

## Clearinghouse Rule 16-055

### WISCONSIN DEPARTMENT OF CORRECTIONS

#### PROPOSED RULE MAKING ORDER

#### INTRODUCTORY CLAUSE

The Wisconsin Department of Corrections proposes an order to repeal and recreate chapter DOC 313, relating to prison industries and correctional farms.

#### RULE SUMMARY

- A. Statutes interpreted: ss. 302.09, 303.01, 303.03, 303.04, and 303.06, Stats.
- B. Statutory Authority to Promulgate the Rule: s. 227.11 (2), Stats.
- C. Explanation of agency authority

Subject to approval by the prison industries board, the department of corrections is authorized to establish prison industries for the employment of inmates in state prisons.

- D. Related statute or rule

Chapters DOC 302, 304, 306, 308, 309, 310, 311, 313, 314, 316, 324, 325, 326, and 327, relating to the supervision of inmates.

- E. Plain Language Analysis

The rule proposal does all of the following:

1. Reorganizes and updates the rule chapter.
2. Repeals the following definitions: employee and program review committee. (Section DOC 313.03.)
3. Creates the following definitions: base wage, industries director, inmate employee, and prison industry. (Section DOC 313.03.)
4. Eliminates throughout the proposed rule the involvement of the program review committee in the assignment of inmates to prison industry work.
5. Changes the emphasis of the rule chapter. The current rule chapter emphasizes the rights of inmates as “employees” of prison industries. The proposed rule chapter emphasizes that prison industries is a correctional program which gives inmates valuable employment experience.
6. Includes among the criteria for selection documented security concerns, including assaultive history, and sentence structure. (Section DOC 313.06 (2) (b) 6. and 7.)
7. Eliminates the provision regarding recommendations for extra good time under s. DOC 313.07 (7).
8. Eliminates the listing of work rules. Establishes the authority of the industries director to establish work rules applicable to inmate employees. (Section

DOC 313.09.)

9. Repeals the provision which established an additional “employee” disciplinary process under s. DOC 313.09 (3). Retains the provision that inmate employees may be disciplined for violations of chapter DOC 303. Authorizes prison industries staff to take corrective action for a violation of work rules established under s. DOC 313.09, regardless of whether the violation constitutes a violation of ch. DOC 303. (Subs. DOC 313.10 (2) and (3).)
10. Expands the bases for terminating an inmate employee from employment in a prison industry to include removal from position for non-negative reasons, being a threat to the security and safety of the institution, and exceeding the period of work assignment. The department added the last criterion for removal to address the limited number of opportunities to access the prison industry program. This provision permits a durational employment limit to allow more inmates the opportunity to work in prison industry jobs. (Section DOC 313.11 (1).)
11. Simplifies the section addressing inmate compensation under the prison industry program. Eliminates the payment of double time as well as paid leave. (Section DOC 313.12.)
12. Clarifies the section addressing the work day. (Section DOC 313.13.)
13. Eliminates the provision giving priority to inmates upon transfer.
14. Eliminates the specific provision for inmates to make “employee” suggestions.
15. Changes the number of days for temporary layoff and eliminates compensation for separation. Adds removal to language in addition to termination. (Section DOC 313.16.)
16. Addresses work done by inmates on correctional farms and the dairy processing plant. (Section DOC 313.18.)

F. Summary of and Comparison with Existing or Proposed Federal Regulations that are intended to address the activities to be regulated by the proposed rule

There are no federal regulations that regulate the employment of inmates in prison industries, except for prison industries programs certified by the federal private sector prison industry enhancement certification program (PSPIEC) under 18 USC 17.61 (c).

G. Comparison of similar rules in adjacent states:

1. Illinois

Prison Industries Board: Illinois does not address this issue.

Assignment to Prison Industries: In Illinois, physically capable inmates may be assigned to prison industries if they are not assigned full-time to another facility program. (20 ILAC 117.30 (b)) In Wisconsin, there is an application process which determines whether inmates will be assigned to prison industries. (DOC 313.04) In Illinois, the factors that a facility may consider in the selection process are (1) the inmate’s security level, grade classification, and adjustment to the institution, and (2) the skills needed to participate in the program. (20 ILAC 117.30 (c) (1) – (2)) In Wisconsin, the factors that a facility may consider in the selection process are (1) education, (2) attitude, (3) experience and training, (4) physical and mental abilities, (5) prior institutional employment, (6) documented security concerns, (7) the inmate’s sentence structure.

