

**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); *to amend* DWD 127.01 (1) and *to create* DWD 127.01 (3m), 128.001 (2) (ag) and (aw), 128.01 (7), 128.02, and 128.025, relating to work search waivers, 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 February 1, 2021.

**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 law and guidance related to administering unemployment insurance benefit claims during the pandemic period the SARS-CoV-2 virus pandemic, which causes the coronavirus disease 2019 (in this Scope Statement, the virus and disease will be referred to as “COVID-19”). In particular, to address COVID-19, the Families First Coronavirus Response Act (FFCRA) (P.L. 116-127), Division D, Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA) did the following: 1) section 4102(a) required states to modify or suspend work search requirements to receive Allotment II of the emergency administration grant and 2) section 4102(b) relaxed federal conformity requirements for work search, including by specifically allowing waiver of work search. Additionally, federal guidance from the U.S. Department of Labor (DOL) advised states to exercise flexibility in administering the unemployment compensation program to address the impacts of COVID-19. *See, e.g.*, Unemployment Insurance Program Letter (UIPL) No. 10-20, dated March 12, 2020).

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 Emergency Order # 7 in response to COVID-19 to assist individuals affected by the disease by temporarily easing eligibility requirements for unemployment benefits.

On May 9, 2020, the Department promulgated EmR2006 to supplant Emergency Order #7. The Joint Committee for Review of Administrative Rules (JCRAR) has extended EmR2006 for the maximum period allowed under s. 227.24 (2) (a), Stats. As a result, EmR2006 expires on February 2, 2021. However, as evidenced by Executive Order # 104 (dated January 19, 2021),

the COVID-19 pandemic continues to threaten public peace, health, safety, and welfare. The Department never contemplated promulgating these rule changes into permanent rules. A permanent rule is not appropriate or allowed under federal law, as this rule will no longer be necessary after the threats to public peace, health, safety, and welfare caused by the COVID-19 pandemic have abated.

This emergency rule will allow the Department to respond to the spread of COVID-19 by waiving work searches for potentially thousands of claimants. For the week ending January 2, 2021, the Department received 25,005 weekly claims for federal Pandemic Unemployment Assistance, 31,936 weekly claims for federal Pandemic Emergency Unemployment Compensation, and 117,123 claims for regular state unemployment insurance. All of those claimants would be required to conduct four work searches each week unless a waiver applies.

Additionally, the rule will ease eligibility for those claimants who would work but for COVID-related reasons, such as being quarantined or subject to any stay-at-home orders.

### ***Statutes Interpreted***

Section 108.04, Stats.

### ***Statutory Authority***

Sections 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.

Work search actions 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...” Federal law specifically allows waiver of work search to address COVID-19. EUISAA, P.L. 116-127, section 4102.

### ***Related Statutes or Rules***

This rule succeeds EmR2006, which is effective for claims filed through the week ending February 6, 2020, and will ease unemployment eligibility requirements during the COVID-19 pandemic. EmR2006 effectively waives work search due to the existence of the public health emergency by providing that a declared public health emergency constitutes the required four work search actions each week. This rule accomplishes the same result by temporarily waiving the requirement to complete four work search actions for each weekly claim.

### *Plain Language Analysis*

This rule temporarily waives the requirement for claimants to complete 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.

The Department will repeal this emergency rule if it determines that the rule is no longer necessary to respond to the threat of COVID-19.

#### *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.

The emergency rule implements federal law regarding the requirements for work search. Under EUISAA, section 4102(a), the state was required to ease requirements to receive unemployment insurance, including waiving work search requirements, to address the impact of COVID-19 as a condition of receiving the state's share of about \$9.457 million of the \$500 million of federal funding to administer the states' unemployment insurance programs. Thus, the emergency rule, and its predecessors Emergency Order # 7 and EmR2006, demonstrate the steps that the state '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).

EUISAA also specifically allows states to waive work search provisions to respond to COVID-19 without violating federal conformity requirements, which otherwise require work search requirements in a state's unemployment laws: "Notwithstanding any other law, if a State modifies its unemployment compensation law and policies with respect to work search . . . 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." P.L. 116-127, s. 4102(b).

Further, the Department proposes to amend ch. DWD 128 to provide for eligibility provisions related to the availability for work and work available requirements for claimants who are quarantined or otherwise affected by COVID-19.

In administering the unemployment compensation program, federal conformity requirements generally require state law to mandate that 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. However, to address the

pandemic, the DOL advised states that “federal [unemployment compensation] framework gives states significant flexibility to determine standards for . . .availability to work . . . in the context of COVID-19.” UIPL10-20 (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 EmR2006, other 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***

2019 Wisconsin Act 185 provided charging relief for employers for claims that are related to the public health emergency, but that relief ended for claims payable on or after December 27, 2020. Absent subsequent legislative action to provide further recharging relief under state law, employers may be impacted by this emergency rule.

