



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

**Unemployment Insurance Rules for Determining a
Claimant’s Ability and Availability for Work**

Chapter DWD 128

The Wisconsin Department of Workforce Development proposes an order to repeal s. DWD 128.02 and to repeal and recreate ss. DWD 128.01, 128.01 (note), and 128.03, relating to unemployment insurance rules for determining a claimant’s ability and availability for work and affecting small businesses.

Analysis Prepared by the Department of Workforce Development

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

Statutes interpreted: Sections 108.04 (1) (b) 1., (2) (a) 1., (7) (c), and (8) (e), Stats.

Related statutes and rules: Sections 108.04 (2) (a) 2. and 3. and (b), Stats.; Chapters DWD 126 and 127

Explanation of agency authority. To be eligible to receive unemployment insurance benefits, an individual must, in addition to other requirements, be “able” to perform suitable work and be “available” for suitable work.

Section 108.04 (2) (a) 1., Stats., provides that a claimant shall be eligible for benefits for any week of total unemployment only if the claimant is able to work and available for work during the week.

Section 108.04 (1) (b) 1., Stats., provides that an employee is ineligible for benefits while the employee is unable to work, or unavailable for work, if his or her employment with an employer was suspended by the employee or by the employer or was terminated by the employer because the employee was unable to do, or unavailable for, suitable work otherwise available with the employer, except in certain circumstances.

Section 108.04 (7) (c), Stats., provides that the disqualification for an employee's voluntary termination of work does not apply if the department determines that the employee terminated his or her work but had no reasonable alternative because the employee was unable to do his or her work or because of the health of a member of his or her immediate family; but if the department determines that the employee is unable to work or unavailable for work, the employee is ineligible to receive benefits while the inability or unavailability continues.

Section 108.04 (8) (e), Stats., provides that if an employee fails to accept suitable work with good cause or return to work with a former employer that recalls the employee with good cause, but the employee is unable to work or unavailable for work, the employee shall be ineligible for the week in which the failure occurred and while the inability or unavailability continues.

Summary of the proposed rule. Under the current Chapter DWD 128, a claimant is not considered "able" to work if the claimant's physical or psychological ability to work limits the claimant to less than 15% of the opportunities for suitable work in the claimant's labor market area. A claimant is not considered "available" for work if the claimant restricts his or her availability for work to less than 50% of the full-time opportunities for suitable work. The Department has found that rigid adherence to percentage standards sometimes produces results that are arbitrary and inconsistent. The Department is unaware of any other states that use percentage tests to determine whether a claimant is "able and available" to work.

The Department proposes to amend Chapter DWD 128 to clarify the determination when claimants are able to work and available for work. The proposed rule eliminates the requirement that a claimant be "able" to work 15% of the opportunities for suitable work in the claimant's labor market area. Able to work means that the claimant has the physical and psychological ability to perform suitable work. During any week, a claimant is not able to work if the claimant is unable to perform suitable work due to a physical or psychological condition. In making the determination whether the claimant is able to perform suitable work, the department shall consider all factors relevant to the circumstances of the case, which may include the following: (1) the claimant's usual or customary occupation; (2) the nature of the restrictions caused by the claimant's physical or psychological condition; (3) whether the claimant is qualified to perform other work within the claimant's restriction considering the claimant's education, training and experience; (4) whether the claimant could be qualified to perform other work within the claimant's restrictions with additional training; and (5) occupational information and employment conditions data and reports available to the Department showing whether and to what extent the claimant is able, within her or her restrictions, to perform suitable work in his or her labor market area.

The proposed rule also eliminates the requirement that a claimant be "available" for work 50% of the full-time opportunities for suitable work in the claimant's labor market area and the requirement that first shift full-time work governs the availability standard for most jobs. Available for work means that the claimant maintains an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market area. During any week, a claimant is not available for suitable work if he or she has withdrawn from the labor market due

to restrictions on his or her availability for work. In determining whether a claimant has withdrawn from the labor market, the department shall consider one or more of the following factors: (1) restrictions on the claimant's salary or wages; (2) shift and time restrictions; (3) travel and transportation restrictions; (4) incarceration for more than 48 hours in a week; (5) other absence from the labor market for more than 48 hours in a week; (6) the types of work sought; (7) other unreasonable restrictions on the claimant's working conditions; and (8) occupational information and employment conditions data and reports available to the Department.