Work Times: Illinois allows each facility to establish the working hours for prison industries. (20 ILAC 117.40 (a)) Wisconsin similarly allows prison industries to establish its own working hours.

Training: Illinois rules require inmates to be trained on equipment, materials, and safety precautions related to their work. (20 ILAC 117.40 (e)) Wisconsin rules establish a probationary period in which inmates are trained to perform their work duties. Illinois requires that inmates sign acknowledgement that they received training prior to using equipment and materials at work. (20 ILAC 117.40 (e)) Wisconsin rules do not require inmates to sign acknowledgment that they had received training, however Wisconsin rules require that employee performance be evaluated during the probation period to insure that adequate training is being provided to the inmates.

Pay Rate: Illinois allows pay scales to be determined at each facility based upon effort, skill, and financial value of work performed (20 ILAC 117.40 (a)) Wisconsin requires that inmates be paid according to actual hours worked and that base wages are established by prison industries. In Illinois, inmates that participate in prison industries must contribute part of their wages (3 – 5%) to offset the cost of their incarceration. (20 ILAC 117.30 (f)) Wisconsin rules have no provisions that require inmates to offset the cost of their incarceration.

Work Conditions: Illinois rules require that the department of corrections comply with federal, state, and local health and safety standards in operating prison industries. (20 ILAC 117.40 (a)) Wisconsin rules do not contain a similar provision. Illinois rules also require that safety inspections be performed at least monthly to ensure safe workplace conditions. (20 ILAC 117.40 (b)) Wisconsin rules do not have a similar provision.

Products of Prison Industries: Illinois prohibits prison industries products from be distributed free of charge and prohibits prison industries products from being included in bartering arrangements. (20 ILAC 117.20 (d) – (e)) Wisconsin rules contain no similar provisions. Illinois requires that its state agencies and institutions purchase needed materials from the prison industries program unless the items are not available (20 ILAC 117.50 (b)) Wisconsin rules contain no similar provisions.

Specific Programs: 20 ILAC 117.70 gives Illinois prison industries the authority to conduct a recycling program, while 20 ILAC 117.80 gives Illinois prison industries the authority to establish animal training and care programs. Wisconsin rules have no similar provisions.

Prison Enhancement Certification Program: Illinois code does not address this issue.

Terminology: Illinois uses the term “Correctional Industries Program” in reference to the state program that provides inmates with work for pay. Wisconsin uses the term “prison industries” in reference to providing inmates with work for pay.

## 2. Iowa

Prison Industries Board: Iowa established a seven-member prison industries advisory board (ICA s. 904.803) to adopt rules and advise the state director of prison industries concerning management of prison industries (ICA s. 904.804). Wisconsin does not address this issue.

Assignment to Prison Industries: Iowa code does not address this issue.

Work Times: Iowa code does not address this issue.

Training: Iowa code does not address this issue.

Pay Rate: Iowa code does not address this issue.

Work Conditions: Iowa code does not address this issue.

Products of Prison Industries: In Iowa, prison industries may sell products to state agencies and institutions, and nonprofit organizations. (ICA s. 904.815) Limited public sales of prison industries products may be made when sales to approved organizations are insufficient to continue operating the shop. (201 IAC 37.2 (4)) Wisconsin does not address this issue.

Specific Programs: Iowa code does not address this issue.

Prison Enhancement Certification Program: Iowa code does not address this issue.

Terminology: Iowa uses the term "Iowa state industries" in reference to its state work program that provides inmates with work for pay. Wisconsin uses the term "prison industries" in reference to providing inmates with work for pay.

### 3. Michigan

Prison Industries Board: Michigan's department of corrections has the authority to establish an advisory council for state correctional industries (MCLS s. 800.324). Wisconsin does not address this issue.

Assignment to Prison Industries: Michigan code does not address this issue.

