

**ORDER OF THE WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EMERGENCY RULE**

The Wisconsin Department of Workforce Development adopts the following rule *to renumber* DWD 128.001 (2) (a); and *to create* DWD 127.01 (2m), 128.001 (2) (ag), 128.01 (7), 128.02, and 128.025, relating to work search actions, availability for work, and work available for people filing claims with the unemployment insurance program during the COVID-19 pandemic.

The Governor approved the scope statement for this rule, SS 013-20, on March 19, 2020. The scope statement was published in register No. 771A4, on March 23, 2020, and was approved by the Department on April 3, 2020. This rule was approved by the Governor on May 5, 2020.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

The Department seeks to create provisions in Chapters DWD 127 and 128 in order to implement federal guidance (see Unemployment Insurance Program Letter No., 10-20, dated March 12, 2020) related to administering unemployment insurance benefit claims during the pandemic period related to the SARS-CoV-2 novel coronavirus, which causes the coronavirus disease 2019 (in this Analysis, the virus and disease will be referred to as “COVID-19”).

Additionally, by Executive Order # 72 (dated March 12, 2020), the Governor declared a public health emergency in order to protect the health and well-being of the state’s residents and directed state agencies to assist as appropriate in the state’s on-going response to the public health emergency. Furthermore, on March 13, 2020, the President declared a national emergency concerning the COVID-19 outbreak. On April 4, 2020, the President issued a major disaster declaration for Wisconsin due to COVID-19, retroactively to January 20, 2020. On March 18, 2020, the Governor issued an emergency order in response to COVID-19 to assist individuals affected by the disease by temporarily easing eligibility requirements for unemployment benefits. (See Emergency Order # 7). The rule supplants the emergency order.

Statutes Interpreted

Section 108.04, Stats.

Statutory Authority

Sections 108.04(2)(a)3., 108.04(2)(bd), and 108.14 (2), Stats.

Explanation of Statutory Authority

The Department has specific and general authority to establish rules interpreting and clarifying provisions of ch. 108, Stats., unemployment insurance and reserves, and general authority for promulgating rules with respect to ch. 108, Stats., under section 108.14 (2), Stats.

Individuals who claim unemployment insurance benefits must perform four actions to search for suitable work in each week for which a claim is filed unless a waiver of that requirement applies. The Department may, under s. 108.04(2)(a)3., Stats., by rule, determine what actions “constitute a reasonable search [for suitable work].”

Work search waivers are statutory, but under s. 108.04(2)(bd), Stats., the “department may, by rule...if doing so is necessary to comply with a requirement under federal law or is specifically allowed under federal law: modify the availability of any [work search] waiver” or “[e]stablish additional [work search] waivers....” Under 42 U.S.C. § 1103(h)(3)(B), states may waive the work search requirement during the COVID-19 pandemic.

Related Statutes or Rules

Section 323.10, Stats., permits the Governor to issue an executive order declaring a public health emergency. On March 12, 2020, the Governor issued Executive Order # 72 declaring a public health emergency related to the COVID-19 pandemic.

Plain Language Analysis

This rule provides, on a temporary basis, that a public health emergency constitutes four work search actions for each week that a claimant files an unemployment insurance claim.

This rule provides criteria for determining when unemployment insurance claimants are available for work during the COVID-19 pandemic. The rule also states that no work is actually available for employees affected by COVID-19 for the purposes of determining whether unemployment insurance claimants missed work available under section 108.04 (1) (a) to (bm), Stats.

Summary of, and comparison with, existing or proposed federal statutes and regulations

Federal law requires that state laws conform to and comply with federal requirements. 20 C.F.R. § 601.5.

Under Families First Coronavirus Response Act, Public Law 116-127, specifically Division D, the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA), a state may receive a share of \$500 million of federal funding for administering the state’s unemployment insurance program if the “State has demonstrated steps it has taken or will take to ease eligibility requirements and access to unemployment compensation for claimants, including waiving work search requirements....” 42 U.S.C. § 1103(h)(3)(B). Wisconsin’s share of the \$500 million is about \$9.457 million.