The proposed rule carries over from federal law the general presumption that a claimant is able and available to work if the claimant is registered to work and does the required work search. The proposed rule will help the Department determine whether a claimant is "able and available" for work based on the claimant's attachment to, or withdrawal from, the labor market by methods that are more transparent than the percentage standards and are more understandable to claimants and employers.

The proposed rule also deletes the provision that overpayments will not be collected for benefits erroneously paid before issuance of an eligibility determination for a given week, clarifies the difference between refusal of work and availability for work, incorporates the federal standard for proof of alien status, and deletes the grace period for claimants with uncontrollable restrictions as unnecessary in light of the new definition of able to work.

Summary of, and comparison with, existing or proposed federal regulations. The Department of Labor issued a new rule on the able and available requirement on January 16, 2007. The federal rule codifies the longstanding interpretation that the Social Security Act and the Federal Unemployment Tax Act require states to limit payment of unemployment insurance to individuals who are able and available for work. This interpretation had not previously been comprehensively addressed in the federal regulations.

The federal regulation provides that a state may consider an individual to be able to work during the week of unemployment claimed if the individual is able to work for all or portion of the week, provided any limitation on his or her ability to work does not constitute a withdrawal from the labor market.

A state may consider an individual to be available for work during the week of unemployment claimed under any of the following circumstances: (1) the individual is available for any work for all or a portion of the week, provided any limitation does not constitute a withdrawal from the labor market; (2) the individual limits his or her availability to work which is suitable as determined under state law; and (3) the individual is on temporary lay-off and is available to work only for the employer that has temporarily laid-off the individual.

A state may consider an individual to be available for work if the individual is appearing for jury duty under a lawfully issued summons. A state must not deny unemployment benefits to an individual for failure to be available for work if the individual is in approved training. An alien must be legally authorized to work to be considered available for work in the United States.

Comparison with rules in adjacent states. Iowa's rules provide that to be able to work an individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation. An individual is available for work if he or she is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse. An individual may have shift restrictions if the individual is available for the

same shift in which his or her wage credits were earned and the individual has a reasonable expectation of securing employment. If a part-time worker is available to the same degree and to the same extent as when his or her wage credits were earned, the individual meets the availability requirement. An individual is available while serving on jury duty. An individual may not be eligible for benefits if the individual has imposed restrictions that leave the individual with no reasonable expectation of securing employment, including restrictions such as type of work, hours, wages, location, or physical restrictions.

The Illinois rules provide that an individual is able to work when physically and mentally capable of performing work for which the individual is otherwise qualified. The focus for ability to work is on the individual's condition; the employers' willingness to hire is irrelevant. The focus also is on any work the individual can perform, not limited to the usual or most recent job. The rule provides that the best evidence that an individual is able to work in a particular occupation is that the individual has performed such work. An individual is available for work unless a condition so narrows opportunities that he has no reasonable prospect of securing work. An individual is unavailable if: domestic circumstances prevent an individual from working during "normal" days and hours in the occupation, the individual demands a wage that is unreasonable, the individual unreasonably restricts the distance the individual is willing to travel to work, or an individual's personal habits are inconsistent with the type of work the individual is seeking. An individual will not be unavailable for refusing to consider work that would violate sincerely held religious or moral convictions. If the individual is self-employed, availability depends on the nature and extent of the self-employment. Whether a seasonal worker is available during the off-season is determined by whether there is some prospect of obtaining work in the individual's customary occupation. When an individual appears to be imposing a condition on acceptance of work, it must be established whether this is a preference or an actual condition on availability. The best evidence that an individual is available for work is that the individual readily secures work despite the imposition of a condition.

Michigan does not have rules on ability and availability for work. Minnesota does not have unemployment insurance rules.

Summary of factual data and analytical methodologies. The Department has found that rigid adherence to percentage standards sometimes produces results that are arbitrary and inconsistent. The proposed rule will help the Department determine whether a claimant is "able and available" for work based on the claimant's attachment to, or withdrawal from, the labor market by methods that are more transparent than the percentage standards and are more understandable to claimants and employers.

