

CR 91-89

RULES CERTIFICATE

STATE OF WISCONSIN)
) SS
DEPT. OF INDUSTRY,)
LABOR & HUMAN RELATIONS)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Carol Skornicka, Secretary of the Department of Industry,
Labor and Human Relation, and custodian of the official records of said department, do hereby certify the
the annexed rule(s) relating to Employment Relationships in the Logging In- were duly
(Subject) dustry
approved and adopted by this department on October 15, 1991
(Date)

I further certify that said copy has been compared by me with the original on file in the department
and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the official seal of the
department at 9:30 a.m.
in the city of Madison, this 15th
day of October A.D. 19 91

Pat Osborne, Deputy Secretary
for Secretary

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ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s)
ss. 101.02(1), 108.02(12) and 108.14(2), Stats.

Stats., the Department of Industry, Labor and Human Relations creates; amends;

repeals and recreates; repeals and adopts rules of Wisconsin Administrative Code chapter(s):

Chapter ILHR 107

(Number)

Employment Relationships in the Logging Industry

(Title)

The attached rules shall take effect on the first day of the month following publication
in the Wisconsin Administrative Register pursuant to section 227.22, Stats.

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Adopted at Madison, Wisconsin this

date: October 15, 1991

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN
RELATIONS

Pat Osborne, Deputy Secretary
for Secretary



State of Wisconsin \ Department of Industry, Labor and Human Relations

RULES in FINAL DRAFT FORM

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Rule No.: Chapter ILHR 107

Relating to: Employment Relationships in the Logging Industry

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SECTION 1. Chapter ILHR 107 is repealed and recreated to read:

Chapter ILHR 107

EMPLOYMENT RELATIONSHIPS IN THE LOGGING INDUSTRY

ILHR 107.001 Definitions

ILHR 107.01 Purpose

ILHR 107.02 Requirements of law; department policy

ILHR 107.03 Effect

ILHR 107.04 Direction and control

ILHR 107.05 Independently established; customarily engaged

ILHR 107.001 DEFINITIONS. In this chapter:

(1) "Department" means the department of industry, labor and human relations.

(2) "Forest products manufacturer" means a business engaged in the processing of logs, and includes pulp mills, saw mills or other manufacturing plants.

(3) "Logging contractor" means a person who contracts for the cutting of timber, the hauling of logs or the skidding of logs, purchases timber to cut, or sells unmanufactured forest products.

(4) "Piece cutter" means a person who fells timber, removes branches from timber, saws timber into logs, or stacks logs.

(5) "Skidding operator" means a person who removes logs from the woods to a roadside landing or other collection point for hauling.

ILHR 107.01 PURPOSE. The purpose of this chapter is to establish standards for determining whether a piece cutter or skidding operator performs services in an independently established business free from a logging contractor's or forest products manufacturer's direction or control so as not to be deemed an "employee" of a logging contractor or forest products manufacturer under s. 108.02(12), Stats.

ILHR 107.02 REQUIREMENTS OF LAW; DEPARTMENT POLICY. In determining whether the logging contractor or forest products manufacturer exercises direction or control over the work of a piece cutter or skidding operator and whether the piece cutter or skidding operator is engaged in an independently established business, the department may not use as evidence any requirements of state or federal law governing the logging industry. The department believes it is unreasonable to consider mandates of law as evidence because they have not been imposed on the relationship between the parties of their own volition.

ILHR 107.03 EFFECT. If a piece cutter or skidding operator has been found, under ss. ILHR 107.04 and 107.05, to be free from the direction and control of a logging contractor or forest products manufacturer and to be engaged in an independently established business, the piece cutter or skidding operator is an independent contractor and not an employee of the logging contractor or forest products manufacturer under s. 108.02(12)(b), Stats.

