

**Order of the Wisconsin
Department of Workforce Development**

The Wisconsin Department of Workforce Development proposes an order to create ch. DWD 226, relating to bone marrow donation leave and organ donation leave.

The statement of scope for this rule, SS 101-20, was approved by the Governor on July 31, 2020, published in register No. 776A1, on August 3, 2020, and approved by the Department of Workforce Development on August 14, 2020. This rule was approved by the Governor on February 10, 2022.

Analysis Prepared by the Department of Workforce Development

Statutes Interpreted

Sections 103.005 (1), 103.11, and 227.11 (2) (a), Stats.

Statutory Authority

Section 103.005 (1), 103.11, and 227.11 (2) (a), Stats.

Explanation of Statutory Authority

2015 Wis. Act 345 created s. 103.11, Stats., which does all of the following: 1) requires employers with 50 or more permanent employees to allow eligible employees up to 6 weeks leave in a 12-month period for the purpose of serving as a bone marrow or organ donor; 2) imposes requirements on employers and employees regarding the leave; and 3) requires the Department of Workforce Development (department) to investigate and take other actions regarding complaints filed by employees about employer compliance with the requirements.

Section 103.005 (1), Stats., provides: "The department shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings."

Section 227.11 (2) (a), Stats., provides: "Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..."

Related Statute or Rules

Section 103.10, Stats., does the following: 1) requires employers with 50 or more permanent employees to provide family and medical to leave to eligible employees; 2) imposes requirements on employers and employees regarding the leave; and 3) requires the department to

investigate and take other actions regarding complaints filed by employees about employer compliance with the requirements. The department promulgated ch. DWD 225 to implement the requirements under s.103.10, Stats.

Section 230.35 (2d), Stats., allows employees in the state civil service system to receive a leave of absence to serve as bone marrow or organ donors.

Plain Language Analysis

Chapter DWD 226 implements the provisions of s. 103.11, Stats. The chapter includes requirements for determining whether an employer is subject to that statute and whether an employee is eligible for bone marrow or organ donor leave under the statute. The chapter specifies how and when eligible employees may take the leave and includes requirements for scheduling, providing notice, and denying requests for the leave. The chapter also includes requirements for 1) substituting other paid or unpaid leave for bone marrow or organ donor leave and 2) extending bone marrow or organ donor leave with other paid or unpaid leave. The statute requires employers to maintain group health insurance coverage for employees who take leave under the same conditions that applied prior to the leave and allows employers to require employees to pay health insurance premiums into an escrow account. The chapter prohibits employers from denying leave based on nonpayment of the premiums and imposes other requirements regarding the payments.

The chapter allows employees to file complaints with the department alleging that employers have violated the statute. The statute requires complaints to be filed within 30 days after a violation occurs or an employee reasonably knows that a violation occurred, whichever is later, and the chapter includes requirements for determining when employees reasonably knew about a violation. The chapter also includes provisions for the following: 1) amendment or withdrawal of complaints by employees; 2) notification of employers who are the subject of complaints; 3) dismissal of complaints that do not satisfy a preliminary review conducted by the department; 4) investigations of complaints by the department; 5) initial determinations by the department of whether there is probable cause to believe that violations have occurred; 6) dismissal of complaints that the department determines lack probable cause or that fail to satisfy other specified requirements; 7) dismissal of complaints based on employees' failure to respond to correspondence from the department; 8) appeals of complaint dismissals; and 9) settlement of complaints.

If the department makes an initial determination that there is probable cause that a violation occurred, the chapter requires the department to certify the case to a hearing on the merits of the complaint before an administrative law judge (ALJ). The chapter includes requirements for hearing notices, employer answers to complaints, pre-hearing conferences and discovery, subpoenas, motions, ALJ disqualification, service of witness lists and copies of exhibits, and facsimile or email filings, as well as requirements for conducting and recording hearings. After a hearing on the merits, the chapter requires an ALJ to issue a decision and order that either dismisses the allegations or orders the employer to take action to effectuate the purposes of the statute. If an employee prevails in the case, the chapter allows the ALJ to award the employee reasonable attorney fees. If a complainant appeals a no probable cause finding, the chapter

requires an ALJ to hold a hearing on probable cause and dismiss allegations that the ALJ finds lack probable cause. Under the chapter, judicial review is allowed only for final decisions and orders of the ALJ, which are those decisions that dispose of an entire complaint and leave no further proceedings on the complaint pending before the department.

