

CR 92-164

# RULES CERTIFICATE

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

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

**Carol Skornicka**

I, \_\_\_\_\_, Secretary of the Department of Industry,

Labor and Human Relations, and custodian of the official records of said department, do hereby certify that

the annexed rule(s) relating to **Wages for Contribution Purposes; Contribution Rates; Certain Excluded Employments; and Coverage and Related Records and Reports**

were duly approved and adopted by this department on April 12, 1993  
(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 8:00 a.m. in the city of Madison, this 12th day of April A.D. 19 93.

*Carol Skornicka*  
Secretary

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# ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s)  
**101.02(1), 108.14(2), 108.015, 108.02(26) and 227.11(2)**

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

repeals and recreates;  repeals and adopts rules of Wisconsin Administrative Code chapter(s):  
**ILHR 101, 102, 103 & 110** **Wages for Contribution Purposes; Contribution Rates; Certain Excluded Employments; and Coverage and Related Records and Reports**

(Number)

(Title)

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



Adopted at Madison, Wisconsin this

date: April 12, 1993

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN  
RELATIONS

*Carol J. ...*  
Secretary



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

# RULES in FINAL DRAFT FORM

Rule No.: \_\_\_\_\_ CHAPTER ILHR 101,102,103 & 110

Relating to: \_\_\_\_\_ TAXABLE WAGES; CONTRIBUTION RATES;  
CERTAIN EXCLUDED EMPLOYMENTS; AND  
COVERAGE & RELATED RECORDS &  
REPORTS

The Wisconsin Department of Industry, Labor and Human Relations proposes an order to repeal ILHR 110.01(2), 110.09, 110.10, 110.12(1)(title) and (intro), 110.13, and 110.14; to renumber ILHR 110.001(5m) to (9), 110.001(16) and (17), 110.01(1), 110.06, 110.07, 110.11(2) to (6), 110.12(title), 110.12(1)(a) and (b), and 110.15 to 110.17; to renumber and amend ILHR 110.001(15) 110.08, 110.11(title) and (1), 110.11(7) and (8), and 110.12(2) and (3); to amend ILHR 103.01 and 110(title); to repeal and recreate ILHR 110.001(14); and to create Chapters ILHR 101 and ILHR 102 relating to taxable wages, certain excluded employments, contribution rates, and coverage and related records and reports.

STATUTORY AUTHORITY: ss. 101.02(1), 108.14(2), 108.015, and 108.02(26).

STATUTES INTERPRETED: ss. 108.015 and 108.02(26).

ANALYSIS OF PROPOSED RULES PREPARED BY THE DEPARTMENT OF INDUSTRY,  
LABOR AND HUMAN RELATIONS:

The rules have been reorganized to increase clarity by separately dealing with the issues of taxable wages, initial contribution rates for certain employers, coverage, and records and reports related to coverage.

The definition of wages in s. 108.02(26) is patterned after the Federal Unemployment Tax Act (FUTA) definition of wages found in 26 USC 3306(b). Chapter ILHR 101 clarifies how the department will interpret and apply the chapter 108 definition of wages.

The retroactive effective date of 1/1/93 is necessary because this rule clarifies and interprets s. 108.02(26), Wis. Stats., which went into effect on 1/1/93. Not having a retroactive effective date would result in employers having to use one definition of wages when reporting unemployment compensation taxable payments made before the effective date and a different definition after that date (all within the same tax year). They would then have to reconcile these different treatments with their FUTA tax offset credit for that tax year. This would result in significant confusion and detailed paperwork. Having the retroactive effective date has no

negative impact on employers or unemployment compensation claimants.

Section ILHR 101.02 provides a formula for determining the portion of an employer's calendar year payments to an individual that will not be considered wages for contribution purposes. The section further provides that such portion will be considered wages for benefit purposes and for the purpose of completing the quarterly wage report. The section also specifies that the following will not be considered wages: federally required Medicare refunds, payments stemming from the exercise of certain Indian fishing rights, and FUTA-exempt contributions into, and payments from, supplemental unemployment benefit plans.

Section ILHR 101.03 specifies that the following types of remuneration will be considered wages: all cash and non-cash payments for agricultural labor, the value of employee achievement awards which are compensation for services, the value of certain tips, and the value of various forms of deferred compensation and salary reduction arrangements. The treatment of tips, deferred compensation and salary reduction arrangements conform to FUTA.

Section 101.04 provides that although the Chapter 108 definition of wages is patterned after FUTA, the Chapter 108 definition of employment must be used in interpreting the Chapter 108 definition of wages.