Work Times: Michigan code does not address this issue.

Training: Michigan code does not address this issue.

Pay Rate: Michigan code does not address this issue.

Work Conditions: Michigan code does not address this issue.

Products of Prison Industries: In Michigan, prison industry products may be sold to state agencies and institutions (MCLS s. 800.326 (1) (a) and also to private businesses or individuals if the products are textiles and there are no similar products manufactured by an in-state private business (MCLS s. 800.326 (1) (c)). Wisconsin rules have no similar provisions.

Specific Programs: Michigan code does not address this issue.

Prison Enhancement Certification Program: MCLS s. 800.324 allows Michigan's department of corrections to establish a private sector/prison industry enhancement certification program. DOC 313.15 governs Wisconsin's implementation of a PS/PIEC program. In Michigan, inmates working in the PS/PIEC program must receive wages that

are not less than those paid for similar work, and deductions may not exceed 80% of gross wages. (MCLS s. 800.324 (h)) In Wisconsin, inmates working in the PS/PIEC program must receive comparable wages to those paid for similar work in the private sector as well. However, Wisconsin rules do not address deductions.

Terminology: Michigan uses the term “correctional industries” in reference to providing inmates with work for pay. Wisconsin uses the term “prison industries” in reference to providing inmates with work for pay.

#### 4. Minnesota

Prison Industries Board: Minnesota code does not address this issue.

Assignment to Prison Industries: Minnesota requires all inmates to work and only illness, physical disability, or participation in an education or treatment program will excuse an inmate from this requirement. (MSA s. 243.18 (2)) Wisconsin rules have no similar provision.

Work Times: Minnesota code does not address this issue.

Training: Minnesota code does not address this issue.

Pay Rate: Minnesota allows the commissioner of corrections to determine appropriate compensation for inmate labor based upon the quality and character of the work performed. (MSA s. 243.23. (1)) Wisconsin allows prison industries to determine appropriate compensation for inmate labor. Minnesota allows the commissioner to pay a minimal amount of money to inmates who cannot work due to illness or physical disability. (MSA s. 243.23 (1)) Wisconsin only requires that inmates that are injured while working for prison industries such that they cannot work must receive the same base pay unless terminated or removed. Minnesota also permits the commissioner to deduct funds from inmate accounts for many reasons including taxes, repaying advances, gate money, family support, court ordered restitution, and room and board. (MSA s. 243.23 (1) – (14)) Wisconsin rules contain no similar provision.

Work Conditions: Minnesota code does not address this issue.

Products of Prison Industries: Minnesota code does not address this issue.

Specific Programs: Minnesota code does not address this issue.

Prison Enhancement Certification Program: In Minnesota, an inmate may work for a private business that manufactures products that are placed in the stream of interstate commerce as long as the inmates are paid at least the minimum wage for work of a similar nature in a similar locality. (MSA s. 243.88 (2)) In Wisconsin, inmates working in the PS/PIEC program must receive comparable wages to those paid for similar work in the private sector.

Terminology: Minnesota uses the term “Minnesota correctional industries” in reference to its state work program that provides inmates with work for pay. Wisconsin uses the term “prison industries” in reference to providing inmates with work for pay.

H. Summary of the factual data and analytical methodologies that DOC used in support of its determination of the rule's fiscal effect on small businesses under s. 227.114, Stats.

The department of corrections has determined that the rule will not have a significant economic impact on a substantial number of small businesses since the rule does not regulate small businesses as that term is defined in s. 227.114, Stats.

I. Any analysis and supporting documents that DOC used in support of the department's determination of the proposed rule's effect on small businesses or that was used when the DOC prepared an economic impact report.

Not applicable.

J. Effect on small businesses

Not applicable.