Under the Coronavirus Aid, Relief and Economic Security (CARES) Act, P.L. 116-136, section 2103, for employers subject to reimbursement financing, 50% of the benefits were to be charged to the federal government for claims between March 15, 2020 through December 26, 2020. That provision was extended for claims through March 14, 2020 by the Consolidated Appropriations Act, 2021, P.L. 116-133, Division N, Title II, Subtitle A, the Continued Assistance for Unemployed Workers Act of 2020. Reimbursement employers, therefore, continued to have

partial relief from full charging for unemployment insurance benefits through the week ending March 13, 2021.

Employers, including small businesses, may be charged for claims that 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 otherwise waived). Likewise, claimants deemed to meet able to work and available to work requirements for COVID-related reasons might have been denied absent the rule. 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 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.

### ***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](mailto:Janell.Knutson@dwd.wisconsin.gov)

### ***Place where comments are to be submitted and deadline for submission***

Mark Kunkel, Rules and Records Coordinator  
Department of Workforce Development  
P.O. Box 7946  
Madison, WI 53707  
E-Mail: [DWDAdminRules@dwd.wisconsin.gov](mailto:DWDAdminRules@dwd.wisconsin.gov)

Comments will be accepted until a date to be determined.

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1           **SECTION 1.** DWD 127.01 (1) is amended to read:

2           **DWD 127.01 (1)** ~~A~~ Except as provided in sub. (3m), a claimant shall be eligible for  
3 unemployment benefits for any given week when the department finds that the claimant has  
4 completed at least 4 actions to search for suitable work within that week. Upon request of the  
5 department, a claimant shall provide verification of conducting at least 4 work search actions that  
6 are reasonably designed to secure work. Registration for work under ch. DWD 126 does not  
7 establish that the claimant is making a reasonable search for suitable work. It is essential that the  
8 claimant personally and diligently search for suitable work. The reasonableness of a search for  
9 work will, in part, depend on the employment opportunities in the claimant's labor market area.  
10 A work search which may be appropriate in a labor market area with limited opportunities may  
11 be totally unacceptable in an area with greater opportunities. Unreasonable limitations by a  
12 claimant as to salary, hours, or conditions of work indicate that a claimant is not making a  
13 reasonable search for suitable work. The department expects claimants to conduct themselves as  
14 would a prudent person who is out of work and seeking work.

15           **SECTION 2.** DWD 127.01 (3m) is created to read:

16           **DWD 127.01 (3m)** The department shall waive work search requirements under sub. (1)  
17 for all claimants to respond to the spread of COVID-19, as defined in s. 128.001 (2) (ag). The  
18 waiver shall apply to each week during which this rule is in effect for any part of a week.

19           **SECTION 3.** DWD 128.001 (2) (a) is renumbered DWD 128.001 (2) (ar).

20           **SECTION 4.** DWD 128.001 (2) (ag) is created to read:

21           **DWD 128.001 (2)** (ag) "COVID-19" means the SARS-CoV-2 virus and any related  
22 disease.

23           **SECTION 5.** DWD 128.001 (2) (aw) is created to read:

1           **DWD 128.001 (2)** (aw) "Public health emergency" means any week or part thereof  
2 during a public health emergency declared by Executive Order # 72 on March 12, 2020, under s.  
3 323.10, Stats., and any extension in response to the SARS-CoV-2 virus, including by the  
4 department of health services under ch. 252, Stats., or during a federally declared emergency in  
5 response to the SARS-CoV-2 virus, or during a period in which the state has been federally  
6 declared to be a major disaster due to the SARS-CoV-2 virus.

7           **SECTION 6.** DWD 128.01 (7) is created to read:

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

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

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

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

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

22           **SECTION 7.** DWD 128.02 is created to read:

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

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

5 (2) There is no work available for employees during a public health emergency.

6 **SECTION 8.** DWD 128.025 is created to read:

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

13 **SECTION 9. INITIAL APPLICABILITY.** This rule first applies to claims filed on or after  
14 February 2, 2021.

15 **SECTION 10. EFFECTIVE DATE.** This rule shall take effect on February 2, 2021, or upon  
16 publication in the official state newspaper as provided in s. 227.24 (1) (c), whichever occurs  
17 later.

Dated this 2nd day of February, 2021.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: \_\_\_\_\_

Amy Pechacek, Secretary-designee