Section 101.05 provides that the department will not retroactively change its interpretation of the definition of wages or a determination based on that interpretation due to a subsequent and different federal interpretation of the FUTA provision on which the Chapter 108 definition is based. Such federal interpretations will only be applied prospectively.

Section 101.06 specifies that the department will continue to consider multiple corporations using a common paymaster to be multiple individual corporations.

Section 101.07 provides that the department will treat as wages, for contribution purposes, payments made by a subchapter S corporation to an officer for services performed for the corporation. The rule further lists certain types of payments which are not to be considered wages for contribution purposes. This provision replaces the same provision in Chapter ILHR 110.

Section 101.08 provides that FUTA-exempt contributions into, and payments from, supplemental unemployment benefit plans (commonly known as SUB-pay) will not be considered wages for contribution purposes.

Section 101.09 provides that when the value of meals and lodging constitutes wages for contribution purposes, the employer must report the items at their actual value or make a reasonable estimate if the actual value is not available. If neither the actual value nor reasonable estimate is available, the department must use the specified monetary amounts enumerated in the rule. This provision replaces the same provision in Chapter ILHR 110.

Section 101.10 requires that, when necessary, employers must provide proof that particular payments are not considered wages under FUTA or the Internal Revenue Code.

Chapter ILHR 102 is created to contain sections, currently found in Chapter ILHR 110, specifying initial contribution rates for new construction industry employers and for payors of

sickness or accident disability payments.

Chapter ILHR 103 is amended to correct outdated statutory citations and to clarify when directors who perform multiple paid duties will be considered to be employees of a corporation or association.

Chapter ILHR 110 has been narrowed to deal only with coverage and related records and reports. Current Chapter 110 provisions on these issues are retained. Sections dealing with contributions have been moved to the new Chapter ILHR 102. Sections dealing with taxable wages have been moved to the new Chapter ILHR 101.

SECTION 1. Chapter 101 is created to read:

CHAPTER 101  
WAGES FOR CONTRIBUTION PURPOSES

- ILHR 101.001 Definitions
- ILHR 101.01 Purpose
- ILHR 101.02 Remuneration Excluded from the Definition of Wages
- ILHR 101.03 Remuneration Included in the Definition of Wages
- ILHR 101.04 Employment
- ILHR 101.05 Prospective Application of Federal Interpretations
- ILHR 101.06 Corporate Common Paymasters
- ILHR 101.07 Subchapter S Corporation Payments
- ILHR 101.08 Supplemental Unemployment Benefits
- ILHR 101.09 Value of Room and Meals
- ILHR 101.10 Internal Revenue Code Requirements

ILHR 101.001 DEFINITIONS. In this chapter:

(1) "Agricultural labor" has the meaning specified in s. 108.02(2), Stats.

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

(3) "Employer" means any person who is or becomes subject to the reimbursement financing or contribution requirements of ch. 108, Stats., including multiemployer benefit plans and other third party payors which become liable under s. ILHR 110.06.

(5) "Federal payroll base" means the first \$7000 of wages which is paid during a calendar year by an employer to an employe and which is payroll under s. 108.02(21), Stats.

(7) "Payroll" has the meaning specified in s. 108.02(21), Stats.

(10) "Wisconsin payroll base" means the first \$10,500 of wages which is paid during a calendar year by an employer to an employe and which is payroll under s. 108.02(21), Stats.

ILHR 101.01 PURPOSE. The definition of wages in s. 108.02(26) is patterned after the FUTA definition of wages found in 26 U.S.C. 3306(b). This chapter clarifies how the department shall apply the definition of wages in s. 108.02(26), Stats. to assess employer contributions to the

unemployment compensation reserve fund. This chapter also specifies changes to the definition of wages in s. 108.02(26), Stats., under the authority granted in s. 108.02(26)(a), Stats., and provides interpretations which may be inconsistent with those applied to 26 U.S.C. 3306(b), under the authority granted in s. 108.015, Stats.

ILHR 101.02 REMUNERATION EXCLUDED FROM THE DEFINITION OF WAGES.

Notwithstanding s. 108.02(26), Stats., wages shall not include:

(1) AMOUNTS ABOVE PAYROLL BASE. (a) For contribution purposes, that portion of an individual's wages during any calendar year which exceeds the greater of the federal payroll base or the Wisconsin payroll base.

(b) Paragraph (a) does not apply for purposes of completing the quarterly wage report or for benefit purposes.