ILHR 107.04 DIRECTION AND CONTROL. (1) The department shall examine the factors enumerated in this section to determine, both under contract and in fact, whether a piece cutter or skidding operator is free from a logging

contractor's or forest products manufacturer's direction or control while the piece cutter or skidding operator performs services for the logging contractor or forest products manufacturer. The department shall determine whether:

(a) The piece cutter or skidding operator is responsible for providing and maintaining all of the equipment, supplies and tools necessary to meet the contract obligations;

(b) The piece cutter or skidding operator supplies or is responsible for supplying the necessary personal services to meet the contract obligations and may engage the services of individuals, including other piece cutters and skidding operators, without the knowledge or consent of the logging contractor or forest products manufacturer;

(c) The piece cutter or skidding operator may refuse to contract for work, may refuse to perform work not covered by the contract when requested by the logging contractor or forest products manufacturer or may refuse to extend a contract for services;

(d) The logging contractor or forest products manufacturer may not supervise, either directly or indirectly, the piece cutter or skidding operator in the performance of services; and

(e) The logging contractor or forest products manufacturer may not discipline or reprimand the piece cutter or skidding operator or impose work rules to be obeyed by the piece cutter or skidding operator.

(2) If the department determines that all of the factors under sub. (1)(a) to (e) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be free from the direction and control of the logging contractor or forest products manufacturer in the

performance of services under s. 108.02(12)(b)1, Stats. If one or more of the factors under sub. (1)(a) to (e) are not present, the department shall consider additional factors of the relationship, both under contract and in fact, including whether:

(a) The piece cutter or skidding operator sets the hours of the day and the days of the week the contract services are to be performed;

(b) The piece cutter or skidding operator does not require training by the logging contractor or forest products manufacturer in order to perform the contract services;

(c) The logging contractor or forest products manufacturer may not discharge the piece cutter or skidding operator except for breach of contract; and

(d) The rate of compensation for services is set by the piece cutter or skidding operator, or is determined through bona fide negotiations with the logging contractor or forest products manufacturer, or the piece cutter and skidding operator are free to reject the rate of compensation offered by the logging contractor or forest products manufacturer.

(3) If the department determines that all of the factors under sub. (2) (a) to (d) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be free from the direction and control of the logging contractor or forest products manufacturer in the performance of services under s. 108.02(12)(b)1, Stats. If one or more of the factors under sub. (2) (a) to (d) are not present, the piece cutter or skidding operator may be deemed to be free from the direction and control of the logging contractor or forest products manufacturer under s. 108.02(12)(b)1, Stats.

(4) If the piece cutter or skidding operator is found to be under the direction or control of the logging contractor or forest products manufacturer under subs. (1) and (2), the piece cutter or skidding operator shall be deemed to be an employe of the logging contractor or forest products manufacturer under s. 108.02(12)(b)1, Stats.

ILHR 107.05 INDEPENDENTLY ESTABLISHED BUSINESS; CUSTOMARILY ENGAGED. (1) If the department determines that a piece cutter or skidding operator is free from a logging contractor's or forest products manufacturer's direction or control in the performance of services under s. ILHR 107.04, the department shall examine the following factors to determine whether a piece cutter or skidding operator who performs services for a logging contractor or forest products manufacturer is performing these services in an independently established business in which the piece cutter or skidding operator is customarily engaged. The department shall determine whether:

(a) The piece cutter or skidding operator negotiated a contract with the logging contractor or forest products manufacturer for the right to cut timber or the right to skid logs;

(b) The piece cutter or skidding operator negotiated the compensation to be paid for cutting timber or skidding logs;

(c) The piece cutter or skidding operator has an ownership interest in a business. In determining whether the piece cutter or skidding operator has an ownership interest in a business, the department shall consider whether the piece cutter or skidding operator:

1. May sell or give away the business without restriction from the logging contractor or forest products manufacturer;

2. Has an expectation of profit or bears the risk of loss while performing services for the logging contractor or forest products manufacturer; and

3. Has a monetary investment in the trade, such as tools, equipment and inventory, which are usual and customary in the industry.

(d) The piece cutter or skidding operator is represented to logging contractors and forest products manufacturers as a person who provides timber cutting or log skidding services;

(e) The piece cutter or skidding operator is free to solicit contracts, enter into contracts and perform services under contract for more than one logging contractor or forest products manufacturer at or about the same time; and

(f) The piece cutter or skidding operator determines the rate of pay, is liable for paying the wages, and actually pays the wages of individuals, including other piece cutters and skidding operators, engaged by the piece cutter or skidding operator to meet the contract obligations.

