

## Chapter DWD 225

### FAMILY AND MEDICAL LEAVE

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**Note:** Chapter Ind 86 was renumbered chapter ILHR 225 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1996, No. 484. Chapter ILHR 225 was renumbered chapter DWD 225 under s. 13.93 (2m) (b) 1., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, November, 1997, No. 503.

**DWD 225.001 Purpose.** The purpose of this chapter is to implement the provisions of s. 103.10, Stats., providing for family and medical leave for employees in certain cases and prohibiting certain practices by establishing interpretations of the provisions of that section to assist in its implementation.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89.

**DWD 225.01 Definitions and scope. (1)** When used in this chapter or in s. 103.10, Stats.:

- (a) "Act" means s. 103.10, Stats., unless the context requires otherwise.
- (b) "Action prohibited" means one or more actions or inactions prohibited by the act.
- (bm) "Agency" means any office, department, independent agency, authority, institution, association, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts.
- (c) "Administrative law judge" means the examiner appointed to conduct hearings arising under s. 103.10 (12), Stats.
- (d) "Child", "Christian Science practitioner", "employee", "employer", "employment benefit", "health care provider", "parent", "serious health condition: and "spouse" have the same definitions as in the act.
- (e) "Complainant" means the person who files a complaint alleging that an action prohibited by the act has been committed.
- (f) "Days" means calendar days unless the context requires otherwise. When used in time computations in this chapter, "day" means a calendar day, except that if the last day of the time period is a Saturday, Sunday or legal holiday, the last day shall be the next business day.
- (g) "Division" means the equal rights division of the Wisconsin department of workforce development.
- (h) "Filing" means the physical receipt of a document.
- (i) "Group health insurance coverage" means the entire health insurance package offered by an employer including without limitation medical, dental and vision insurance.
- (j) "Person" includes but is not limited to one or more individuals, partnerships, associations, corporations, joint stock or mutual companies, bodies politic or corporate, unincorporated organizations, trusts, legal representatives, trustees or receivers.
- (k) "Probable cause" means a reasonable ground for belief, supported by facts and circumstances strong enough in them-

selfes to warrant a prudent person in the belief, that an action prohibited by s. 103.10 (11), Stats., probably has been or is being committed.

(L) "Respondent" means the person or agency alleged to have committed an action prohibited by the act.

(m) The words "a 12-month period", as used in s. 103.10 (3) (b) and (4) (b), Stats., mean a calendar year commencing immediately after midnight on January 1 and ending at midnight on December 31 each year.

(n) The words "a 12-month period", as used in s. 103.10 (9) (c) 2., Stats., mean a period of 365 consecutive days commencing with the date the first payment is required by an employer to be paid by an employee pursuant to s. 103.10 (9) (c), Stats.

(o) The words "week" and "weeks", as used in s. 103.10 (2) (c), Stats., mean 7 consecutive calendar days.

(2) A person engaging in any activity, enterprise or business in this state shall be deemed to be "employing at least 50 individuals on a permanent basis" within the meaning of s. 103.10 (1) (c), Stats., if, during at least 6 of the preceding 12 calendar months, with partial months to count as full months, the employer, according to its usual personnel recordkeeping practices as required by ss. DWD 272.11 and 274.06, actually treated at least 50 individuals as being permanent employees as to the activities, enterprises or businesses of that employer.

(3) A person shall be deemed to have "been employed by the same employer for more than 52 consecutive weeks" within the meaning of s. 103.10 (2) (c), Stats., if the person has actually been treated by the employer, according to the usual personnel recordkeeping practices of the employer as required by ss. DWD 272.11 and 274.06, as an employee during each of those 52 weeks, irrespective of the number of hours worked in those weeks and notwithstanding that the employee may have, in that 52-week period, been off work for one or more weeks on vacation leave, sick leave or other leave, or on layoff, if such vacation leave, sick leave or other leave was granted to the employee by the employer according to a regular practice of granting such leaves, or the layoff was initiated by the employer, and if the employer allowed the employee to return to work at the end of the leave or layoff without having to reapply for employment.

(4) A person shall be deemed to have "worked for the employer for at least 1,000 hours during the preceding 52-week period" within the meaning of s. 103.10 (2) (c), Stats., if the number of hours actually worked in that period plus the number of hours for which the employee was paid pursuant to a regular policy of paid vacation leave, sick leave or other paid leave equals at least 1,000 hours.

