Department of Children and Families

Summary of Public Hearing

Sanctions in the Wisconsin Works Program
DCF 101/CR 17-066

The department held a public hearing on October 25, 2017. Comments opposed to the proposed rule were received from Patricia DeLessio and Harold Menéndez of Legal Action of Wisconsin (LAW).

Nicole Hagen and Reno D. Wright of Ross Innovative Employment Solutions and Laura Wierzbicki of Maximus observed for information only.

Comment Summary and Department Response

General

LAW comment: As a general matter the proposed rule fails to insure that the W-2 contractor has carefully reviewed the participant's record to insure that the agency has complied with the rules and policy of the program before issuing a notice of planned reduction, termination, or disqualification. The participant's FEP, presumably the individual who knows the participant the best, has the ability to determine whether the agency has conducted a screening and assessment of the participant's abilities and limitations, to determine whether the participant has any disabilities that affect her participation in W-2 activities or ability to work, and to insure that the participant has an employability plan that was properly developed before a notice is issued.

Department response*: W-2 informal assessment policy requires workers to conduct ongoing informal assessments, which includes discussing with the participant any underlying causes of nonparticipation, the appropriateness of the assigned activities, the need for additional supportive services, and the provision of accommodations that will allow the individual to participate. (W-2 Manual, Section 5.2.1) In addition, W-2 case closure policy requires workers to explore potential barriers that may be interfering with a participant's ability to cooperate and take steps to address those barriers prior to closing a case for noncooperation. (W-2 Manual, Section 11.4.2) Implementation of the rule does not change current policy requirements. Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

DCF 101.195 Notice

LAW comment: Section DCF 101.195 (1) provides that the notice advising the participant of the proposed reduction must include a description of the activities missed, the dates of nonparticipation, the number of hours missed and the amount to be deducted from the participant's payment. The rule fails to reflect the limitation found in the statute and rule that a participant's payment may only be reduced for nonparticipation in activities included in the Employability Plan. In addition, a participant needs complete information about missed activities to respond to the notice's planned reduction or termination, including the location and time of each missed activity.

***Department response**: The Legislative Council Rules Clearinghouse also commented on the term "nonparticipation." The department has updated the proposed rule to include a definition for "nonparticipation."*

Current policy requires W-2 agencies to provide written notice to participants of a planned 20 percent or more payment reduction or termination. (W-2 Manual, Chapter 11) The proposed rule aligns with existing policy. The notice of proposed payment reduction is specific enough for a participant to respond to the allegations in the notice. In addition, the participant has an Employability Plan or a supplement to the Employability Plan that identifies the specific location and time of the activity. Therefore, the department has determined that a change to the rule in response to the remainder of this comment is not warranted.

LAW comment: Section DCF 101.195 (2) provides that notice describing the deficiency, failure or other behavior must be provided to a participant before eligibility to participate in the W-2 program is terminated. A participant facing termination, and a disqualification for refusal, needs the same information as a participant facing a payment reduction. A notice that simply parrots the language of a rule subsection and does not include detailed factual allegations – date, time, location, and a description of the particular deficiency, failure or other behavior alleged to constitute refusal – deprives the participant of basic information needed to respond to a disqualification for refusing to participate.

***Department response**: The department has updated the proposed rule to require that the notice include the date and description of the deficiency, failure, or other behavior that resulted in the termination.*

LAW comment: Section 101.195 (3) (a) defines reasonable time for purposes of submitting good cause as 7 business days. In some cases an extension may be needed if a participant needs more time because she is having difficulty establishing documentation of good cause or needs assistance obtaining documentation. The rule does not require that the notice inform the participant of the availability of assistance documenting or verifying good cause where assistance is needed, or whether additional time may be available in such instances.

***Department response**: Current good cause verification policy provides participants 7 business days to provide good cause. The W-2 agency may extend the 7-day time limit if it is unduly burdensome to the participant. The proposed rule requires an additional notice when nonparticipation results in a 20% payment reduction or noncooperation with program requirements occurs. The additional notice provides a final opportunity for the participant to provide good cause and, for that reason, an extension of the 7 business days is not permissible. In addition, the notice instructs the participant to contact the W-2 worker immediately.*

DCF 101.21 Sanctions

LAW comment: Section DCF 101.21 (1) (a) 1. of the proposed rule defines appropriate as "consistent with an individual's employability plan" and ties sanctions for refusing to participate to the employability plan. This raises significant concerns because employability plans often fail to adequately address barriers to employment, including disabilities. In our experience this failure results

in assigning participants to activities they cannot successfully complete because needed accommodations or supports are not provided.