(2) If the department determines that all of the factors under sub. (1)(a) to (f) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be performing services in an independently established business in which the piece cutter or skidding operator is customarily engaged under s. 108.02(12)(b)2, Stats. If one or more of the factors under sub. (1)(a) to (f) are not present in the relationship between the piece cutter or skidding operator and logging contractor or forest products manufacturer, the department shall consider additional factors including whether:

(a) The business of the piece cutter or skidding operator could continue when the contractual relationship with the logging contractor or forest products manufacturer ends;

(b) The piece cutter or skidding operator is free to perform services for other logging contractors or forest products manufacturers while performing services for the logging contractor or forest products manufacturer;

(c) The piece cutter or skidding operator bears the principal burden of maintaining personal expenses such as meals, lodging and transportation, while performing services;

(d) The piece cutter or skidding operator has a reputation in the community generally on which to rely for business as a piece cutter or skidding operator; and

(e) The piece cutter or skidding operator may incur liability for damages if there is a breach of contract by the piece cutter or skidding operator.

(3) If the department determines that all of the factors under sub. (2) (a) to (e) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be performing services in an independently established business in which the piece cutter or skidding operator is customarily engaged under s. 108.02(12)(b)2, Stats. If one or more of the factors under sub. (2) (a) to (e) are not present, the piece cutter or skidding operator may be deemed to be performing services in an independently established business in which the piece cutter or skidding operator is customarily engaged under s. 108.02(12)(b)2, Stats.

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.

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Statutory Authority. Pursuant to the authority vested in the department of industry, labor and human relations by ss. 101.02(1) and 108.14(2), Stats., the department of industry, labor and human relations hereby proposes to affect sections of the rules which implement and interpret 108.02(12), Stats., as follows:

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The Wisconsin Department of Industry, Labor and Human Relations proposes an order to repeal and recreate chapter ILHR 107, relating to employment relationships in the logging industry. The proposed rule is identical to the rule being repealed except for the deletion of the two-year sunset provision in the effective date language.

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Analysis of Proposed Rule

(The same analysis submitted with the original rule.)

Statutory authority: ss. 101.02(1), and 108.14(2), Stats.

Statute interpreted: s. 108.02(12), Stats.

Under Chapter 108, Stats., any individual providing a service for pay is presumed to be an employe. Section 108.02(12), Stats., defines "employe" as any individual who performs services for an employing unit unless the employing unit satisfies the department that the individual performs the services in an independently established business free from the employing unit's direction or control. Chapter ILHR 107 establishes standards for determining whether a piece cutter or skidding operator performing services for a logging contractor or forest products manufacturer is an employe or an independent contractor. In applying this rule, the department will not use requirements of law governing the logging industry as evidence of direction or

control. However, the rule does not preclude the department from examining the way in which mandates of law are carried out to determine whether direction or control exists in the relationship between the parties.

The piece cutter or skidding operator will be found to be free from the logging contractor or forest products manufacturer's direction or control if all of the following factors are present in the relationship:

(a) The piece cutter or skidding operator is responsible for providing and maintaining all of the equipment, supplies and tools necessary to meet the contract obligations;

(b) The piece cutter or skidding operator supplies or is responsible for supplying the necessary personal services to meet the contract obligations and may engage the services of individuals including other piece cutters and skidding operators without the knowledge or consent of the logging contractor or forest products manufacturer;

(c) The piece cutter or skidding operator may refuse to contract for work, may refuse to perform work not covered by the contract when requested by the logging contractor or forest products manufacturer or may refuse to extend a contract for services;

(d) The logging contractor or forest products manufacturer may not supervise, either directly or indirectly, the piece cutter or skidding operator in the performance of services; and

(e) The logging contractor or forest products manufacturer may not discipline or reprimand the piece cutter or skidding operator or impose work rules to be obeyed by the piece cutter or skidding operator.

If even one of these factors is missing, the department will consider

additional factors to determine whether direction or control exists. The department will consider whether:

(a) The piece cutter or skidding operator sets the hours of the day and the days of the week the contract services are to be performed;

(b) The piece cutter or skidding operator does not require training by the logging contractor or forest products manufacturer in order to perform the contract services;

(c) The logging contractor or forest products manufacturer may not discharge the piece cutter or skidding operator except for breach of contract; and

(d) The rate of compensation for services is set by the piece cutter or skidding operator, or is determined through bona fide negotiations with the logging contractor or forest products manufacturer, or the piece cutter and skidding operator are free to reject the rate of compensation offered by the logging contractor or forest products manufacturer.