(5) Where a person's policy with respect to leave for the reasons described in s. 103.10 (3) (b) and (4) (a), Stats., is to provide the same leave as granted in s. 103.10 (3) (b) and (4) (a), Stats., the posting of a statement to that effect together with a copy of the act, in the manner prescribed by s. 103.10 (14) (b), Stats., shall satisfy the requirements of s. 103.10 (14) (b), Stats.

(6) To the extent that an employer grants leave to an employee for the birth of the employee's natural child in a manner which is no more restrictive than the leave available to that employee under s. 103.10 (3) (b) 1., Stats., the leave granted by the employer shall be deemed to be leave available to that employee under s. 103.10 (3) (b) 1., Stats.

(7) To the extent that an employer grants leave to an employee for the placement of a child with the employee for adoption or as a precondition for adoption under s. 48.90 (2), Stats., in a manner which is no more restrictive than the leave available to that employee under s. 103.10 (3) (b) 2., Stats., the leave granted by the employer shall be deemed to be leave available to that employee under s. 103.10 (3) (b) 2., Stats.

(8) To the extent that an employer grants leave to an employee to care for the employee's child, spouse or parent in a manner which is no more restrictive than the leave available to that employee under s. 103.10 (3) (b) 3., Stats., the leave granted by the employer shall be deemed to be leave available to that employee under s. 103.10 (3) (b) 3., Stats.

(9) To the extent that an employer grants leave to an employee relating to the employee's own health in a manner which is no more restrictive than the leave available to that employee under s. 103.10 (4), Stats., the leave granted by the employer shall be deemed to be leave available to that employee under s. 103.10 (4), Stats.

(10) To the extent that leave granted by an employer to an employee is deemed by this subsection to be leave available to that employee under the act, the use of that leave granted by the employer shall be use of that leave available under the act.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; correction in (2) and (3) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; **emerg. am. (1) (L) eff. 8-5-03; CR 03-092; cr. (1) (bm), am. (1) (f), (h) and (L) Register March 2004 No. 579, eff. 4-1-04.**

**DWD 225.02 When and how leave taken.** (1) The leave allowed under the act may be taken in non-continuous increments. An employee may schedule and take partial absence leave, as provided in s. 103.10 (3) (d), Stats., or medical leave as provided in s. 103.10 (4) (c), Stats., in actual increments of less than a full workday if the employer allows any other leave to be taken in increments of less than a full workday. The duration of the shortest increment available to the employee under the act shall be equal to the shortest increment the employer allows to be taken by that employee for any other non-emergency leave.

(2) For purposes of the partial absence leave authorized by s. 103.10 (3) (d), Stats., the word "week" as used in s. 103.10 (3) (a), Stats., means 5 days of leave which would otherwise be workdays for the requesting employee.

(3) (a) An employee shall be deemed to have scheduled partial absence, for the reasons described in s. 103.10 (3) (b) 1. and 2., Stats., in a fashion that "does not unduly disrupt the employer's operations" within the meaning of s. 103.10 (3) (d), Stats.,

1. If the employee provides the employer with notice of the employee's proposed schedule of partial absence which is at least as much notice as the shortest notice that employee is required to give the employer for the taking of any other non-emergency or non-medical leave, and

2. If the schedule is sufficiently definite for the employer to be able to schedule replacement employees, to the extent replacement employees are required, to cover for the absences.

(b) An employee shall be deemed to have scheduled partial absence, for the reasons described in s. 103.10 (3) (b) 3., Stats., in

a fashion that "does not unduly disrupt the employer's operations" within the meaning of s. 103.10 (3) (d), Stats.,

1. If the employee provides the employer with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity for the leave, and

2. Except where precluded by the need for health care consultation or treatment, if that proposed schedule is sufficiently definite that the employer is able to schedule replacement employees, to the extent replacement employees need to be scheduled, to cover the absence of the employee taking the leave.

(c) If an employer has a written policy which requires notice of scheduled absences under s. 103.10 (3) (d), Stats., to be in writing, if this policy governs all employees of the employer within this state, and if the employee has been made aware of this policy, the employee shall advise the employer under this subsection in writing.