The W-2 contractors have an obligation to fully assess participants' barriers to participation and have at their disposal a variety of resources to help them develop employability plans that do just that. For example, DCF and DVR have long had a Memorandum of Understanding providing for technical assistance to W-2 contractors serving participants with disabilities. There is no requirement that the W-2 participant be co-enrolled with DVR in order for the W-2 contractor to request technical assistance from DVR in identifying activities, supports or accommodations for W-2 participants and developing an Employability Plan. Yet W-2 contractors do not routinely seek assistance from DVR or avail themselves of other resources to assist them in developing employability plans for participants faced with significant barriers to employment.

Unfortunately, most W-2 participants are not aware of the W-2 contractors' obligations to provide supports for the barriers they face in securing and maintaining employment. As a result, they are not able to assess the suitability of activities assigned in the EP, or to themselves identify the supports, services, or accommodations they may need to participate in W-2 and to benefit from their W-2 participation. Imposing sanctions without examining the suitability of the employability plan and the steps taken to develop the employability plan penalizes participants for the failure of the W-2 contractor.

Department response*: There are forms and publications that agencies are required to distribute to W-2 applicants and participants that inform them of their rights to services or accommodations that they may need to participate in assigned activities. The agency is required to provide and review the W-2 Rights and Responsibilities publication to all participants during the application process. Similarly, the W-2 agency is required to provide and review the W-2 Participation Agreement at application. W-2 participants are also required to sign the W-2 Participation Agreement. (W-2 Manual, Chapter 1) In addition, current policy requires a W-2 worker to conduct assessments. This process includes referring a participant for a formal assessment and modifying the employability plan to include services and accommodations recommended in a formal assessment. (W-2 Manual, Chapter 5) Finally, prior to taking action to close a case, policy requires that a worker take steps to address barriers, including offering the barrier screening tool and referring the participant for formal assessments to identify needed accommodations. (W-2 Manual, Section 11.4.2) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Section DCF 101.21 (1) (a) 2. defines employer as including a W-2 agency. This term is already defined in state law as subsidized or unsubsidized employer or a work experience provider. The department cannot by rule change this definition.

Department response*: The department has the statutory authority to perform the functions included in the definition and, for that reason, it can further interpret the statutory definition in rule. The proposed rule does not change the statutory definition of "employer" but it does interpret the definition to include a subsidized and unsubsidized employer and to encompass entities that provide a structured work environment. In addition, the Legislative Council Rules Clearinghouse did not comment on the department's statutory authority to broaden these definitions. Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Section DCF 101.21 (1) (a) 3. defines employment as including work, work experience, meetings or training. This term is already defined in state law as subsidized or unsubsidized employment or an assigned work experience activity. The department cannot change this definition by rule.

Department response*: The department has the statutory authority to perform the functions included in the definition and, for that reason, it can further interpret the statutory definition in rule. The proposed rule definition does not change the statutory definition of "employment" but interprets the definition to include subsidized and unsubsidized employment and structured work environments to which a participant may be assigned. Therefore, the department has determined that a change to the rule in response to this comment is not warranted. However, the department has updated the rule to remove "meeting" from the definition of employment because it is redundant with* ss. DCF 101.21 (1) (c) 2. through 4.

LAW comment: Section DCF 101.21 (1) (a) 5. defines "misconduct" for purposes of imposing a disqualification for refusing to participate. Although much of the language is borrowed from state unemployment insurance law, the proposed rule does not incorporate significant portions of those provisions intended to protect employees from the improper denial of benefits:

First, unlike the unemployment insurance statute (s. 108.04 (5) (a), Stats.), the proposed rule at s. DCF 101.21 (1) (a) 5. a. does not require that a participant have had knowledge of an employer's written policy concerning the use of alcohol or controlled substances, or that the individual have either admitted to the use or refused to take a test that conforms with a testing methodology that has been approved by DWD. This raises questions about the level of proof required to impose a refusal disqualification.

Department response*: In order to be consistent with the standards of conduct that unsubsidized employers develop for their employees, current W-2 policy requires that employers acting as work training providers in the W-2 program enter into an agreement that assures that they will follow rules that are consistent with what they provide to unsubsidized employees. In addition, it requires that the positions replicate actual conditions of work and provides responsibilities and expectations similar to unsubsidized employees. These expectations must be in writing. For that reason, it is expected that a W-2 participant would have knowledge of an employer's written policy concerning the use of alcohol or controlled substances. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Next, s. DCF 101.21 (1) (a) 5. d., does not include the requirement that "any harassment, assault, or other physical violence" have been instigated by the participant, as is required under UI law. Under the proposed rule, an individual defending herself from an unprovoked attack is guilty of misconduct.