(2) MEDICARE REFUNDS. The amount of any refund required under s. 421 of the Medicare Catastrophic Coverage Act of 1988, as specified in Act Dec. 19, 1989, P.L. 101-239, 103 Stat. 2473.

(3) INDIAN FISHING RIGHTS. Remuneration for services performed in a fishing rights-related activity of an Indian tribe by a member of the tribe for another member of the tribe or for a qualified Indian entity, as specified in 26 U.S.C. 7873(a)(2).

(4) SUPPLEMENTAL UNEMPLOYMENT BENEFITS. Employer contributions into or payments out of a supplemental unemployment benefits plan for employees if the contributions or payments are not considered wages under FUTA, regardless of whether the unemployment compensation benefits plan is part of an employer profit-sharing plan. The employer shall demonstrate to the satisfaction of the department that such contributions or payments are not

considered wages under FUTA.

ILHR 101.03 REMUNERATION INCLUDED IN THE DEFINITION OF WAGES. Notwithstanding 108.02(26), Stats., wages shall include:

- (1) All cash and non-cash remuneration paid for agricultural labor.
- (2) The value of an employe achievement award which is compensation for services.
- (3) Remuneration for services whether paid directly or indirectly by the employer.
- (4) The value of tips which are wages under 26 U.S.C. 3306(s).

NOTE: Subject to ILHR 101.05, employers should use the version of 26 U.S.C. 3306(s) which is in effect at the time the remuneration is paid. Although it may have since been amended, 26 U.S.C. 3306(s) (1991) and I.R.C. 3306(s) (1991) define such tips as follows:

**26 USC §3306(s) Tips treated as wages.**

For purposes of this chapter, the terms "wages" includes tips which are -

- (1) received while performing services which constitute employment,  
and
- (2) included in a written statement furnished to the employer pursuant to section 6053(a).

(5) The value of certain deferred compensation and salary reduction arrangements which are wages under 26 U.S.C. 3306(r).

NOTE: Even though 26 U.S.C. 3306(r) and s. 108.02(26)(a)(4)a-f, Stats. address deferred compensation and salary reduction agreements, the amounts considered wages under 26 U.S.C. 3306(r) are not excluded from the definition of wages by s. 108.02(26)(a)(4)a-f. . Subject to ILHR 101.05, employers should use the version of 26 U.S.C. 3306(r) which is in effect at the time the remuneration is paid. Although it may have since been amended, 26 U.S.C. 3306(r) (1991) and I.R.C. 3306(r) (1991) follow:

**26 USC §3306(r) Treatment of certain deferred compensation and salary reduction arrangements.**

(1) **Certain employer contributions treated as wages.** Nothing in any paragraph of subsection (b) (other than paragraph (1)) shall exclude from the term "wages"

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not included in gross income by reason of section 402(a)(8), or

(B) any amount treated as an employer contribution under section 414(h)(2) where the pickup referred to in such section is pursuant

to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

**(2) Treatment of certain nonqualified deferred compensation plans.**

(A) In general. Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter as of the later of -

(i) when the services are performed, or

(ii) when there is no substantial risk of forfeiture of the rights to such amount.

(B) Taxed only once. Any amount taken into account as wages by reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter.

(C) Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (b)(5).

ILHR 101.04 EMPLOYMENT. In interpreting s. 108.02(26), Stats., the department shall apply the definition of employment found in s. 108.02(15), Stats.

ILHR 101.05 PROSPECTIVE APPLICATION OF FEDERAL INTERPRETATIONS.

A final federal interpretation about whether certain payments constitute wages, either generally or as to a particular case, which differs from an earlier departmental interpretation regarding those payments or kinds of payments shall only be applied prospectively. The department may not retroactively change either its interpretation or a determination based on that interpretation due to a subsequent and different federal interpretation.

ILHR 101.06 CORPORATE COMMON PAYMASTERS. Two or more related corporations concurrently employing the same individual and compensating the individual through a common paymaster which is one of such corporations shall each be considered a separate employer.

ILHR 101.10 INTERNAL REVENUE CODE REQUIREMENTS. When s. 108.02(26), Stats. or FUTA requires that a payment must meet the requirements of a particular section of the internal revenue code in order to not be considered wages, the employer shall demonstrate to the satisfaction of the department that the payment meets such requirements.

SECTION 2. Chapter ILHR 102 is created to read:

CHAPTER ILHR 102  
CONTRIBUTION RATES

- ILHR 102.01 Purpose
- ILHR 102.02 New Construction Industry Employers; Initial Contribution Rates
- ILHR 102.03 Payors of Sickness or Accident Disability Payments; Contribution rates

ILHR 102.01 PURPOSE. This chapter specifies the initial contribution rates for certain categories of employers.