(4) (a) An employee shall be deemed to have given the employer "advance notice of the medical treatment or supervision in a reasonable and practicable manner" within the meaning of s. 103.10 (6) (b) 2., Stats., if the notice identifies the planned dates of the leave and is given to the employer by the employee with reasonable promptness after the employee learns of the probable necessity of the leave.

(b) If the employer has a written policy which requires notice of leave pursuant to s. 103.10 (6) (b) 2., Stats., to be in writing, if this policy governs all employees of the employer within this state, and if the employee has been made aware of this policy, the notice required by s. 103.10 (6) (b) 2., Stats., shall be in writing except where precluded by the need for health care consultation or treatment.

(5) An employee shall be deemed to have made "a reasonable effort" to schedule a leave so that it does not "unduly disrupt the employer's operations" within the meaning of s. 103.10 (6) (b) 1., Stats.,

(a) If the employee provides the employer with a proposed schedule for the leave with reasonable promptness after the employee learns of the probable necessity of the leave, and

(b) Except where precluded by the need for health care consultation or treatment, if that proposed schedule is sufficiently definite that the employer is able to schedule replacement employees, to the extent replacement employees need to be scheduled, to cover the absence of the employee taking the leave.

(6) (a) An employee may commence family leave pursuant to s. 103.10 (3) (b) 1., Stats., no earlier than 16 weeks before the estimated date of birth and no later than 16 weeks after the actual date of birth.

(b) An employee may commence family leave pursuant to s. 103.10 (3) (b) 2., Stats., no earlier than 16 weeks before the expected date of placement either for adoption or as a precondition for adoption under s. 48.90 (2), Stats., and no later than 16 weeks after the actual date of placement either for adoption or as a precondition for adoption under s. 48.90 (2), Stats.

(7) Leave available during "a 12-month period", within the meaning of s. 103.10 (3) (a) and (4) (b), Stats., and s. DWD 225.01 (1) (m), must be used within that 12-month period. No more than one 6 week period of leave may be used by an employee, either as continuous or partial absence leave, as to the birth or adoption of any one child.

(8) Family leave requested by an employee may be denied by an employer if the employee substantially fails to provide that employer with proper notice of that leave pursuant to s. 103.10 (6), Stats., as interpreted by this section.

(9) Except where emergency health care consultation or treatment is required, an employer may deny a requested leave where the employer has made a proper request for certification pursuant to s. 103.10 (7), Stats., as to that leave, and the employee request-

ing the leave fails or refuses, after that proper request, to substantially comply with the provisions of s. 103.10 (7), Stats., as to certification.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; correction in (7) and (8) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484.

**DWD 225.03 Substituting leave. (1)** At the option of the employee, an employee entitled to family or medical leave under the act may substitute, for any leave requested under the act, any other paid or unpaid leave which has accrued to the employee.

**(2)** Leave substituted for leave available under the act will be credited, for purposes of using up the leave available under the act, to the extent the substituted leave is actually used by the employee calculated in no less than the increments available pursuant to s. DWD 225.02 (1).

**(3)** The employer may not require an employee to substitute any other paid or unpaid leave available to the employee for either family or medical leave under the act.

**(4)** If any other type of leave is substituted for family or medical leave, and any seniority or employment benefit would normally accrue during the taking of that other type of leave, that seniority or employment benefit shall accrue during the taking of that substituted leave.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; correction in (2) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484.

**DWD 225.031 Consecutive leave.** If any employee chooses to utilize leave provided under s. 103.10 (3) or (4), Stats., the employee may not extend leave taken by adding leave of any other type provided by the employer, unless:

**(1)** The employee meets the employer's requirements for taking the other leave which are in effect for all employees; or

**(2)** The employer consents to the extension.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89.

**DWD 225.04 Continuation of insurance. (1)** The employee shall be deemed to be continuing to make the contributions required of the employee under group health insurance coverage within the meaning of s. 103.10 (9) (b), Stats., if the employee pays the contribution required by the employer within the time required by the employer.

**(2)** The employer may not require the employee to pay the employee's contribution, except into escrow as provided by s. 103.10 (9) (c), Stats., more frequently, or in greater amounts, than was required of the employee prior to the leave being taken.