K. Agency contact person

William J. Pollard, Warden, Dodge Correctional Institution, Department of Corrections, c/o 3099 East Washington Avenue, P.O. Box 7925, Madison, WI, 53707-7925; by phone: (920) 324-7200; or by email: DOCDLAdministrativeRulesCommittee@wisconsin.gov

L. Place where comments are to be submitted and deadline for submission

Written comments on the proposed rule will be accepted and receive consideration if they are received by Bill Pollard c/o Glen Mercier. Written comments should be addressed to: Glen Mercier, at 3099 East Washington Avenue, P.O. Box 7925, Madison, WI, 53707-7925 or by e-mail: DOCDLAdministrativeRulesCommittee@wisconsin.gov

**SUBMISSION OF RULE TO THE PRISON INDUSTRIES BOARD.** The department submitted the rule proposal to the Prison Industries Board for approval as required under s. 303.015 (1) (c), Stats. The Board approved the rule proposal on December 3, 2014.

## TEXT OF RULE

SECTION 1. Chapter DOC 313 is repealed and recreated to read:

### **Chapter DOC 313**

#### **PRISON INDUSTRIES**

- DOC 313.01 Purpose.
- DOC 313.02 Authority.
- DOC 313.03 Definitions.
- DOC 313.04 Establishment of a prison industry.
- DOC 313.05 Documentation.

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| DOC 313.06 | Application and approval.  |
| DOC 313.07 | Probationary period.   |
| DOC 313.08 | Performance evaluation.  |
| DOC 313.09 | Work rules.  |
| DOC 313.10 | Discipline.  |
| DOC 313.11 | Termination and removal.   |
| DOC 313.12 | Compensation.  |
| DOC 313.13 | Work day.  |
| DOC 313.14 | Inmate employee labor unions.  |
| DOC 313.15 | Equal opportunity.   |
| DOC 313.16 | Shutdown and layoff.   |
| DOC 313.17 | Private sector and prison industry enhancement certification programs. |
| DOC 313.18 | Correctional farms   |

**DOC 313.01 Purpose.** The purposes of prison industries are to provide meaningful employment opportunities, to assist inmates in reintegration into their communities, and to maintain self-supporting industries through the sale of products and services. The goals of prison industries include all of the following:

- (1) Provide inmates with work skills, habits, and training necessary to compete in the job market, thereby increasing the potential for a successful return to society.
- (2) Maintain self-sufficiency of the program to the degree possible while maintaining inmate wages based on productivity.
- (3) Utilize production methods and business practices consistent with those used by private industry.
- (4) Develop, produce, and market products and services of benefit to customers at a competitive price.
- (5) Provide products and services that do not unfairly compete with Wisconsin-based manufacturers and service providers.

**DOC 313.02 Authority.** This chapter is created under the authority of s. 227.11 (2) (a), Stats., and implements ss. 302.09, 303.01, 303.03, and 303.06, Stats.

**DOC 313.03 Definitions.** The definitions in ss. DOC 303.02 and 310.03 apply to this chapter. In addition, in this chapter:

- (1) “Base wage” means the official hourly rate for a position. The base wage does not include differential, holiday, incentive, or bonus pay.
- (2) “Department” means the department of corrections.
- (3) “Industries director” means the director appointed by the secretary under s. 303.01 (9), Stats., or designee.
- (4) “Industries Supervisor “ Means the industries employee assigned to supervise inmate employees.
- (5) “Inmate employee” means an inmate who works for and is compensated by the prison industries program. An inmate employee is not an employee of the state.
- (6) “Involuntary unassigned” means inmates who are eligible, available, and waiting for placement in approved work or program assignments where such work or program assignments exist, but are not currently available.
- (7) “Prison industry” or “industry” means an industry established under s. 303.01, Stats., for inmate employees to manufacture products or components or provide services.
- (8) “Private sector prison industry enhancement certification programs (PSPIEC)” means prison industries programs certified by the federal private sector prison industry enhancement certification program.

**DOC 313.04 Establishment of a prison industry. (1)** The department may establish prison industries with the approval of the prison industries board and after a hearing before the joint committee on finance.

**(2)** The department may locate, move, or expand prison industries to one or more prisons or other locations owned by the department.

**(3)** Prison industries may acquire new or additional customers.

**(4)** The department shall notify the joint committee on finance under s. 303.01 (1) (c), Stats., if there is an increase in the number of inmate employees in a prison industry by 200 or more full time equivalent positions in a biennium.