Effect of rule on small businesses. The rule will affect small businesses but will not have a significant economic impact on a substantial number of small businesses.

Analysis used to determine effect on small businesses. The proposed rule affects how the department will determine whether a claimant is able and available for work. The proposed rule does not add or change any requirements for small businesses. There are no reporting, bookkeeping, or other procedures required for compliance with the proposed rule and no professional skills are required of small businesses.

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Place where comments are to be submitted and deadline for submission.

Comments may be submitted to Elaine Pridgen, Office of Legal Counsel, Dept. of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946, or elaine.pridgen@dwd.state.wi.us. The comment deadline is July 19, 2007.

SECTION 1. DWD 128.01 and 128.01 (note) are repealed and recreated to read:

DWD 128.01 Able to work and available for work. (1) **APPLICABILITY.** Under s. 108.04 (2), Stats., a claimant shall be eligible for unemployment benefits for any week of total unemployment only if the claimant is able to perform suitable work and available for suitable work. Under ss. 108.04 (1) (b), 108.04 (7) (c), and 108.04 (8) (e), Stats., a claimant shall be eligible for unemployment benefits only if the claimant is able to perform suitable work and available for suitable work. The department may determine the claimant's ability to perform suitable work and availability for suitable work at any time through questioning of the claimant and other procedures.

(2) **PRESUMPTION.** Unless evidence is obtained that in the relevant week the claimant was not able to work or available for work, a claimant is presumed able to work and available for work for any week that all of the following conditions are met:

(a) The claimant has registered for work and has complied with ss. DWD 126.02 and 126.04, or registration is waived under s. DWD 126.03 or excused under s. DWD 126.05.

(b) The claimant has complied with the work search requirements of s. 108.04 (2) (a) 3., Stats., and ch. DWD 127, or a work search is waived or excused under ch. DWD 127.

(3) **ABLE TO WORK.** Able to work means that the claimant has the physical and psychological ability to perform suitable work. During any week, a claimant is not able to work if the claimant is unable to perform any suitable work due to a physical or psychological condition. In determining whether the claimant is able to perform suitable work, the department shall consider all factors relevant to the circumstances of the case, which may include the following:

(a) The claimant's usual or customary occupation.

(b) The nature of the restrictions caused by the claimant's physical or psychological condition.

(c) Whether the claimant is qualified to perform other work within the claimant's restrictions considering the claimant's education, training, and experience.

(d) Whether the claimant could be qualified to perform other work within the claimant's restrictions with additional training.

(e) Occupational information and employment conditions data and reports available to the department showing whether and to what extent the claimant is able, within his or her restrictions, to perform suitable work in his or her labor market area.

(4) AVAILABLE FOR WORK. (a) Available for work means that the claimant maintains an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market area. During any week, a claimant is not available for suitable work if he or she has withdrawn from the labor market due to restrictions on his or her availability for work. In determining whether a claimant has withdrawn from the labor market, the department shall consider one or more of the following factors:

1. 'Salary or wages.' A claimant is considered to have withdrawn from the labor market if he or she is not available for full-time suitable work at a wage reasonably comparable to the usual wage that was paid to the claimant while working in the claimant's usual occupation. The claimant's usual wage is determined by evaluating the wage rates that were paid to the claimant in one or more previous jobs since the start of the claimant's base period. The claimant's usual occupation is determined by considering the claimant's training and experience as evidenced by the claimant's employment since the start of the claimant's base period.

2. 'Shift and time restrictions.' A claimant is considered to have withdrawn from the labor market if he or she is not available for full-time suitable work during the standard hours in which work is performed in the occupations in which the claimant usually works or has prior training or experience. In determining the standard hours in which work is performed in the occupations, the department shall include the hours and the shift that the claimant worked in an occupation in one or more previous jobs since the start of the claimant's base period. For purposes of this subdivision, a claimant whose availability is restricted by an immediate family member's medical or health condition or other infirmity requiring essential care that is uniquely and actually provided by the claimant is not considered to have withdrawn from the labor market, provided that the claimant remains available for full-time suitable work, regardless of the shift or hours.

3. 'Travel and transportation.' A claimant is considered to have withdrawn from the labor market if he or she is either not willing or not able to travel a reasonable distance and time to and from work. In making this determination, the department may consider the wage sought, the modes of available transportation, commuting costs, and the claimant's commuting history.