**(3)** The employer may not deny leave under this act based upon nonpayment by the employee into the escrow account.

**(4)** In the event an employer requires an employee to fund an escrow account under s. 103.10 (9) (c), Stats., the employer may pay from the escrow account the amount of the employee's contribution which either is or becomes due during any leave taken under the act.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89.

**DWD 225.05 Time to commence administrative proceedings.** If an employer is not in compliance with the notice posting requirements of s. 103.10 (14) (a), Stats., at the time a violation occurs under s. 103.10, Stats., an employee complaining of that violation shall be deemed not to "reasonably have known" that a violation occurred within the meaning of s. 103.10 (12) (b), Stats., until either the first date that the employer comes into compliance with s. 103.10 (14) (a), Stats., by posting the required notice, or the first date that the employee obtains actual knowledge of the information contained in the required notice, whichever date occurs earlier. If the employer is not in compliance with the notice posting requirements of s. 103.10 (14) (a), Stats., at the time a violation occurs under s. 103.10, Stats., the employer has the burden of proving actual knowledge on the part of the employee within the meaning of this section.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89.

**DWD 225.06 Complaints. (1) WHO MAY FILE COMPLAINT.** 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.

**(2) WHERE TO FILE COMPLAINTS.** A complaint may be filed in person with any division office, or it may be mailed to one of the following division offices:

(a) Equal Rights Division, 201 E. Washington Avenue, Madison, WI 53702.

(b) Equal Rights Division, 819 N. 6th Street, Milwaukee, WI 53203.

**(3) FORM AND CONTENT OF COMPLAINT.** A complaint shall be written on a form which is available at any division office or on any form acceptable to the department. Each complaint shall be signed by the person filing the complaint or by the person's duly authorized representative. The signature constitutes an acknowledgment that the party or the representative has read the complaint; that to the best of that person's knowledge, information and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

(a) The name and address of the complainant.

(b) The name and address of the respondent.

(c) A concise statement of the facts, including pertinent dates, constituting the alleged prohibited action.

**(4) ASSISTANCE BY THE DEPARTMENT.** The department shall, upon request, provide appropriate assistance in completing and filing complaints.

**(5) AMENDMENT OF COMPLAINT.** A complaint may be amended, subject to the approval of the department, except that a complaint may not be amended less than 10 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the department shall investigate the allegations of the amended complaint. After an initial determination has been issued, amendments may be allowed by the administrative law judge only for claims which relate back to the original complaint for statute of limitation purposes. If an amendment is approved after the case has been certified to hearing, the case may be remanded to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent has violated the act as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 225.09 (1).

**(6) WITHDRAWAL OF COMPLAINT.** A complaint may be withdrawn at any time. A request for a withdrawal shall be in writing and shall be signed by the complainant or by the complainant's duly authorized representative. Upon the filing of a request for a withdrawal, the department shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated in the order.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.07 Complainant's duty to respond to correspondence from the department.** The department may dismiss the complaint if the complainant fails to respond to the department within 20 days from the date of mailing of any correspondence from the department concerning the complaint, provided that correspondence was sent by certified mail, return receipt requested, to the last known address of the complainant.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.08 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT.** The department shall serve a copy of a com-



plaint which meets the requirements of s. DWD 225.06 upon each respondent prior to the commencement of any investigation.

(2) **CONTENT OF NOTICE.** The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the department. The notice shall further state that, if the respondent fails to answer the complaint in writing, the department may make an initial determination as to whether a prohibited act has occurred based only on the department's investigation and the information supplied by the complainant.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

### DWD 225.09 Preliminary review of complaints.

(1) **REVIEW OF COMPLAINT.** The department shall review every complaint filed to determine all of the following:

- (a) Whether the complainant is protected by the act.
- (b) Whether the respondent is subject to the act.
- (c) Whether the complaint states a claim for relief under the act.
- (d) Whether the complaint was filed within the time period set forth in the act, if that issue is raised in writing by the respondent.

(2) **PRELIMINARY DETERMINATION DISMISSING COMPLAINT.** The division shall issue a preliminary determination dismissing any complaint, or any portion of a complaint, which fails to meet the requirements of sub. (1). The department shall send the order of dismissal by first class mail to the last known address of each party and to their attorneys of record.

