

**State of Wisconsin
Department of Workforce Development
Unemployment Insurance Division**

DWD 128

Unemployment Insurance Requirement of Ability to Work and Availability for Work

The Wisconsin Department of Workforce Development proposes an order to amend ss. 128.01(2)(b), 128.01(note), and 128.02(1)(a); and to create s. DWD 128.02(3), relating to the unemployment insurance requirement of ability to work and availability for work.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 108.04(2), 108.14(2), and 227.11, Stats.
Statute interpreted: Sections 108.04(2), Stats.

Federal and state unemployment insurance law requires that a claimant may be eligible for benefits only if the claimant is able to work and available for work. Section DWD 128.02 provides a temporary grace period from the general able and available requirements in s. DWD 128.01 if the claimant has certain uncontrollable restrictions. Claimants are eligible for a grace period as designated in s. DWD 128.02(2) if they have uncontrollable restrictions that limit them to less than 15% of suitable work, their previous employment was terminated for reasons unrelated to those restrictions, and they are able and available for work under the same conditions that applied to their most recent employment.

The department has never intended that s. DWD 128.02 mean that a claimant who was not able and available for any work would be eligible for UI. However, in light of a recent decision by the Labor and Industry Review Commission (LIRC) in *Vuttiphon Z. Honea v. Milwaukee Ballet Company, Inc.*, the federal Department of Labor has expressed concern that s. DWD 128.02 could be read to mean that Wisconsin was not following the federally-mandated able and available requirement for eligibility. The *Honea* decision suggests that if s. DWD 128.02(1)(a) is to be interpreted as requiring a claimant to be available for at least some work, the rule language that currently says “less than 15% of the opportunities for suitable work” should read “less than 15% but more than 0% of the opportunities for suitable work.” The proposed rule makes that change.

Also in response to Department of Labor concerns over the LIRC decision in the *Honea* case, the proposed rule clarifies that the grace period in s. DWD 128.02 does not apply to aliens who are not able and available for work because their authorized work has ended or their work authorization period has expired. There has been some confusion in situations where the authorized work has ended but the work authorization period is not expired. However, since federal immigration law provides that once the authorized work has ended the alien must depart the United States, these claimants cannot be considered able and available for work and are not eligible for unemployment insurance. The *Honea* decision is available on the LIRC web site at <http://www.dwd.state.wi.us/lirc/ucdecsns/>

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The proposed rule also makes a technical correction to s. DWD 128.01(2)(b). A recent amendment to s. DWD 128.02(1)(a) added “psychological condition” to the description of uncontrollable restrictions that may make a claimant eligible for the grace period. This change was made to reflect court interpretations. The language in DWD 128.01(2)(b) is intended to parallel the language in s. DWD 128.02(1)(a) but the amendment was inadvertently not made in Section DWD 128.01(2)(b). The proposed rule amends s. DWD 128.01(2)(b) to include “psychological condition.”

In addition, obsolete references to ILHR are updated to DWD in the note following s. DWD 128.01.

SECTION 1. DWD 128.01(2)(b), 128.01(note), and DWD 128.02(1)(a) are amended to read:

DWD 128.01(2)(b) The claimant’s physical or psychological condition or personal circumstances over which the claimant has no control limit the claimant to less than 15% of the opportunities for suitable work, including all such jobs whether vacant or filled, in the claimant’s labor market area; or

DWD 128.01(note): Section ~~ILHR~~ DWD 128.01 (2) (a) applies to a claimant whose restrictions on availability for work are within his or her power to change or alter. School attendance is generally a controllable restriction and, therefore, “without good cause” unless the person is enrolled in an approved training program under s. 108.04 (16), Stats. The wage demand of a claimant is also considered a controllable restriction. A claimant obligated to care for minor children is expected to make arrangements which would permit the claimant to accept suitable work. Unwillingness or failure to make such arrangements are controllable restrictions and, normally, without good cause.

Section ~~ILHR~~ DWD 128.01 (2) (b) applies to a claimant whose physical condition or uncontrollable personal circumstances limit the opportunity for suitable work. A claimant may be severely limited in the type of work which he or she could perform because of illness, disability, injury or age, but still be able to perform at least 15% of the suitable jobs in the claimant’s labor market area.

DWD 128.02(1)(a) The claimant's physical or psychological condition, or personal circumstances over which the claimant has no control limit the claimant to less than 15% , but more than 0%, of the opportunities for suitable work, as specified under s. DWD 128.01 (2) (b);

SECTION 2. DWD 128.02(3) is created to read:

DWD 128.02(3) This section is not applicable to an alien whose authorized work has ended or whose authorization to work has expired, whichever is earlier.

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.