

Chapter Ind 88

EQUAL OPPORTUNITIES — FAIR EMPLOYMENT

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Note: Chapter Ind 88 as it existed on June 30, 1986, was repealed and new chapter Ind 88 was created effect July 1, 1986.

Ind 88.001 Purpose. The purpose of this chapter is to implement the law prohibiting employment discrimination and unfair honesty testing, to provide a constructive, impartial and speedy procedure for the resolution of disputes arising under the law and to work toward the goal of eliminating employment discrimination and unfair honesty testing in this state.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.01 Definitions. When used in this chapter or in the Wisconsin fair employment act:

(1) "Act" means the Wisconsin fair employment act, ss. 111.31 to 111.395, Stats.

(2) "Administrative law judge" means the examiner appointed to conduct hearings arising under ch. 111, Stats.

(3) "Commission," "complainant," "conciliation," "department," "discrimination," "discriminatory acts or practices," "examiner," "findings," "hearing," "investigation," "notice," "order," "petition," "respondent," "serve," "subpoena," "unfair honesty testing" and "unlawful" mean the same as those terms are used in the act.

(4) "Complaint" means either a complaint or an amended complaint.

(5) "Division" means the equal rights division of the department.

(6) "Filing" means the physical receipt of a document at any division office.

(7) "Person" means one or more individuals, partnerships, associations, bodies politic or corporate, joint-stock or mutual companies, unincorporated organizations, trusts, legal representative, trustees or receivers.

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(8) "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief, that discrimination or unfair honesty testing probably has been or is being committed.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.02 Complaint. (1) **CONTENT.** A complaint shall identify the full name and address of each complainant and respondent. It shall state clearly and concisely the facts constituting the alleged unlawful discrimination or unfair honesty testing, including the dates of each occurrence.

(2) **FORM.** A complaint shall be written on a form which is available at any division office or job service office of the department, or on any other form acceptable to the department. The complaint shall be signed, notarized and verified.

(3) **PERSONS WHO MAY FILE.** A complaint may be filed by any person or by the person's duly authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

(4) **FILING.** A complaint may be filed at any division office. A complaint which does not meet the requirements of subs. (1) and (2) shall not be accepted for filing.

(5) **ASSISTANCE.** Appropriate assistance in completing complaint forms shall be made available by the department.

(6) **DEFERRED COMPLAINTS.** A complaint deferred to the department by a federal or local equal employment opportunity agency with which the department has a work-sharing agreement complies with the requirements of subs. (1) and (2), and is filed when received by the federal or local agency.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.03 Review of complaints. (1) **PRELIMINARY REVIEW.** The department shall review every complaint filed to ascertain whether the complainant is protected by the act, whether the respondent is subject to the act, whether the complaint states a claim for relief under the act and whether it has been filed within the time period prescribed by the act. Except where prevented by the anonymity requirement of s. 111.375 (1), Stats., the department shall serve upon the parties a preliminary determination and order dismissing any complaint which fails to meet these requirements.

(2) **APPEAL TO THE ADMINISTRATOR.** A complainant may appeal from an order dismissing a complaint under sub. (1) by filing a written request with the administrator of the division. The request shall be filed within 20 days after the date of the order and shall state specifically the grounds upon which it is based. If a timely request is filed, the administrator, or a person designated by the administrator, shall review the preliminary determination and shall either affirm, reverse, modify or set aside the preliminary determination and order. Such decision shall be served upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be referred for investigation. If the decision af-

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firm the preliminary determination, it is the final decision of the department and shall be subject to review in court.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.04 Withdrawal and amendment of complaints. (1) **WITHDRAWAL.** A complaint may be withdrawn at any time. A request for withdrawal shall be written and shall be signed by the complainant or by the complainant's duly authorized representative or attorney of record. Upon the filing of a request for withdrawal, the department shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated.

(2) **AMENDMENT.** Subject to the approval of the department, a complaint may be amended no later than 10 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.05 Notice to respondents. Except where prevented by the anonymity requirement of s. 111.375 (1), Stats., the department shall serve a copy of a complaint which meets the requirements of s. Ind 88.03 (1) upon each respondent prior to the commencement of any investigation. The department shall simultaneously serve a notice requesting a response to the complaint within 10 days after the date of the notice.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.06 Investigations. (1) The department shall investigate all complaints which satisfy the review under s. Ind 88.03 and may subpoena persons or documents when related to an investigation. Subpoenas may be enforced pursuant to s. 885.12, Stats.