**DOC 313.05 Documentation.** The industries director shall document prison industry operations, including job positions, titles and descriptions, qualifications, compensation, probationary term, work hours, work rules, and policies. Inmate access to these documents shall be established in industry policy.

**DOC 313.06 Application and approval. (1)** Inmates may only apply for a position in prison industries that are available at the institution in which the inmates reside. The application may include an inmate's preference for a position.

**(2)** The industries supervisor or designee shall do all of the following:

(a) Interview inmate applicants for specific positions under the industries supervisor's supervision.

(b) Consider the following criteria in the selection of inmate employees:

1. Education requirements.
2. Attitude and willingness to learn.
3. Experience and training.
4. Physical or mental ability to perform the essential functions of the position, with or without reasonable accommodations.
5. Past employment record with prison industries or other institution work experience.
6. Security concerns.
7. Sentence structure.

(c) Select a qualified inmate applicant consistent with established requirements.

**DOC 313.07 Probationary period. (1)** Inmates hired by prison industries shall serve a probationary period during which the inmate's employment may be terminated under s. DOC 313.11 (1) (a) or (b).

**(2)** Inmate employees shall not receive incentive pay during their original probationary period.

**(3)** The duration of the probationary period for any position shall be established by prison industries management so as to provide adequate time for the average inmate employee to learn the duties of the position.

**(4)** The industries supervisor may extend the probationary period for an additional 30 days if the inmate employee has not demonstrated satisfactory performance but can reasonably be expected to attain satisfactory performance.

**DOC 313.08 Performance evaluation. (1) The industries supervisor shall evaluate each inmate employee's performance as often as required to ensure the inmate employee is meeting performance and productivity expectations. The evaluation shall be written and include the specific skills and expectations of the position.**

**(2)** An evaluation shall be completed upon completion of probation, at regular



intervals, prior to any pay rate change and upon termination.

**(3)** The criteria to be used in evaluating inmate employees shall include all of the following:

- (a) Quality of performance of assigned duties.
- (b) Productivity level.
- (c) Initiative.
- (d) Attitude.
- (e) Contributions beyond usual job duties.
- (f) Improvement in the criteria listed in this subsection.

**(2)** The industries supervisor or designee shall meet with the inmate employee as part of the evaluation process to discuss the inmate employee's performance.

**(3)** If an inmate employee's evaluation indicates performance below expectations, the industries supervisor shall meet with the inmate employee to address the performance problem.

**(4)** Copies of the inmate employee evaluation shall be distributed to the inmate employee, the industries supervisor, and the social services file.

**DOC 313.09 Work rules.** The industries director has the authority to establish work rules applicable to inmate employees.

**DOC 313.10 Discipline.** Chapter DOC 303 applies to all inmate employees. Prison industries staff shall report rule violations in accordance with ch. Ch. DOC 303.

**DOC 313.11 Termination and removal. (1)** Inmate employees may be terminated or removed from prison industries work for any of the following reasons:

(a) *Voluntary.* An inmate employee may voluntarily remove himself or herself from employment with prison industries at any time, with approval of the industries supervisor.

(b) *During the probationary period.* An industries supervisor may terminate an inmate employee's employment during probation because of performance, conduct, or for any other reason deemed appropriate by the industries supervisor.

(c) *Discipline violation.* An industries supervisor may terminate an inmate's employment for violations under s. DOC 313.09 and ch. DOC 303.

(d) *Inadequate performance.* An inmate employee may be terminated for inadequate performance as determined by an evaluation made under s. DOC 313.08.

(e) *Layoff.* An inmate employee may be removed due to a reduction in work force in accordance with s. DOC 313.16.

(f) *Unable to work.* An inmate employee who is determined to be unable to work due to a health condition by a department health care professional may be removed from employment if the health condition exceeds 30 days.

(g) *Transfer or release.* An industries supervisor shall remove an inmate employee from employment upon transfer to another institution or release to the community.

(h) *Security and safety.* The industries director may terminate an inmate employee who is perceived to be a threat to security or safety.

(i) *Exceeds period of work assignment.* Industries supervisor may terminate an inmate employee after meeting work assignment time periods established by the industries director.