If all of these factors are present, the piece cutter or skidding operator will be found to be free from the logging contractor's or forest products manufacturer's direction or control. If one or more of the factors is missing, the department may find the piece cutter or skidding operator to be an employe of the logging contractor or forest products manufacturer.

If the department finds that the logging contractor or forest products manufacturer does not maintain direction or control, then the department must determine whether the piece cutter or skidding operator has an independently established business.

The piece cutter or skidding operator will be found to be performing

services for the logging contractor or forest products manufacturer in an independently established business in which the piece cutter or skidding operator is customarily engaged if all of the following factors are present in the relationship:

(a) The piece cutter or skidding operator negotiated a contract with the logging contractor or forest products manufacturer for the right to cut timber or the right to skid logs;

(b) The piece cutter or skidding operator negotiated the compensation to be paid for cutting timber or skidding logs;

(c) The piece cutter or skidding operator has an ownership interest in a business. In determining whether the piece cutter or skidding operator has an ownership interest in a business, the department shall consider whether the piece cutter or skidding operator:

1. May sell or give away the business without restriction from the logging contractor or forest products manufacturer;

2. Has an expectation of profit or bears the risk of loss while performing services for the logging contractor or forest products manufacturer; and

3. Has a monetary investment in the trade, such as tools, equipment and inventory, which are usual and customary in the industry.

(d) The piece cutter or skidding operator hold themselves out to logging contractors and forest products manufacturers as persons who provide timber cutting or log skidding services;

(e) The piece cutter or skidding operator is free to solicit contracts, enter into contracts and perform services under contract for more

than one logging contractor or forest products manufacturer at or about the same time; and

(f) The piece cutter or skidding operator determines the rate of pay, is liable for paying the wages, and actually pays the wages of individuals including other piece cutters and skidding operators engaged by the piece cutter or skidding operator to meet the contract obligations.

If even one of these factors is missing, the department will consider additional factors to determine whether the piece cutter or skidding operator performs the services in an independently established business. The department will consider whether:

(a) The business of the piece cutter or skidding operator could continue when the contractual relationship with the logging contractor or forest products manufacturer ends;

(b) The piece cutter or skidding operator is free to perform services for other logging contractors or forest products manufacturers while performing services for the logging contractor or forest products manufacturer;

(c) The piece cutter or skidding operator bears the principal burden of maintaining personal expenses such as meals, lodging and transportation, while performing services;

(d) The piece cutter or skidding operator has a reputation in the community generally on which to rely for business as a piece cutter or skidding operator; and

(e) The piece cutter or skidding operator may incur liability for damages if there is a breach of contract by the piece cutter or skidding operator.

If all of these factors are present, the piece cutter or skidding operator will be found to be performing services in an independently established business. If one or more of the factors is missing, the department may find the piece cutter or skidding operator to be an employe. If the piece cutter or skidding operator is free from direction or control and is in an independently established business, he or she will be deemed to be an independent contractor and not an employe of the logging contractor or forest products manufacturer.

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Tommy G. Thompson
Governor
Carol Skornicka
Secretary



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State of Wisconsin
Department of Industry, Labor and Human Relations

October 15, 1991

Gary Poulson
Assistant Revisor of Statutes
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Douglas LaFollette
Secretary of State
10th Floor
30 West Mifflin Street
Madison, Wisconsin 53703

Dear Messrs. Poulson and LaFollette:

TRANSMITTAL OF RULE ADOPTION

CLEARINGHOUSE RULE NO. 91-89
RULE NO. Chapter ILHR 107
RELATING TO: Employment Relationships in the Logging Industry

Pursuant to section 227.20, Stats., agencies are required to file a certified copy of every rule adopted by the agency with the offices of the Secretary of State and the Revisor of Statutes.

At this time, the following material is being submitted to you:

1. Order of Adoption.
2. Rules Certificate Form.
3. Rules in Final Draft Form.

Pursuant to section 227.114, Stats., a summary of the final regulatory flexibility analysis is included for permanent rules. A fiscal estimate and fiscal estimate worksheet is included with an emergency rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Carol Skornicka".

Carol Skornicka
Secretary

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