The EUISAA also provides that states have emergency flexibility to amend work search provisions: “EMERGENCY FLEXIBILITY.—Notwithstanding any other law, if a State modifies its unemployment compensation law and policies with respect to work search, waiting week, good cause, or employer experience rating on an emergency temporary basis as needed to respond to the spread of COVID–19, such modifications shall be disregarded for the purposes of applying section 303 of the Social Security Act and section 3304 of the Internal Revenue Code of 1986 to such State law.” Public Law 116-127 § 4102(b).

Federal law generally requires unemployment benefit claimants to be available for work. *See* 42 U.S.C. § 503(a)(12); 20 C.F.R. §§ 604.3 and 604.5. According to the United States Department of Labor, “federal UC framework gives states significant flexibility to determine standards for ... availability to work ... in the context of COVID-19.” *Unemployment Compensation (UC) for Individuals Affected by the Coronavirus Disease 2019 (COVID-19)*, Unemployment Insurance Program Letter No. 10-20 (US-DOL, Mar. 12, 2020).

Comparison with rules in adjacent states

Other states have waived or relaxed requirements related to work search and have temporarily provided flexibility regarding availability for work by executive order, administrative rule, or statute in response to the COVID-19 pandemic.

Minnesota has waived work search during the COVID-19 by Minn. Emergency Executive Order 20-05.

Illinois has, by emergency rule, waived work search requirements for claimants who are temporarily laid off as a result of COVID-19. Illinois has also, by emergency rule, provided a clarifying example to find claimants available for work if they are required to be at home with a child but could telework.

Michigan has suspended work search and increased eligibility for benefits to quarantined workers under Mich. Executive Order 2020-10.

Iowa has waived work search requirements due to the COVID-19 pandemic.

Summary of factual data and analytical methodologies

The Department reviewed the current Wisconsin administrative rules, the Governor’s Emergency Orders, federal unemployment compensation law and United States Department of Labor guidance, and emergency rules and orders in other states to maximize Wisconsin’s receipt of federal funding and to clarify the law for claimants during the COVID-19 pandemic.

Analysis and supporting documents used to determine effect on small business or in preparation of an economic impact analysis

Under 2019 Wisconsin Act 185, unemployment insurance benefit claims related to the public health emergency declared on March 12, 2020 will be charged to the balancing account of the Trust Fund for employers subject to contribution financing. The benefits will be charged as follows: 50% of the benefits will be charged to the appropriation in s. 20.445 (1) (gd), Stats., for employers subject to reimbursement financing; the remaining 50% will be charged to the federal government under the federal Coronavirus Aid, Relief and Economic Security (CARES) Act. The charging relief for employers under state law is effective for state unemployment insurance benefits paid for the period of March 15, 2020 through December 26, 2020.

If a claim filed during the effective period of this rule is not related to the public health emergency declared on March 12, 2020, businesses, including small businesses, will incur charges to their account in the Trust Fund (for contribution employers) or will be required to reimburse the Trust Fund for the benefits (for reimbursable employers). Some of those claims might have been denied but for this rule if, for example, the claimants had not conducted four work search actions in each week (and if that requirement was not waived). Also, some of those claims might have been denied if the claimants missed work available. It is not possible to quantify the effect of this rule on small business due to this variety of factors.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

The proposed rule may affect small businesses, as defined in s. 227.114 (1), Stats., if employees of small businesses are found to be eligible for unemployment benefits and if they would not have been previously eligible under the law in effect before this rule took effect. However, 2019 Wisconsin Act 185 provides that certain benefit charges related to the public health emergency declared on March 12, 2020 will not be charged to employers.

Agency contact person

Questions related to this rule may be directed to:

Janell Knutson, Director, Bureau of Legal Affairs
Division of Unemployment Insurance
Department of Workforce Development
P.O. Box 8942
Madison, WI 53708
Telephone: (608) 266-1639
E-Mail: Janell.Knutson@dwd.wisconsin.gov

Place where comments are to be submitted and deadline for submission

Janell Knutson, Director, Bureau of Legal Affairs
Division of Unemployment Insurance
Department of Workforce Development
P.O. Box 8942
Madison, WI 53708
E-Mail: DWDAdminRules@dwd.wisconsin.gov

Comments will be accepted until a date to be determined.