**(2)** An industries supervisor shall document all of the following information when an inmate employee is terminated or removed:

- (a) Name of inmate employee.
- (b) Date of termination or removal.
- (c) Shop name.

- (d) Supervisor's name.
- (e) Reason for termination or removal.

**DOC 313.12 Compensation.** (1) Inmate employees shall be paid for actual hours worked.

(2) Each inmate employee shall be paid a base wage established by the industries director. Pay adjustments based on prison industries written policy may be added to the original base wage.

(3) Overtime pay at the rate of one and one-half times the base wage shall be given to inmate employees for hours worked in excess of 40 hours per week.

(4) Inmate employees shall be paid at the institution rate for involuntary unassigned for the regular scheduled hours if there is a temporary layoff under s. DOC 313.16.

(5) When an inmate employee is injured in the performance of job duties and is unable to work, the inmate shall continue to receive the same base wage until the inmate employee returns to work or is terminated or removed under s. DOC 313.09.

(6) An inmate employee shall be paid at the inmate employee's current base wage for all hours absent from work when removed pending investigation or placement into TLU status unless terminated or removed under s. DOC 313.09.

(7) Inmate employees may be paid piece-rate wages.

**DOC 313.13 Work day.** (1) The industries director shall establish the regular work day for full-time, part-time, and temporary positions.

(2) An inmate employee may not be absent from the worksite during work hours unless the industries supervisor approves the absence. The industries supervisor may approve absences for necessary programming that cannot be scheduled during non-work hours.

**DOC 313.14 Inmate employee labor unions.** Inmate employee labor unions are prohibited.

**DOC 313.15 Equal opportunity.** (1) Prison industries shall promote equal employment opportunity through programs and practices.

(2) Prison industries shall strive to achieve an inmate work force that reflects the racial composition of the population of the employing institution.

(3) Prison industries shall gather and monitor racial information from its employing units on a quarterly basis and direct action as necessary.

(4) Prison industries shall strive to provide parity in employment opportunities for male and female inmates.

**DOC 313.16 Shutdown and layoff.** (1) The industries director has the authority to lay off inmate employees when necessary due to business conditions.

(2) If a layoff is for a period of ten consecutive working days or fewer, the affected inmate employee shall receive the institution involuntary unassigned pay for the regular scheduled hours during the layoff period.

(3) If an inmate employee on layoff has not been reemployed after ten consecutive working days, the inmate employee may be removed from employment.

(4) If the inmate employee is removed from employment under sub. (3) and called back to the same position within 60 calendar days following removal, the inmate employee shall return at the former base wage.

**DOC 313.17 Private sector prison industry enhancement certification programs.** Prison industries programs certified by the federal private sector prison industry

enhancement certification program (PSPIEC) under 18 USC 17.61 (c) and operating under the authority of s. 303.06 (2), Stats., are not subject to ss. DOC 313.7 but are subject to all of the following:

(1) Each inmate employee working in a PSPIEC program shall be paid a wage comparable to that paid in the private sector for work of a similar nature in the locality in which the prison industry is located or, as a minimum, the federal minimum wage.

(2) Overtime hours shall be compensated for in accordance with the Fair Labor Standards Act, 29 USC 201.

(3) An inmate employee injured in the performance of job duties shall receive injury compensation pay in an amount equal to the amount the inmate employee would have received had the inmate employee worked during the inmate's recuperation.

(4) The regular work schedule for PSPIEC programs shall be as close to 40 hours per week as possible based on institution schedules and prison industries workload.

(5) An inmate employee who has been laid off and is called back to the same position within 60 calendar days shall return at the inmate employee's former wage rate. If the inmate employee is called back to a different position, the inmate employee shall receive an appropriate wage for the duties being performed.

**DOC 313.18 Correctional farms.** Employment provisions of this chapter apply to inmate employees who work on correctional farms or at correctional farm dairy processing plants that are owned or operated by the department, except that inmate employees who work in agricultural positions on correctional farms are exempt from overtime provisions under s. DOC 313.12 (3) but are eligible to receive pay adjustments under s. DOC 313.12 (2).

SECTION 2. 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.

REGULATORY FLEXIBILITY ANALYSIS

FISCAL ESTIMATE: See attached.