(2) If during an investigation it appears that the respondent has engaged in discrimination or unfair honesty testing against the complainant other than that alleged in the complaint, the department may advise the complainant that the complaint should be amended to so allege. If the complaint is so amended, the department shall investigate the allegations of the amended complaint as well as the allegations of the initial complaint.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.07 Initial determinations as to cause. (1) **GENERAL.** At the conclusion of the investigation, the department shall issue a written initial determination which shall state whether or not there is probable cause to believe that any discrimination or unfair honesty testing occurred as alleged in the complaint. The initial determination shall state the facts upon which it is based and shall be served upon the parties.

(2) **PROBABLE CAUSE.** If the department initially determines that there is probable cause to believe that any discrimination or unfair honesty testing occurred as alleged in the complaint, it may refer those allegations to conciliation. The department may, by a notice to be served with the initial determination, notify the parties that conciliation services are available but that if conciliation fails or is waived the matter shall be set for hearing.

(3) **NO PROBABLE CAUSE.** If the department initially determines that there is no probable cause to believe that discrimination or unfair hon-

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esty testing occurred as alleged in the complaint, it may dismiss those allegations. The department shall, by a notice to be served with the initial determination, notify the parties of the complainant's right to appeal as provided in s. Ind 88.08.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.08 Appeals of initial determinations of no probable cause. Within 30 days after the date of an initial determination that there is no probable cause, a complainant may file with the division a written request for a hearing on the issue of probable cause. If no timely written request is filed, the initial determination's order of dismissal shall be final. If a timely written request is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. Ind 88.10 and 88.12-88.18, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.09 Conciliation. (1) **RESOLUTIONS OF DISPUTES.** When a matter is referred to conciliation following a determination of probable cause, the department shall attempt to resolve the dispute between the parties by conciliation unless either party waives conciliation in writing.

(2) **CONCILIATION AGREEMENT.** If conciliation resolves the dispute, a written conciliation agreement shall be prepared which shall state all measures to be taken by any party. The agreement may provide for dismissal of the complaint, provided that such dismissal is without prejudice to the complainant's right to pursue the complaint against any respondent who fails to comply with the terms of the agreement.

(3) **WAIVER OR FAILURE OF CONCILIATION; CERTIFICATION TO HEARING.** If an attempt at conciliation is waived or unsuccessful, the department shall issue a notice certifying the matter to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. Ind 88.10 and 88.12-88.18, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. The department shall advise the parties and their representatives in writing of the specific time, date and place established for the hearing by issuance of a notice of hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date of hearing not less than 30 days after the date of mailing of the notice of hearing and a place of hearing either in the county of the respondent's residence or in the county in which the alleged discrimination or unfair honesty testing appears to have occurred. It shall specify the nature of the discrimination or unfair honesty testing which is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

History: Cr. Register, June, 1986, No. 366, eff. 7-1-86.

Ind 88.11 Answer. (1) **WHEN REQUIRED; FILING AND SERVICE.** Within 21 days after the date of a notice of hearing on the merits, each respondent shall file an answer with the department. The answer shall be filed with the Register, July, 1987, No. 379

that gross sum is considered as wages except as a showing is made to the contrary.

(3) Prisoners injured in prison industries are considered to be earning the maximum average weekly earnings under the provisions of s. 102.11, Stats., except as a showing is made to the contrary.

(4) The 30 hour minimum workweek under s. 102.11 (1) (f), Stats., does not apply to a part-time employe unless the employe is a member of a regularly scheduled class of part-time employes. In all other cases part-time employment is on the basis of normal full-time employment in such job. However, this subsection does not apply to part-time employes defined in s. 102.11 (1) (f), Stats., who restrict availability on the labor market. As to the employes so defined, those wages will be expanded to the normal part-time or full-time wages unless the employer or insurance company complies with s. Ind 80.02 (2) (a).

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82.

Ind 80.60 Exemption from duty to insure (self-insurance). (1) DEFINITIONS. In this section:

(a) "Self-insurance" means exemption from the duty to insure, as provided in s. 102.28 (2) (b), Stats.

