

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

The Wisconsin Department of Workforce Development adopts the following emergency rule *to create* DWD 120.02, relating to providing notification of the availability of unemployment insurance to employees at the time of separation from employment.

The Governor approved the scope statement for this rule, SS 018-20, on March 30, 2020. The scope statement was published in register no. 772A1 on April 6, 2020. The notice of preliminary hearing on the scope statement was published in register no. 772A3 on April 20, 2020. The Department held a preliminary hearing on the scope statement on April 23, 2020. The deadline to comment on the scope statement was April 24, 2020. The Department approved the scope statement on April 28, 2020. This rule was approved by the Governor on September 23, 2020.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

On March 12, 2020, by Executive Order 72, the Governor declared a public health emergency to protect the health and well-being of the state's residents and directed state agencies to assist as appropriate in the State's ongoing response to the public health emergency. On March 13, 2020, the President declared a national emergency concerning the COVID-19 pandemic. Due to the pandemic, many businesses temporarily or permanently closed, resulting in significant business income reduction and layoffs.

On March 18, 2020, the federal Families First Coronavirus Response Act became law. Division D of the Families First Coronavirus Response Act is the Emergency Unemployment Insurance Stabilization and Access Act of 2020 ("EUISAA"). EUISAA provides \$1 billion in emergency grants to states to administer unemployment insurance programs. A state must take required actions to be eligible to receive the EUISAA grants. One EUISAA grant requirement is that the "State requires employers to provide notification of the availability of unemployment compensation to employees at the time of separation from employment. Such notification may be based on model notification language issued by the Secretary of Labor." 42 USC 1103 (h) (2) (A).

An emergency rule is necessary to implement EUISAA and corresponding U.S. Department of Labor guidance (Unemployment Insurance Program Letter No. 13-20, dated March 22, 2020, and Unemployment Insurance Program Letter No. 13-20, change 1, dated May 4, 2020) to ensure that claimants have timely notification of the availability of unemployment insurance.

Statutes Interpreted

Section 108.04 (2) (c), Stats.

Statutory Authority

Sections 108.04 (2) (c) 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 s. 108.14 (2), Stats.

The Department may promulgate rules to require an “employer [to] inform his or her employees of the requirements of [the general qualifying requirements for unemployment insurance] in such reasonable manner.” Section 108.04 (2) (c), Stats.

Related Statutes or Rules

Current s. DWD 120.01 requires employers to “keep employees informed about unemployment insurance under ch.108, Stats., by posting appropriate notice-posters supplied by the unemployment insurance division.” Posters must be posted “on bulletin boards, near time clocks, and other places where all employees will readily see them.”

Plain Language Analysis

This rule specifies how employers must provide notification of the availability of unemployment insurance to employees at the time of separation from employment. An employer’s failure to do so could result in an employee having additional time to file an initial claim for benefits. This is consistent with current law, which provides employees with additional time to file an initial claim if the employer fails to post required notices about unemployment insurance in the workplace.

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 CFR 601.5.

EUISAA provides, as a requirement for additional federal funding for state unemployment insurance programs, that the “State requires employers to provide notification of the availability of unemployment compensation to employees at the time of separation from employment. Such notification may be based on model notification language issued by the Secretary of Labor.” 42 USC 1103 (h) (2) (A).

Summary of comments on the statement of scope and description of how the comments were taken into account in drafting the rule

At the public hearing on the scope statement, the Department received one comment on the rule, which was: Does the Department envision that an employer would have to provide notice in all

terminations including reductions, terminations and furloughs? The Department responded that it has not yet drafted the emergency rule; this is a public hearing on the scope of the rule. However, the U.S. Department of Labor has indicated that employers must notify individual employees of the availability of unemployment insurance at the time of separation from employment. The Department drafted this rule to require an employer to provide notice of the availability of unemployment insurance at the time of all separations, which is consistent with EUISAA.

The Department also received one written comment on the scope statement. The written comment indicated concern that the scope statement “does not delineate what, if any, penalties would apply if an employer is found to be in noncompliance” with this rule. The Department did not create a penalty for noncompliance with the new rule. However, if an employer does not comply with the new rule, an employee may be able to backdate their unemployment insurance benefit claim. But the employee would not be able to backdate their unemployment insurance benefit claim on this basis if the employee was aware of the availability of unemployment insurance.