4. 'Incarceration.' A claimant who is incarcerated for more than 48 hours during any week is considered to have withdrawn from the labor market for that week unless the claimant has work release privileges that allow the claimant to meet all requirements related to availability for work.

5. 'Absence from the labor market.' A claimant who is absent from his or her labor market area for more than 48 hours during any week is considered to have withdrawn from the labor market for that week, unless the claimant shows that he or she remains continuously attached to the labor market during the absence or that the primary purpose of the absence was to seek

suitable work. A claimant may show continuous attachment to the labor market by the claimant's availability to timely receive and respond to offers of work by phone or other means of communication and willingness and ability to return to the labor market within 24 hours.

6. 'Types of work sought.' A claimant is considered to have withdrawn from the labor market if the claimant does not broaden his or her availability for work to additional types of suitable work as the period of his or her unemployment lengthens.

7. 'Other unreasonable restrictions on working conditions.' A claimant is considered to have withdrawn from the labor market if he or she places other unreasonable restrictions on working conditions.

8. 'Occupational information and employment conditions data.' Occupational information and employment conditions data and reports available to the department showing the extent to which full-time suitable jobs exist in the claimant's labor market area within his or her restrictions.

(b) Nothing in par. (a) may prevent the department from denying benefits to a claimant who fails, without good cause, to accept suitable work when offered, as provided in s. 108.04 (8) (a), Stats., or to a claimant who fails, without good cause, to return to suitable work with a former employer that recalls the claimant within 52 weeks after the claimant last worked for the employer, as provided in s. 108.04 (8) (c), Stats. The standards for determining a claimant's availability for suitable work and a claimant's failure, without good cause, to accept suitable work are different standards.

(5) **LAWFUL RESIDENT.** To be considered available for suitable work for a week, an alien must be legally authorized to work that week in the United States by the appropriate agency of the federal government. In determining whether an alien is legally authorized to work in the

United States, the department will follow the requirements of 42 USC 1320b-7 (d) (2), which relates to verification of and determination of an alien's status.

Note: 42 USC 1320b-7 (d) (2) is Section 1137 (d) of the Social Security Act.

(6) JURY DUTY. The department shall consider a claimant to be available for suitable work during the time that the claimant responds to and remains under a summons for jury service, whether or not impaneled on a jury. Jury duty shall be good cause for not reporting for an eligibility review under s. DWD 128.03.

(7) PARTIAL UNEMPLOYMENT. The department may require a claimant who is partially unemployed to comply with the requirements of this chapter if any of the following apply:

(a) There is a definite indication that the claimant is not genuinely interested in working full-time.

(b) During any week, the claimant was not able to perform or not available for work available with an employing unit.

SECTION 2. DWD 128.02 is repealed.

SECTION 3. DWD 128.03 is repealed and recreated to read:

DWD 128.03 Eligibility review. (1) The department may periodically review the records of any individual claiming unemployment benefits to determine whether the claimant meets the continuing eligibility requirements of chs. DWD 126 to 128 and s.108.04, Stats. A claimant shall respond as required when notified by the department of a review of the claimant's continuing eligibility for benefits.

(2) The eligibility review may include any of the following:

(a) An interview with the claimant conducted by a representative of the department.

(b) A review of the appropriateness of the claimant's registration or waiver of registration under ch. DWD 126.

(c) A determination as to whether the claimant is able to perform suitable work and available for suitable work under this chapter.

(d) An assessment of the claimant's work search efforts under ch. DWD 127.

(e) A determination as to whether the claimant is making satisfactory progress under s. 108.04 (16), Stats., if the claimant is participating in approved training.

(f) A review of any reemployment services the claimant has received.

(g) Preparation of a reemployment plan as reasonably necessary to assist the claimant in his or her efforts to obtain work.

(3) If the claimant fails to participate in an eligibility review interview under sub. (2) (a) without good cause, the claimant shall be ineligible for benefits for the week in which the interview was scheduled.

SECTION 4. INITIAL APPLICABILITY. This rule first applies to determinations made the Sunday after the effective date of this rule.

SECTION 5. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Administrative Register as provided in s. 227.22 (2) (intro.), Stats.