***Department response**: In order to be consistent with the standards of conduct that unsubsidized employers develop for their employees, current W-2 policy requires that employers acting as work training providers in the W-2 program enter into an agreement that assures that they will follow rules that are consistent with what they provide to unsubsidized employees. In addition, it requires that the positions replicate actual conditions of work and provides responsibilities and expectations similar to unsubsidized employees. These expectations must be in writing. For that reason, it is expected that this include providing a safe workplace for employees and a safe place of business for customers. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Finally, s. DCF 101.21 (1) (a) 5. e., is not found in the unemployment statute. This provision is vague and will be applied subjectively. As discussed below, such provisions may violate basic fairness and due process requirements.

***Department response**: In order to be consistent with the standards of conduct that unsubsidized employers develop for their employees, current W-2 policy requires that employers acting as work training providers in the W-2 program enter into an agreement that assures that they will follow rules that are consistent with what they provide to unsubsidized employees. These expectations must be in writing. For that reason, it is expected that this include prohibiting the use of profane or abusive language. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Section s. DCF 101.21 (1) (a) 5. c. includes within the definition of misconduct conviction of an individual of a crime or other offense subject to civil forfeiture while off or on duty if this prevents the individual from performing her job duties. This section is overly broad and fails to recognize the realities that many low income parents face. This section appears to include tickets for minor traffic violations which eventually result in the suspension of an individual's driver's license for unpaid tickets because the individual simply cannot afford to pay the tickets. This is especially a problem because in some cases multiple tickets are issued during one traffic stop for something as minor as a broken tail light, making fines unaffordable. This loss of driving privileges severely limits the range of jobs and training sites to which a participant can travel in rural areas, as well as in highly segregated urban areas.

***Department response**: The department removed the phrase "or other offense subject to civil forfeiture" from s. DCF 101.21 (1) (a) 5. c. Current W-2 policy requires the worker to explore potential barriers with the participant and to take steps to address barriers, including referring the participant to supportive services that are appropriate for assisting the participants with overcoming barriers and finding and maintain employment.*

LAW comment: Section DCF 101.21 (1) (c) expands the behavior that is automatically considered a refusal to participate well beyond what was intended by state law. In doing so the department ignores the reality that W-2 parents face. Many of them are single parents with little or no other support who often lack reliable transportation.

Department response*: As allowed by s. 49.151 (1m) (f), Stats., the department is specifying other behaviors or actions that demonstrate refusal to participant and, in doing so, is replicating standards of conduct that unsubsidized employers develop for their employees. Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Subsection (c) 2. provides a W-2 participant who is late more than 15 minutes on one occasion to a job interview or job fair has failed to participate. This is simply an unreasonable expectation for single parents without reliable transportation who may lack a stable home and who have little or no work experience. A participant who travels to an unfamiliar area for the first time for a job interview may get lost, or may misread a bus map or schedule. A single occurrence of tardiness may occur as the result of a mistake, inadvertence or a misunderstanding. While the reason for the tardiness may not amount to good cause, disqualification from W-2 for 3 months for a single instance is unduly harsh and will result in increased destitution and homelessness among families with children. It is an unreasonable expectation to consider a participant who arrives more than 15 minutes late on one occasion to a job interview or job fair to have refused to participate.

Department response*: The penalty described in the proposed rule is not intended to include situations where there was a mistake, inadvertence, or misunderstanding on the part of the participant causing him or her to be 15 or more minutes late. As stated above, the worker must explore the reasons for not participating and determine if services provided were appropriate with the participant. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to determine if benefits were improperly denied. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Subsection (c) 4. provides that appearing for an interview or meeting with a prospective employer wearing inappropriate attire or exhibiting inappropriate grooming after receiving instructions about such attire and grooming will be considered a refusal to participate. This provision is vague, subjective and raises serious questions regarding race and religion. For example, should an individual be sanctioned because her religious practices dictate a style or form of dress or grooming that conflicts with the instructions of W-2 staff, or for misunderstanding what "appropriate" attitude or grooming may mean to a particular W-2 worker or prospective employer? What if the individual does not own attire that is considered "appropriate" and can't afford to purchase such attire?

