC petition for review in UI. A DWD agencywide email migration changes the internet "address" or page to a revised format, which is substituted in the proposed rule.

Current LIRC rules regarding judicial review erroneously state that out of state plaintiffs or petitioners should commence actions for judicial review in Dane County. This is based on outdated statutory and case law. Sections 801.50(2)(a) and

227.53(1)(a)3. of the statutes provide that actions for judicial review by out of state plaintiffs or petitioners shall be commenced in the county where the claim or dispute arose. The proposed rule amendment corrects the error.

Summary of, and comparison with, existing or proposed federal regulations - There are no federal regulations governing practice and procedure before the commission.

Comparison with rules in adjacent states - Adjacent states have higher-level administrative authorities (excepting Minnesota) for deciding appeals in unemployment insurance, workers compensation and employment discrimination cases which are analogous to the Wisconsin Labor and Industry Review Commission. Rules of practice of such authorities are generally comparable to those of the commission.

Summary of factual data and analytical methodologies - The commission has not collected any data or conducted any analyses in connection with its development of these proposed rule changes.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report - The commission has not collected any data or conducted any analyses in connection with its development of these proposed rule changes.

Effect on small business - The commission's rules of procedure affect small businesses when they are parties to cases pending before the commission. The proposed rule changes simply clarify existing rules and are not anticipated to have any effect on small businesses.

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Place where comments are to be submitted: - Mail: Wisconsin Labor and Industry Review Commission, P.O. Box 8126, Madison WI 53708-8126. Facsimile: (608) 267-4409.

TEXT OF RULE

SECTION 1. LIRC 1.025(3) and (4) are amended to read:

LIRC 1.025(3) Petitions for review may be filed by facsimile transmission. A petition for review transmitted by facsimile is not deemed filed unless and until the petition is received and printed at the recipient facsimile machine of the commission or of the division of the department to which the petition is being transmitted. The party transmitting a petition by facsimile is solely responsible for ensuring its timely receipt. The commission is not responsible for errors or failures in transmission. A Except in the case of petitions for review in fair employment and public accommodations cases under s.106.52 or s.111.39(5) Stats., where a facsimile transmission filed after the regular business hours of the equal rights division (i.e. 4:30 p.m.), shall be considered filed on the next business day, a petition for review transmitted by facsimile is deemed filed on the date of transmission recorded and printed by the facsimile machine on the petition. If the commission's or department's records indicate receipt of the facsimile at a date later than that shown, then the later date shall control.

(4) Except in the case of petitions for review in fair employment and public accommodations cases under s. 106.52 or 111.39(5), Stats., petitions for review may be filed electronically through the internet website of the commission, at the page found at <http://www.dwd.state.wi.us/lirc/petition.htm> <http://dwd.wisconsin.gov/lirc/petition.htm>. Successful filing of a petition for review electronically through the internet website of the commission will result in a display on the petitioner's internet browser of a message confirming that the petition has been successfully filed. A petition for review transmitted electronically through the website of the commission is not deemed filed unless and until the confirmation message is displayed. The commission is not responsible for errors in transmission that result in failure of a petition to be successfully filed electronically through the website of the commission. A petition for review filed electronically through the internet website of the commission is deemed filed on the date of filing stated on the commission's electronic record of the filing.

SECTION 2. LIRC 2.05 is amended to read:

LIRC 2.05 Actions for judicial review. Judicial review of any commission decision under s. 108.09 or 108.10, Stats., shall be commenced in the manner and upon the grounds specified in ss. 108.09(7) and 102.23, Stats., and not under ch. 227 or s. 801.02, Stats. Either party may commence a legal action for review of the commission decision in circuit court within 30 days from the date the decision was mailed to the party's last known address. Such action is commenced only by filing a summons and complaint with the circuit court and serving an authenticated copy of the summons and the complaint upon the commission, all within 30 days. Service must be made upon a commissioner of the labor and industry review commission

or an agent authorized by the commission to accept service only at the commission's office in Madison. Such service shall be deemed complete service on all parties but there shall be left with the person so served as many copies of the summons and complaint as there are defendants. Service by mail is effective only if the pleadings are actually received by the commission within the appeal period. The complaint shall state the grounds upon which review is sought. The action shall be commenced against the commission, and the party in whose favor the decision was made shall also be made a defendant. The proceedings shall be in the circuit court of the county where the plaintiff resides except that, if the plaintiff is a state agency, the proceedings shall be in the circuit court of the county where the defendant resides. If the plaintiff is a non-resident of Wisconsin, the proceedings shall be in the circuit court ~~for Dane county~~ where the claim arose. The proceedings may be brought in any circuit court if all parties stipulate and that court agrees. The appealing party shall arrange for preparation of the necessary legal documents.

SECTION 3. LIRC 3.05 is amended to read:

LIRC 3.05 Actions for judicial review. Judicial review of any commission decision shall be commenced in the manner and upon the grounds specified in s.102.23, Stats., and not under ch. 227, Stats., or s. 801.02, Stats. Either party may commence a legal action for review of the commission decision in circuit court within 30 days from the date the decision was mailed to the party's last known address. Such action is commenced only by filing a summons and complaint with the circuit court and serving an authenticated copy of the summons and the complaint upon the commission, all within 30 days. Service must be made upon a commissioner of the labor and industry review commission or an agent authorized by the commission to accept service only at the commission's office in Madison. Such service shall be deemed complete service on all parties but there shall be left with the person so served as many copies of the summons and complaint as there are defendants. Service by mail is effective only if the pleadings are actually received by the commission within the appeal period. The complaint shall state the grounds upon which review is sought. The action shall be commenced against the commission, and the party in whose favor the decision was made shall also be made a defendant. The proceedings shall be in the circuit court of the county where the plaintiff resides except that, if the plaintiff is a state agency, the proceedings shall be in the circuit court of the county where the defendant resides. If the plaintiff is a non-resident of Wisconsin, the proceedings shall be in the circuit court ~~for Dane county~~ where the claim arose. The proceedings may be brought in any circuit court if all parties stipulate and that court agrees. The appealing party shall arrange for preparation of the necessary legal documents.

SECTION 4. LIRC 4.04 (1) is amended to read:

LIRC 4.04 Actions for judicial review. (1) FAIR EMPLOYMENT. Judicial review of any commission order or decision in fair employment cases under s. 111.39(5), Stats., shall be commenced in the manner and upon the grounds

specified in ss. 227.52 and 227.53, Stats. Any person aggrieved by a final decision of the commission shall be entitled to judicial review in circuit court. Proceedings for review shall be instituted within 30 days from the date of the decision. Such proceedings are instituted by serving a petition for review, either personally or by certified mail, upon the labor and industry review commission in Madison, and, by filing such petition with the clerk of the circuit court for the county where the judicial review proceedings are to be held. Copies of the petition shall be served upon all parties who appeared before the commission in the case not later than 30 days after commencing the proceeding for review. The copies shall be served personally, by certified mail, or when service is timely admitted in writing, by first class mail. The petition shall state the nature of the petitioner's interest, the facts showing that the petitioner is a person aggrieved by the decision, and the grounds upon which review is sought. The petition shall be entitled in the name of the person serving it as petitioner and the commission as respondent. The proceedings shall be in the circuit court of the county where the petitioner resides. If the petitioner is a non-resident of the state, the proceedings shall be in the circuit court ~~for Dane county~~ where the dispute arose.