(3) **APEAL OF PRELIMINARY DETERMINATION.** A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the department. The appeal shall be filed within 10 days after the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify or set aside the preliminary determination. The department shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, it may be subject to review in court if it is a final decision and order as defined in s. DWD 225.25 (1).

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.10 Investigations.** (1) **CONDUCT OF INVESTIGATION.** The department shall investigate all complaints that satisfy the review under s. DWD 225.09. In conducting investigations under this chapter, the department may seek the cooperation of all persons to provide requested materials to the department; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials, and to take statements of persons reasonably necessary for the furtherance of the investigation. The department may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

(2) **ADVISING COMPLAINANT TO AMEND COMPLAINT.** If, during an investigation, it appears that the respondent may have committed a prohibited act which is not alleged in the complaint, the department may advise the complainant that the complaint should be amended.

(3) **DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION.** (a) The department may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the department concerning the complaint within 20 days after the correspondence was sent by certified mail to the last-known address of the person filing the complaint, in accordance with the provisions of s. DWD 225.07.

2. The complainant signed a valid waiver and release of claims arising out of the complainant's employment with the respondent that would preclude the department from finding that the respondent has violated the act.

3. The allegations in the complaint have been previously dismissed by the department or by a state or federal court.

(b) A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department. The appeal shall be filed within 10 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The department shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it may be subject to review in court if it is a final decision and order as defined in s. DWD 225.25 (1).

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; correction in (1) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; **emerg. am. eff. 8-5-03; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.**

**DWD 225.11 Initial determination.** (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 a prohibited act occurred as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

(2) **INITIAL DETERMINATION OF PROBABLE CAUSE.** If the department initially determines that there is probable cause to believe that any prohibited act occurred as alleged in the complaint, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. DWD 225.15 to 225.24.

(3) **INITIAL DETERMINATION OF NO PROBABLE CAUSE.** If the department initially determines that there is no probable cause to believe that a prohibited act occurred as alleged in the complaint, it may dismiss those allegations. The department shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 225.12.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; correction in (3) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; **emerg. am. eff. 8-5-03; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.**

**DWD 225.12 Appeal of initial determination of no probable cause.** (1) **WHEN FILED.** Within 10 days after the appeal of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request for hearing shall state specifically the grounds upon which the appeal is based. The department shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

(2) **DISMISSAL FINAL IF NO APPEAL FILED.** If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the department.

(3) **CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS.** If a timely appeal 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.

DWD 225.15 to 225.24, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues, the department may, with the consent of the parties, consolidate the hearing on probable cause and the hearing on the merits.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; corrections in (1) and (2) made under s. 13.93 (2m) (b) 7., Stats., Register, April, 1996, No. 484; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

#### **DWD 225.13 Private settlement and conciliation.**

The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the department. The department may assist the parties to reach a settlement agreement. The parties shall notify the department immediately upon reaching a settlement.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

#### **DWD 225.14 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing.**

A complaint may be dismissed based upon the conditions set forth in s. DWD 225.09 (1) or for any other procedural basis after the case is certified to hearing under either s. DWD 225.11 (2) or 225.12 (3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts that may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.15 Notice of hearing. (1) CONTENT.** In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 225.09 (1) or an appeal of an initial determination of no probable cause under s. DWD 225.11 (2), the department shall advise the parties and their representatives and attorneys of record in writing by first-class mail, of the specific time, date and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 10 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the prohibited act that 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.

**(2) PLACE OF HEARING.** The hearing shall be held in the county where the alleged prohibited act occurred, or at another location with the consent of the parties. For purposes of this subsection, the county where the alleged prohibited act occurred is the county where the respondent resides or where the alleged violation occurred.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.16 Answer. (1) WHEN REQUIRED.** Within 10 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause, along with a certification that a copy of the answer has been mailed to all other parties.

**(2) CONTENT OF ANSWER.** The answer shall contain the respondent's current address. It shall also contain a specific admission, denial or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint, the respondent shall so state and this shall have the effect of a denial. Admis-

sions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon by a respondent shall be raised in the answer unless it has previously been raised by motion in writing. Failure to raise an affirmative defense in a timely filed answer may, in the absence of good cause, be held to constitute a waiver of such a defense.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.17 Pre-hearing conference.** In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with the provisions of s. 227.44 (4), Stats.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.18 Prehearing discovery. (1) WHEN DISCOVERY MAY BEGIN.** Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45 (7), Stats.