Department response*: W-2 case management includes the discussion of appropriate attire for interviews for work opportunities that are consistent with a participant's interests and abilities. Case management also includes assistance with obtaining necessary attire for an interview or a particular work opportunity. For these reasons, expectations regarding appropriate attire and grooming for an interview are appropriate.*

In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available

to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.

LAW comment: Subsection (c) 5. provides that failing to complete a job application required by a prospective employer will be considered a refusal to participate. On its face this section could apply to any job application. It would allow the disqualification of an individual who fills out an application to the best of her ability, or even if she is not qualified for the position. It is also possible that a job that seemed suitable turns out not to be feasible because of her family's needs, limited child care availability or lack of transportation.

Department response*: Current W-2 policy requires the worker to explore potential barriers with the participant and to take steps to address barriers, including referring the participant to supportive services that are appropriate for assisting the participants with overcoming barriers and finding and maintaining employment. The proposed rule is not intended to apply to individuals who are unable to find or maintain employment because they are in need of supportive services to overcome barriers to employment. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Subsection (c) 6. provides that communicating salary, hours of employment or working conditions that disqualifies an individual from the employment is a refusal to participate. This provision makes little sense. There are jobs an individual simply cannot take because the hours of work offered are at a time of day when there is no or limited bus service, because the travel time is prohibitive, because of a lack of childcare or for many other reasons. In addition, this provision is not limited to jobs that offer full-time employment. Forcing a participant to take a job without guaranteed hours may result in inability to pay rent or for other necessities.

Department response*: The Legislative Council Rules Clearinghouse also commented on the level of employee requirements that would disqualify an individual. Therefore, the department has determined that a change to the rule in response to this comment is warranted. The department has updated the rule to clarify that communicating an unreasonable requirement would disqualify an individual.*

LAW comment: Subsection (c) 7. provides that providing incorrect or incomplete information to a prospective employer constitutes a refusal to participate but it is not limited to intentional misstatements or omissions and will penalize individuals for unintentional statements or omissions.

Department response*: The proposed rule is limited to occurrences where the participant receives direction or training from the agency on interviewing and completing applications. Policy will require the W-2 worker to review the case to ensure that appropriate direction or training was provided to the participant and to determine if there may be previously undiscovered limitations, disabilities, or*

changes in the participant's circumstances. Therefore, the department has determined that a change to the rule in response to this comment is not warranted.

LAW comment: Subsection (c) 9. provides that 2 consecutive payment reductions or 3 in a rolling 6 month period of 20% or more constitute a failure to participate. This section simply compounds the penalty already imposed by a reduction in payment and goes beyond the intent and scope of state law which was intended to address other failures. It also fails to hold the W-2 agencies accountable for determining the reasons for the non-participation as soon as it occurs and addressing those reasons by modifying the employability plan, referring the individual for assessment or taking other action.

Department response*: W-2 policy requires the W-2 worker to conduct ongoing informal assessments, which includes the need to discuss with the participant any underlying causes of nonparticipation to identify any barriers that might exist and take steps to address those barriers. (W-2 Manual, Chapters 5 and 11) When two consecutive instances of payment reductions of 20% or more or three in a rolling six-month period occurs, the W-2 worker is required to take action to explore for underlying barriers, address any identified barriers, or modify the Employability Plan prior to imposing the a refusal to participate penalty. (W-2 Manual, Section 11.4.2) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Subsection (c) 10. provides that refusing or failing to follow a verbal or written direction from W-2 staff or work site staff constitutes a refusal to participate. This provision is vague and overly broad. Does it apply to any direction no matter how minor and/or unreasonable? Does it apply to miscommunication attributable to language barriers, learning disabilities or low literacy levels? Does even one such failure constitute a refusal?

Department response*: As allowed by s. 49.151 (1m) (f), Stats., the department is specifying other behaviors or actions that demonstrate refusal to participant and, in doing so, is replicating standards of conduct that unsubsidized employers develop for their employees. This includes following direction in a structured work environment. The W-2 worker must explore the case for any barriers that may impact the individual's ability to follow directions and take action to provide needed accommodations. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Subsection (c) 11. provides that using vulgar or abusive language or engaging in abusive behavior at a W-2 or work site constitutes a refusal to participate. This section is likewise vague and overly broad. What constitutes abusive behavior and who will decide? Will the individual's circumstances (they may be under extreme duress) and mental state be taken into account? And what if they are reacting to provocation? What standard of proof will be applied to substantiate allegedly abusive behavior or language?