The written comment also asked the Department, to the extent consistent with federal law, to exempt employers from the requirements of this rule for employees who separate for misconduct or “other benefit disqualifying actions.” The Department interprets EUISAA to require employers to provide notice of the availability of unemployment insurance to all employees at separation, regardless of the reasons for or circumstances surrounding the termination. This is because the relevant provision in EUISAA does not contain an exception for separations due to misconduct or other reasons that would make the employee ineligible. The notice provided by the employer is not a notice that the employee is eligible for benefits, only that they may apply.

Comparison with rules in adjacent states

Minnesota (Emergency Executive Order 20-29), Michigan (Mich. Admin. Code R 421.204), and Illinois (56 Ill. Adm. Code 2720.100(a)) each require employers to give employees notice of the availability of unemployment insurance at the time of separation from employment. Iowa does not currently have this requirement in law.

Summary of factual data and analytical methodologies

The Department reviewed Wisconsin statutes, administrative rules, the Governor’s Emergency Orders, recent changes to federal law, and recent federal guidance to determine what methods employers must use to give notice to their employees of the availability of unemployment insurance at the time of separation.

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

EUISAA provides, as a requirement for additional federal funding for state unemployment insurance programs, that the “State requires employers to provide notification of the availability of unemployment compensation to employees at the time of separation from employment. Such notification may be based on model notification language issued by the Secretary of Labor.” 42 USC 1103 (h) (2) (A).

Under current law, employers must keep employees informed about unemployment insurance by posting appropriate notice-posters supplied by the unemployment insurance division. An employer’s failure to do so may result in additional time for employees to file initial claims for unemployment insurance benefits.

Consistent with the new federal law, this rule adds a requirement that employers must also notify employees of the availability of unemployment insurance at the time of separation. Employers who fail to provide this notice may have additional benefits charged to their unemployment insurance account in the Trust Fund if the employee is given additional time to file an initial claim due to the employer’s failure to give notice. Additional time to file an initial claim is only given to claimants who were unaware of the requirement to file for unemployment insurance benefits, so it is expected that the fiscal effect on employer unemployment insurance accounts will be minimal.

Employers may incur an additional expense in providing notice under this rule if they elect to provide notice in paper form by, for example, mailing a letter to the employee. However, employers may provide electronic notice, such as e-mail or text message, to employees. Electronic notice is not expected to create new out-of-pocket costs for employers.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

This rule may affect small businesses, as defined in s. 227.114 (1), Stats., if a small business has employees who separate from employment. Those employers would be required, under this rule, to provide notice to the employees of the availability of unemployment insurance to the employees at the time the employees separate from employment.

Agency contact person

Questions related to this rule may be directed to:

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Place where comments are to be submitted and deadline for submission

Mark Kunkel, Rules and Records Coordinator
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Comments will be accepted until a date to be determined.

1 **SECTION 1.** DWD 120.02 is created to read:

2 **DWD 120.02 Notice at Separation.**

3 **(1)** Each employer shall provide notification of the availability of unemployment
4 insurance to employees at the time of separation from employment by at least one of the
5 following methods:

6 **(a)** Letter.

7 **(b)** E-mail.

8 **(c)** Text message.

9 **(d)** Flyer.

10 **(e)** Any other department-approved method designed to give immediate notice to
11 employees of the availability of unemployment insurance at the time of separation.

1 (2) If the circumstances of the separation make immediate notice under this section
2 impossible, the employer shall provide notice to the employee as soon as possible.

3 (3) Notice under this section shall include content approved by the department.

4 **Note:** Approved content for the notice under this section is available online at
5 <https://dwd.wisconsin.gov/dwd/publications/ui/notice.htm>.

6 (4) An employer's failure to comply with this section constitutes exceptional
7 circumstances over which the claimant has no control under s. DWD 129.01 (4) (f) unless the
8 employee was aware of the availability of unemployment insurance. If the employer meets the
9 requirements of s. DWD 120.01, the employee is deemed to be aware of the availability of
10 unemployment insurance for the purposes of this subsection.

11 **SECTION 2. EFFECTIVE DATE.** This rule shall take effect on November 2, 2020.

Dated this 29th day of September, 2020.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: _____
Robert Cherry, Deputy Secretary