**(2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL.** In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery shall, not less than 10 days prior to conducting such discovery, state in writing that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel, and the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of depositions shall be filed with the department at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the department by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

**(3) SCOPE, METHODS AND USE OF DISCOVERY.** The scope of discovery, the methods of discovery and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

**(4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY.** The administrative law judge may compel discovery, issue protective orders, and impose sanctions in the manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

**(5) FILING WITH THE DEPARTMENT.** Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.19 Subpoenas and motions. (1) SUBPOENAS.** The department or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.12, Stats.

**(2) MOTIONS.** Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall

be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law judge assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.20 Disqualification of the administrative law judge.** Upon the administrative law judge's own motion, or upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other reason. The administrative law judge's determination shall be made a part of the record and decision in the case.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.21 Exchange of names of witnesses and copies of exhibits.** By no later than the tenth day prior to the hearing, the parties shall file with the division and serve upon the other party a written list of the names of witnesses and copies of the exhibits that the parties intend to use at the hearing. For the purpose of this section, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not reasonably have anticipated using prior to the hearing.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.22 Hearings. (1) PROCEDURE.** Hearings shall be conducted in conformity with the act and with the provisions of ch. 227, Stats.

**(2) POSTPONEMENTS AND CONTINUANCES.** All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

**(3) APPEARANCE OF PARTIES.** Parties may appear at the hearing in person and by counsel or other representative.

**(4) FAILURE TO APPEAR AT HEARING.** If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the hearing, the hearing shall proceed as scheduled. If within 10 days after the date of hearing, any party who fails to appear shows good cause in writing for the failure to appear, the administrative law judge may reopen the hearing.

**History:** Cr. Register, November, 1989, No. 407, eff. 12-1-89; CR 03-092: r. and recr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 225.23 Record of hearing. (1) METHOD OF RECORDING HEARING.** A stenographic, electronic, or other record of oral proceedings shall be made at all hearings conducted under the act. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is tape-recorded, the original tapes shall remain in the division for 5 years following the hearing, after which they may be discarded.

**(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS.** Any party may file a transcript of the hearing with the division. The

transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim transcript of the proceedings.

**(3) COST FOR TRANSCRIPTION OF RECORD.** Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the department shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. If a transcript has been provided to the court for the purpose of judicial review, the department shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

**History:** Emerg. am. eff. 8-5-03; CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04

**DWD 225.24 Decision and order. (1) GENERAL.** After the close of the hearing, including any briefs that may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision which shall include findings of fact, conclusions of law and an order, and which may be accompanied by an opinion.

**(2) DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE.** After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and order which dismisses the allegations of the complaint or which orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to court if it is a final decision and order as defined in s. DWD 225.25 (1).

**(3) DECISION AND ORDER AFTER HEARING ON THE MERITS.** After a hearing on the merits, the administrative law judge shall issue a decision and an order that shall either dismiss the allegations of the complaint or shall order such action by the respondent as shall effectuate the purposes of the act, depending upon the administrative law judge's findings and conclusions on the merits of the complaint. A certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

**(4) COMPUTATION OF INTEREST.** Interest on any award made pursuant to this subchapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04

**DWD 225.25 Appeals. (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS.** Any party may seek judicial review of a final decision and order of the administrative law judge. Only final decisions and orders of the administrative law judge may be appealed. A final decision is one that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

**(2) NOTICE OF APPEAL RIGHTS.** Every decision and order of an administrative law judge under s. DWD 225.24 shall be accompanied by a separate notice advising the parties of their rights to seek judicial review of the decision pursuant to the act.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04

**DWD 225.26 Pay status and witness fees for state employee parties and state employee witnesses.**

**(1) PAY STATUS OF STATE EMPLOYEE PARTIES.** State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre-hearing conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall

do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts scheduled under s. 20.916 (8), Stats.

**(2) PAY STATUS OF STATE EMPLOYEE WITNESSES.** State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accord-

ance with the uniform travel schedule amounts scheduled under s. 20.916 (8), Stats., unless the administrative law judge determines that their testimony was or would have been irrelevant, immaterial, or unduly repetitious.

**(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES.** State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04