Department response*: As allowed by s. 49.151 (1m) (f), Stats., the department is specifying other behaviors or actions that demonstrate refusal to participant and, in doing so, is replicating standards*

of conduct that unsubsidized employers develop for their employees. This includes providing a safe workplace for employees and a safe place of business for customers. In addition, the proposed rule provides a W-2 participant with the opportunity to provide good cause to prevent the improper denial of benefits. Finally, a W-2 dispute resolution process is available to participants if they believe a W-2 agency improperly imposed a refusal disqualification. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.

LAW comment: Section DCF 101.21 (1) (d) incorporates the good cause rule found at s. DCF 101.20. However, s. DCF 101.20 is intended to address non-participation. It does not address factors that may constitute good cause for all the types of "refusal" identified in s. DCF 101.21 (1) (c). For example, should an individual who is the victim of an unprovoked physical attack at an employment site be sanctioned because she resorted to physical violence to defend herself? Should an individual who is subjected to verbal abuse and has profanities directed at him be sanctioned for responding in kind? Should an individual be sanctioned for failing to follow verbal or written directions of W-2 staff or staff at an employment site if she reasonably believes that following those instructions would endanger her health or safety? Should an individual be sanctioned because her religious practices dictate a style or form of dress or grooming that conflicts with the instructions of W-2 staff, or for misunderstanding what "appropriate" attire or grooming may mean to a participant, W-2 worker or prospective employer? What about a participant, who because of her poverty, does not have "work-appropriate clothes?" If an individual fills out an application to the best of his ability but does not understand a question on an application form or does not know information that is requested on an application and leaves spaces blank, does that justify a 3-month disqualification for "refusal?" None of these scenarios are contemplated by the existing good cause rule.

Furthermore, some of the actions that are characterized as a refusal in the proposed rule are vague and offer little or no guidance to participants so that they may conduct themselves in a manner that is not regarded as a refusal. While it is not an entitlement, W-2 is still required to operate within certain legal constraints based on fairness and due process. Rules that can be applied in a highly subjective manner and that are too vague to be understood run afoul of those constraints. This concern arises with the dress and grooming provision, the salary, hours and working conditions provision of the proposed rule, and could well arise with other provisions, depending on how they are applied.

Department response*: Section DCF 101.20 (1) (o) allows for the FEP to determine other circumstances beyond the control of the participant as good cause. It also requires that the FEP consider what a reasonable employer may allow under its absence policy and hardships that make completing activities and notifying the agency of missed activities more difficult for W-2 participants. In addition, a W-2 dispute resolution process is available to determine if benefits were improperly denied. (W-2 Manual, Chapter 12) Also, as stated above, these rules are consistent with the standards of conduct that unsubsidized employers develop for their employees and employers acting as work training providers in the W-2 program enter into an agreement that assures that they will follow rules that are consistent with what they provide to unsubsidized employees. Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*

LAW comment: Conclusion: As explained above, many W-2 participants face significant barriers to employment, including serious disabilities. W-2 law and policy, and disability law, require that participants be assessed to identify barriers and their impact, and that W-2 placement, Employability Plans, and assigned activities be responsive to those barriers. The proposed rule fails to consider (1)

the W-2 contractors' failure to conduct a screening or assessment; (2) the failure to develop an employability plan that complies with state rules; (3) whether the assigned activities were inappropriate in view of the screening and assessment conducted; or (4) whether the participant is a person with a disability and the failure to participate, deficiency or other behavior is related to or caused by the participant's disability. Without this type of review, participants with undetected or unaddressed barriers that may have contributed to any "refusal" will be penalized for the contractors' failures and for the very reason they are in need of W-2.

Department response*: Current W-2 policy requires a worker to conduct assessments and to use information gathered through the assessment process to develop an employability plan with a participant. (W-2 Manual, Chapter 5) Policy also requires workers to initiate action to uncover why a participant has not completed a required activity, including a review of the employability plan to ensure that activities assigned are appropriate. (W-2 Manual, Section 11.4.2)The Legislative Audit Bureau and the department's Milwaukee Operations Section, Program Integrity and Performance Section, and Bureau of Regional Operations monitor W-2 agencies' compliance with program requirements and achievement of program performance standards. Issues of non-compliance require W-2 agencies to take corrective action to remedy any deficiencies. In addition, the W-2 dispute resolution process is available if a participant disagrees with the W-2 agency's decision. This process is another mechanism for ensuring that W-2 agencies follow law, rule, and policy. (W-2 Manual, Chapter 12) Therefore, the department has determined that a change to the rule in response to this comment is not warranted.*