

Department of Workforce Development
Secretary's Office
201 E. Washington Avenue
P.O. Box 7946
Madison, WI 53707
Telephone: (608) 266-3131
Fax: (608) 266-1784
Email: sec@dwd.wisconsin.gov



Tony Evers, Governor
Amy Pechacek, Secretary-designee

DATE: June 23, 2023

TO: Michael J. Queensland
Senate Chief Clerk
Room B20 Southeast, State Capitol
PO Box 7882
Madison, WI 53707-7882

Edward A. Blazel
Assembly Chief Clerk
17 West Main Street, Room 401
Madison, WI 53703

FROM: Amy Pechacek, Secretary-designee
Department of Workforce Development

SUBJECT: Notice and Report for Final Draft Form of Proposed Rule
Clearinghouse Rule 22-083 – Chapter DWD 65

Pursuant to s. 227.19 (2), Stats., the Department of Workforce Development (Department) is submitting for legislative review the attached proposed rule in final draft form for Clearinghouse Rule 22-083, which revises ch. DWD 65. The governor approved this proposed rule on June 22, 2023. The analysis required under s. 227.14 (2), Stats., is included in the proposed rule. Also attached is the Fiscal Estimate & Economic Impact Analysis and the Rules Clearinghouse report and comments.

Basis and Purpose

Prior to passage of the federal Workforce Innovation and Opportunity Act of 2014 (WIOA), the federal Rehabilitation Act prohibited state agencies such as the Department's Division of Vocational Rehabilitation (DVR) from providing services under an order of selection to individuals who are not placed in the category for most significant disabilities. An order of selection is a waitlist for determining which categories of individuals will receive vocational rehabilitation services when resources are not available to serve all applicants for services. The WIOA amended the federal Rehabilitation Act to authorize state agencies to provide specific services and equipment for maintaining employment to individuals regardless of their category under the order of selection. The Department recently promulgated Clearinghouse Rule CR 22-

008, which made various changes to the Department's vocational rehabilitation rules, including allowing DVR to exercise the authority granted under the WIOA.

After Clearinghouse Rule CR 22-008 went into effect, DVR staff met with the Rehabilitation Services Administration (RSA) of the US Department of Education. The RSA makes grants to state agencies for vocational rehabilitation services under the federal Rehabilitation Act and regularly meets with state agencies regarding eligibility for the grants. At the meeting, the RSA recommended that, in order to meet the intent of federal regulations, the Department should revise ch. DWD 65 to specify that DVR's authority to provide services and equipment to individuals for maintaining employment should apply only to individuals at immediate risk of losing employment. Disregarding the RSA's recommendation could jeopardize the Department's eligibility for federal vocational rehabilitation grants. Therefore, in this rule, the Department proposes to revise ch. DWD 65 as recommended by the RSA.

Public Hearings

The Department did not hold a preliminary public hearing and comment period on the Statement of Scope for the proposed rule. The Department held a public hearing on the proposed rule on January 25, 2023. No comments were received at the public hearing.

Changes to the Analysis or Fiscal Estimate

The Department revised the analysis to indicate the deadline for comments and to reflect modifications the Department made to the rule in response to the Rules Clearinghouse. The Department made no other changes to the analysis or fiscal estimate.

Responses to Rules Clearinghouse

Statutory Authority. The Department revised the Explanation of Statutory Authority as recommended by the Rules Clearinghouse.

Conflict With or Duplication of Existing Rules. The Rules Clearinghouse made the following two comments:

1. "Section DWD 65.07 establishes how the department determines the order of selection. Under s. DWD 65.07, the department generally utilizes the functional assessment rating to determine the appropriate category for each consumer in an order of selection. The functional assessment rating does not determine whether, and to what degree, a consumer may be at risk of losing employment and the proposed rule does not address how the department determines which consumers are at immediate risk of losing employment in order to qualify to receive services before consumers with less significant disabilities. Should the department consider amending its rules to provide a means by which the department determines which consumers meet the 'immediate risk of losing employment' criterion for receiving services?"

Department's response. As recommended by the Rules Clearinghouse, the Department revised the rule to provide a means for determining which consumers meet the "immediate risk of losing employment" criterion. Specifically, the Department created s. DWD 65.04 (3) (b) 1., which requires a consumer to notify the Department that the consumer is at immediate risk of losing employment. The Department also created s. DWD 65.04 (3) (b) 2., which allows the Department to provide services or equipment to maintain employment to the consumer if the Department determines that the consumer would almost certainly lose the consumer's current job if specific services or equipment are not provided in the very near future that would enable the consumer to maintain employment. This determination corresponds to the RSA's clarification of the meaning of "immediate risk of losing employment" in the preamble to federal regulations implementing the WIOA. See 81 Federal Register 55630, 55667 (August 16, 2016).

2. "Should the department consider separating the criterion of being at immediate risk of losing employment and needing specific services or equipment to maintain employment from the criteria based on the significance of disability and indicate that 'notwithstanding' the significance of a consumer's disability, a consumer may receive services before other consumers if the consumer is at significant risk of losing employment? Absent such clarification, how will the department prioritize receipt of services between consumers at immediate risk of losing employment and consumers with the most significant disabilities?"

Department response. To clarify the rule as recommended by the Rules Clearinghouse, the Department added "notwithstanding significance of disability" to s. DWD 65.04 (3) (a).

Final Regulatory Flexibility Analysis and Response to SBRRB

The proposed rule will have no significant economic impact on small businesses, as defined in s. 227.114 (1), Stats. Therefore, the Department did not submit the proposed rule to the Small Business Regulatory Review Board (SBRRB) and a final regulatory analysis is not required.