(b) "Full-insurance" means the insurance of all liability by one policy, as required in s. 102.31 (1) (a), Stats.

(c) "Divided-insurance" means consent to the issuance of two or more policies, as provided in s. 102.31 (1), Stats.

(d) "Partial-insurance" means self-insurance of a part of the liability and consent to the issuance of one or more policies on the remainder of the liability, as provided in ss. 102.28 (2) (b) and 102.31 (1), Stats.

(e) "Excess insurance" means catastrophic insurance for employers granted self-insurance, and is not full-insurance, self-insurance, partial-insurance or divided-insurance.

(2) EXCESS INSURANCE. Excess insurance may be carried without further order of the department.

(3) REQUIREMENTS FOR THE STATE AND ITS POLITICAL SUBDIVISIONS.

(a) The state and its political subdivisions may self-insure without further order of the department, if they are not partially-insured or fully-insured, or to the extent they are not partially-insured by written order under s. 102.31 (1), Stats., under one or more policies, and if they agree to report faithfully all compensable injuries and agree to comply with ch. 102, Stats., and the rules of the department. However, any such employer desiring partial-insurance or divided-insurance must submit an application to the department and be given special consent as described in s. Ind 80.61.

(b) 1. Any political subdivision of the state electing to self-insure shall notify the department in writing of such election before undertaking self-insurance. Political subdivisions of the state that were self-insured on July 1, 1984, need not give notice of such election until January 1, 1987.

2. The notice of election to self-insure shall be accompanied by an agreement to faithfully report all compensable injuries and to comply

with ch. 102, Stats., and the rules of the department in accordance with s. 102.28 (2) (b) and (c).

(c) Self-insurance granted under par. (a) is subject to revocation under s. 102.28 (2) (c), Stats. Once the privilege of self-insurance is revoked, further self-insurance may be authorized only under the procedures set forth in sub. (4).

(4) REQUIREMENTS FOR OTHER EMPLOYERS. (a) *Application*. Employers other than those specified in sub. (3), desiring self-insurance shall submit an application on a form available from the department. If the application is approved, the department shall permit self-insurance by written order. Employers granted self-insurance shall submit renewal applications on a departmental form to the department annually. Self-insurance shall expire on the day specified by the department in its order.

(b) *Minimum requirements*. The minimum requirements necessary for initial consideration for self-insurance are:

1. The employer shall be a corporation authorized to do business in Wisconsin and registered in the office of the secretary of state.
2. The employer shall have an average employment of at least 100 persons working in Wisconsin at the time the initial application is filed. All or some of these 100 persons may be employed in Wisconsin by its parent corporation, or by subsidiary or affiliated companies of the employer.
3. The employer shall own and maintain lands, buildings and plants in Wisconsin at least equal to a total net book value of \$500,000 or \$500 per employe, whichever amount is greater, including the net book value of the lands, buildings and plants owned in Wisconsin by the employer and its parent and subsidiary companies, less liens, if the employer is a corporation which is a wholly or majority owned subsidiary. The employer shall notify the department of any sale or transfer of this property which reduces the net book value below these minimum amounts.
4. If the employer is a corporation which is a majority or wholly owned subsidiary, it shall submit to the department a guaranty of payments by the ultimate or top parent company on a department form and a certified copy of the resolution adopted by the board of directors of the parent corporation.
5. The employer shall submit a certified copy of the resolution adopted by the board of directors authorizing the execution of the application and the agreement shall be submitted when the initial application is submitted.
6. The employer shall submit a copy of the latest financial report prepared for the stockholders of the corporation or its parent company and a copy of the latest annual 10-K filed by the corporation or its parent company with the U.S. securities and exchange commission with the submission of the initial and each renewal application. If neither report is prepared, the corporation shall submit an independently certified current financial statement together with such other financial information as the department may require to substantiate the financial data.

7. The employer shall make adequate arrangements in Wisconsin for claims administration under ch. 102, Stats., and this chapter, and for occupational safety and health, which are acceptable to the department.

8. The employer shall maintain acceptable performance in prompt payment and reporting of claims under ch. 102, Stats.

9. The employer shall maintain acceptable safety and health performance as measured by worker's compensation statistics and other occupational injury and illness information, including but not limited to the employer's OSHA incidence rating.