SECTION 3 ILHR 103.01 is amended to read:

ILHR 103.01 CERTAIN EXCLUDED EMPLOYMENTS. The following provisions shall apply in interpreting certain paragraphs of s. 108.02~~(5)~~(15), Stats:

(1) UNPAID CORPORATION OR ASSOCIATION OFFICERS AND MERE DIRECTORS EXCLUDED. Pursuant to s. 108.02~~(5)(g)~~(15), Stats., service as an unpaid officer of a corporation or association is not "employment", but all paid officers of any association or corporation are in "employment" under ch. 108, Stats., subject to s. 108.02(15)(L). Mere "directors", however, who perform no paid duties for a corporation or association other than attendance at directors meetings shall not be deemed in an "employment" or be deemed the employer's "employees" for the purposes of ch. 108, Stats. Directors who perform multiple paid duties for a corporation or association, including attendance at directors meetings, shall not be considered "employees" in "employment" when attending directors meetings but shall be considered "employees" in "employment" when performing other paid duties.

SECTION 4. Chapter ILHR 110 (title) is amended to read:

CHAPTER ILHR 110  
CONTRIBUTIONS, TAXABLE WAGES COVERAGE AND RELATED RECORDS AND REPORTS

- ILHR 110.001 Definitions
- ILHR 110.01 Purpose
- ILHR 110.02 Required records to retain; retention periods; department's investigative powers
- ILHR 110.03 Required records and reports to submit
- ILHR 110.04 Conditions for coverage and liability; reporting requirements
- ILHR 110.05 Conditions for status as a nonprofit organization; reimbursement financing
- ILHR 110.06 Liability due to sickness or accident disability payments

ILHR 110.067 Due dates for certain reports; contribution reports; reimbursement financing

~~ILHR 110.078~~ General provisions relating to reporting wages on the employer's contribution report  
~~ILHR 110.08~~ Value of room and meals  
~~ILHR 110.09~~ Supplemental unemployment benefits  
~~ILHR 110.10~~ Value of discounts  
~~ILHR 110.11~~ Sickness or accident disability payments  
~~ILHR 110.12~~ Subchapter S corporation payments  
~~ILHR 110.13~~ Cafeteria plans  
~~ILHR 110.14~~ Certain deferred compensation, retirement and salary reduction arrangements  
~~ILHR 110.15~~ New construction industry employers; initial contribution rates  
ILHR 110.1609 Termination of coverage  
ILHR 110.1710 Reactivating employer accounts

SECTION 5. ILHR 110.001(5m) to (8) are renumbered ILHR 110.001(6) to (9).

SECTION 6. ILHR 110.001(9) is renumbered ILHR 101.001(4).

SECTION 7. ILHR 110.001(14) is repealed and recreated to read:

ILHR 110.001(14) "Sickness or accident disability payment" means any payment made on account of sickness or accident disability which is considered wages under s. 108.02(26), Stats.

SECTION 8. ILHR 110.001(15) is renumbered ILHR 101.001(9) and amended to read:

ILHR 101.001(9) "Supplemental unemployment benefits plan" means a plan under which an employer or a third party payor makes a payment to supplement any unemployment benefits which may be paid to its the employer's employees who become partially or totally unemployed.

SECTION 9. ILHR 110.001(16) and 110.001(17) are renumbered ILHR 110.001(15) and 110.001(16).

SECTION 10. ILHR 110.01(1) is renumbered ILHR 110.01.

SECTION 11. ILHR 110.01(2) is repealed.

SECTION 12. ILHR 110.06 and 110.07 are renumbered 110.07 and 110.08.

SECTION 13. ILHR 110.08 is renumbered ILHR 101.09 and amended to read:

ILHR 101.09 VALUE OF ROOM AND MEALS. ~~The department shall treat the value of any lodging or meals furnished by an employer to an employe as wages for contribution purposes under ch. 108, Stats., if the value of the lodging or meals is for personal services performed directly for the employer and not for required or necessary expenses incurred in the work for the employer. The~~ For purposes of s. 108.02(26), the employer shall value the lodging and meals at the actual value or, if the actual value is not available, the employer shall make a reasonable estimate of the value. If the actual value or reasonable estimate is not available, the department shall value the lodging and meals as follows:

employer shall make a reasonable estimate of the value. If the actual value or reasonable estimate is not available, the department shall value the lodging and meals as follows:

- (a) Lodging - \$70.00 per week or \$10.00 per day; and
- (b) Meals - \$57.00 per week or \$2.75 per meal.