1 **SECTION 1.** DWD 127.01 (2m) is created to read:

2 **DWD 127.01 (2m)** (a) In this subsection, "public health emergency" means any week or
3 part thereof during a public health emergency declared by Executive Order # 72 on March 12,
4 2020, under s. 323.10, Stats., and any extension in response to the SARS-CoV-2 virus, including
5 by the department of health services under ch. 252, Stats., or during a federally declared
6 emergency in response to the SARS-CoV-2 virus, or during a period in which the state has been
7 federally declared to be a major disaster due to the SARS-CoV-2 virus.

8 (b) A public health emergency constitutes four work search actions for each weekly
9 claim filed by a claimant during the public health emergency, unless federal law requires the
10 claimant to actively seek work to qualify for federally funded benefits.

11 (c) The secretary of the department may waive compliance with par. (b) if the secretary
12 determines that the waiver is necessary to permit continued certification of state law for grants to
13 this state under Title III of the federal Social Security Act or for maximum credit allowances to
14 employers under the federal Unemployment Tax Act or to maximize claimant's eligibility for
15 100% federally funded benefits to protect the balance of the Wisconsin Unemployment
16 Insurance Trust Fund.

17 **SECTION 2.** DWD 128.001 (2) (a) is renumbered DWD 128.001 (2) (ar).

18 **SECTION 3.** DWD 128.001 (2) (ag) is created to read:

1 **DWD 128.001 (2)** (ag) “COVID-19” means the SARS-CoV-2 virus and any related
2 disease.

3 **SECTION 4.** DWD 128.01 (7) is created to read:

4 **DWD 128.01 (7) COVID-19.** (a) Notwithstanding any other subsection in this section, the
5 department shall consider a claimant to be available for suitable work if the claimant is perceived
6 by an employer as exhibiting COVID-19 symptoms preventing a return to work, or the claimant
7 is quarantined by a medical professional due to COVID-19 symptoms, or the claimant is
8 instructed to stay home under local, state or federal government direction or guidance due to
9 COVID-19, and one of the following applies:

10 1. The employer has instructed the claimant to return to work after the employee no
11 longer exhibits symptoms, after a set amount of time to see if the disease is present, or after the
12 quarantine is over.

13 2. The employer has not provided clear instruction for the claimant to return to work.

14 3. The claimant would be available for other work with another employer but for the
15 perceived COVID-19 symptoms preventing a return to work or but for the quarantine.

16 (b) This subsection shall be good cause for not reporting for an eligibility review under s.
17 DWD 128.03.

18 **SECTION 5.** DWD 128.02 is created to read:

19 **DWD 128.02 Work Available.** For the purposes of s. 108.04 (1) (a) to (bm), Stats.,:

20 (1) An employee is not considered absent from work or to have missed work available if
21 the employee is perceived by an employer as exhibiting COVID-19 symptoms preventing a
22 return to work or the employee is quarantined by a medical professional or under local, state or
23 federal government direction or guidance due to COVID-19.

1 (2) There is no work available for employees during a public health emergency, as
2 defined in s. DWD 127.01 (2m) (a).

3 **SECTION 6.** DWD 128.025 is created to read:

4 **DWD 128.025 Waiver.** The secretary of the department may waive compliance with all
5 or any part of s. DWD 128.01 (7) or 128.02 if the secretary determines that the waiver is
6 necessary to permit continued certification of state law for grants to this state under Title III of
7 the federal Social Security Act or for maximum credit allowances to employers under the federal
8 Unemployment Tax Act or to maximize a claimant's eligibility for 100% federally funded
9 benefits to protect the balance of the Wisconsin Unemployment Insurance Trust Fund.

10 **SECTION 7. EFFECTIVE DATE.** This rule shall take effect upon publication in the official
11 state newspaper as provided in s. 227.24 (1) (c).

Dated this _____ day of May, 2020.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: _____
Caleb Frostman, Secretary