10. The employer shall furnish satisfactory security such as guaranty bond, deposit of securities, reserves, excess worker's compensation insurance, financial reports and reports on outstanding liabilities before and after self-insurance is granted, terminated or revoked, as the department requires to assure the payment of all past, present, existing and potential worker's compensation liability.

11. An employer granted self-insurance may be excused from the requirements of subds. 2 and 3 by the department if the number of employees or net book value of property in Wisconsin subsequently is reduced below the specified minimums.

(c) *General criteria to be considered by the department.* The following factors may be used by the department to initially grant or renew self-insurance, in addition to the minimum requirements, in evaluating the qualifications of the employer, the amount and type of guaranty and securities, the number and kind of special reports to assure the payment of all worker's compensation claims:

1. The financial strength and liquidity of the employer, its profit and loss history, and changes in other key financial conditions affecting the employer's ability to promptly pay all compensation;

2. The employer's organizational structure, management background, kind of business, length of time in business, and any contemplated or newly implemented reorganization including but not limited to merger, consolidation, buying of new corporation, divesting or spinning off of current operations, and other corporate changes;

3. Tangible property of the employer and its subsidiaries or parent corporation, including but not limited to lands, buildings and plants owned and maintained in Wisconsin;

4. The employer's bond or other business ratings;

5. The number of employer's employees, payroll and hours worked in Wisconsin;

6. The claims administration and safety and health engineering programs maintained by the employer;

7. The compensation loss history, including reported losses, incurred losses, paid losses, unpaid losses, outstanding liability, and compensation premium of the employer;

8. Excess insurance, surety bond, deposit of securities, guaranty by parent company, and other guarantees and security pledged by the employer;

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9. The employer's performance indicators under ch. 102, Stats., including, but not limited to, promptness or time taken in making first indemnity payments, promptness or time taken in submitting first reports, and injury and illness incidence and severity rates; and

10. The financial and performance ratios, characteristics and trends for the employer or the consolidated group of employers to which the employer belongs as compared with the financial and performance ratios, characteristics and trends for other employers and for the particular or most similar industry in which the employer or the employer's consolidated group is involved.

(d) *Surety bond, deposit of securities, excess insurance, or other security.* The required minimum bond, minimum amount of cash or securities, minimum excess insurance upper limit, maximum excess insurance retention, or other security satisfactory to the department, shall be determined after the application has been reviewed and analyzed by the department. The employer shall use the required department bond and deposit agreement form.

1. Guaranty bonds shall be written by companies authorized to transact surety business in Wisconsin.

2. Cash or securities shall be deposited with banks qualified to exercise trust powers in Wisconsin. These securities shall be negotiable and converted into cash at any time by the depository at request of the department.

3. If excess insurance is required by the department, it shall be procured from a licensed excess insurance worker's compensation company, and written on the basis of rates and policy form filed with and approved by the state of Wisconsin commissioner of insurance. The policy for the required excess insurance shall be filed with and approved by the Wisconsin compensation rating bureau.

(e) *Enjoining and restraining employer.* Whenever the department has probable cause to believe that an employer currently or previously granted self-insurance for its parent or subsidiary company is liquidating and distributing its assets to its stockholders, or is selling or is about to sell the tangible property it owns and maintains in Wisconsin and the employer or its parent or subsidiary company is moving or is about to move its operations out of Wisconsin, without providing for the payment under the terms of the agreement in the self-insurance application or guaranty form it has executed and submitted to the department, the department may, through the attorney general cause a petition to be filed to enjoin and restrain the employer or its parent or subsidiary company from engaging in such action.

History: Cr. Register, September, 1982, No. 321, eff. 10-1-82; am. (3), (4) (a), (b) (intro.) and (c) (intro.), cr. (4) (b) 11., Register, September, 1986, No. 369, eff. 10-1-86.

Ind 80.61 Divided-insurance and partial-insurance requirements under s. 102.31 (1) and (6), for all employers, including contractors working on a wrap-up project. (1) DEFINITIONS. In this section:

(a) "Divided-insurance" means consent to the issuance of 2 or more policies, as provided in s. 102.31 (1), Stats.

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