SECTION 14. ILHR 110.09 and 110.10 are repealed.

SECTION 15. ILHR 110.11 (title) and (1) are renumbered ILHR 110.06 (title) and (1) and amended to read:

ILHR 110.06 LIABILITY DUE TO SICKNESS OR ACCIDENT DISABILITY PAYMENTS. (1)-POLICY. Under s. 108.02(13)(j), Stats., an employer includes a person who ~~pays wages to an individual on account of~~ makes sickness or accident disability payments if the person is classified as an employer under rules promulgated by the department. This section specifies the circumstances under which persons who make sickness or accident disability payments are to be considered employers for contribution purposes under ch. 108, Stats. This section also specifies the procedures employers under this section shall follow in reporting payments and making contributions.

SECTION 16. ILHR 110.11(2) to (6) are renumbered 110.06(2) to (6).

SECTION 17. ILHR 110.11(7) is renumbered 110.06(7) and amended to read:

(7) APPLICABLE PROVISIONS. The provisions of ss. ILHR 110.04 ~~to 110.07~~ , 110.05, 110.07 and 110.08 as these provisions relate to employers and employing units shall also apply to payors of sickness or accident disability payments.

SECTION 18. ILHR 110.11(8) is renumbered ILHR 102.03 and amended to read:

ILHR 102.03 PAYORS OF SICKNESS OR ACCIDENT DISABILITY PAYMENTS; CONTRIBUTION RATES. ~~An employer~~ A person not previously subject to the contribution provisions under ch. 108, Stats., which becomes an employer subject to these provisions because of ~~payment of~~ sickness or accident disability payments under ~~this section~~ s. ILHR 110.06, shall be subject to the initial contribution rate under s. 108.18, Stats. for each of the first two calendar years.

SECTION 19. ILHR 110.12 (title) is renumbered ILHR 101.07(title).

SECTION 20. ILHR 110.12(1)(title) and (Intro) are repealed.

SECTION 21. ILHR 110.12(1)(a) and (b) are renumbered ILHR 101.001(6) and (8).

SECTION 22. ILHR 110.12(2) and (3) are renumbered 101.07(1) and (2), and amended to read:

ILHR 101.07 SUBCHAPTER S CORPORATION PAYMENTS, (1) AMOUNTS INCLUDED AS WAGES. Except as provided under sub. ~~(3)~~ (2), the department shall treat as wages for contribution purposes under ch. 108, Stats., any payment made by a subchapter S corporation to an officer which is reasonable compensation for services performed for the corporation. If an officer performs services for a subchapter S corporation but receives no payment as wages, the department shall treat as wages the reasonable value of the services performed.

(2) AMOUNTS NOT INCLUDED AS WAGES. The department may not treat as wages for contribution purposes under ch. 108, Stats., any of the following payments:

(a) A distribution of earnings and profits which is in excess of any payment treated as wages under sub. ~~(2)~~ (1).

SECTION 23. ILHR 110.13 and 110.14 are repealed.

SECTION 24. ILHR 110.15 is renumbered ILHR 102.02.

SECTION 25. ILHR 110.16 and 110.17 are renumbered ILHR 110.09 and ILHR 110.10.

SECTION 26. EFFECTIVE DATE. Pursuant to s. 227.22(2), Stats., this rule shall take effect on the first day of the month following the date of publication in the Wisconsin Administrative Register

Tommy G. Thompson  
Governor  
Carol Skornicka  
Secretary



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State of Wisconsin  
Department of Industry, Labor and Human Relations

April 12, 1993

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Gary Poulson  
Assistant Revisor of Statutes  
2nd Floor  
119 Martin Luther King Blvd.  
Madison, Wisconsin 53703

Douglas LaFollette  
Secretary of State  
10th Floor  
30 West Mifflin Street  
Madison, Wisconsin 53703

Revisor of Statutes  
Bureau

Dear Messrs. Poulson and LaFollette:

**TRANSMITTAL OF RULE ADOPTION**

CLEARINGHOUSE RULE NO. 92 - 164

RULE NO. Chapter ILHR 101, 102, 103 & 110

RELATING TO: TAXABLE WAGES; CONTRIBUTION RATES; CERTAIN EXCLUDED  
EMPLOYMENTS; AND COVERAGE & RELATED RECORDS & REPORTS

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 cursive script, appearing to read "Carol Skornicka".

Carol Skornicka  
Secretary