Summary of, and comparison with, existing or proposed federal regulations

The Family and Medical Leave Act of 1993 (FMLA), 29 USC 2601 et seq., as amended, entitles eligible employees who work for covered employers to take unpaid, job-protected leave with continuation of group health insurance coverage for specified family and medical reasons, including inability to work because of a serious health condition. Although FMLA and its implementing regulations do not specifically refer to bone marrow and organ donation, the recovery time from donation would likely qualify as a "serious health condition" and be covered under FMLA.

Comparison with rules in adjacent states

An Illinois law allows state employees to take paid leave of up to 30 days for organ or bone marrow donation. 5 ILCS 327. An Iowa law allows state employees to take up to 30 days paid leave for organ donation and up to 5 days for bone marrow donation. Iowa Code 70A.39. Under Minnesota laws, state and local employees may take up to 40 hours paid leave for organ donations and state, local, and private employees may take up to 40 hours paid leave for bone marrow donation. 2019 Minnesota Statutes 181.945 and 181.9456. Michigan does not have comparable laws.

Summary of factual data and analytical methodologies

Development of this rule did not involve the gathering, analysis, or use of data. Therefore, Wis. Stat. s. 227.14 (2m) does not apply to this rulemaking.

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

The Statement of Scope for the rule was posted for 14 days to solicit comments on economic impact from the public and no comments were received.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

Because this rule only pertains to employers with 50 or more employees, the proposed rule is not anticipated to impact small businesses, as defined in s. 227.114 (1), Stats. The proposed rule is anticipated to have an economic impact on employers with 50 or more employees if an employee serves as a bone marrow or organ donor.

Agency contact person

Questions and comments related to this rule may be directed to:

Matthew White, Director, Bureau of Investigations
Equal Rights Division
Department of Workforce Development
P.O.Box 8928
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E-Mail: MatthewP.White@dwd.wisconsin.gov

Place where comments are to be submitted and deadline for submission

Mark Kunkel, Rules and Records Coordinator
Department of Workforce Development
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E-Mail: dwdadminrules@dwd.wisconsin.gov

The deadline for comments was December 29, 2021, and no comments were filed.

SECTION 1. DWD 226 is created to read:

CHAPTER DWD 226

BONE MARROW AND ORGAN DONOR LEAVE

DWD 226.001 Purpose. This chapter implements the provisions of s. 103.11, Stats., providing for bone marrow and organ donor leave for employees in certain cases and prohibiting certain practices by establishing interpretations of the provisions of that section to assist in its implementation.

DWD 226.01 Definitions and scope. (1) When used in this chapter or in s. 103.11, Stats.:

(a) "12-month period," as used in s. 103.11 (4), Stats., means a calendar year commencing at 12:01 a.m. on January 1 and ending at midnight on December 31 each year.

NOTE: Section 103.11 (4), Stats., specifies requirements for taking bone marrow and organ donation leave and limits the leave to no more than 6 weeks in a 12-month period.

(b) "12-month period," as used in s. 103.11 (9) (c) 2., Stats., means a period of 365 consecutive days commencing with the date the first payment is required by an employer to be paid by an employee under s. 103.11 (9) (c), Stats.

NOTE: Section 103.11 (9) (b) and (c), Stats., apply to employers who maintain group health insurance coverage for employees. If an employee takes bone marrow and organ donation leave, then, during the period of the leave, s. 103.11 (9) (b), Stats., requires the employer to maintain the coverage under the same conditions that applied immediately before the leave began. Section 103.11 (9) (c) 1., Stats., allows the employer to require the employee to have in escrow with the employer an amount equal to the entire premium or similar expense for 8 weeks of the employee's group health insurance coverage. If an employer requires an employee to have that amount in escrow, s. 103.11 (9) (c) 2., Stats., allows the employee to pay the amount to the employer in equal installments at regular intervals over at least a 12-month period.

(c) "Administrative law judge" means the examiner appointed to conduct hearings under s. 103.11 (12), Stats.

(d) "Complainant" means the person who files a complaint alleging a violation under s. 103.11, Stats.

(e) "Day" means a calendar day. When used in time computations, "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.

(f) "Department" means the Wisconsin department of workforce development.

(g) "Employee" means an individual employed in this state by an employer.

(h) "Employer" means a person engaging in any activity, enterprise, or business in this state employing at least 50 individuals on a permanent basis, and includes the state and 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.

(i) "Filing" means the physical or electronic receipt of a document by the department, including receipt by hand delivery, US mail, facsimile, email, or receipt on the department's website.

(j) “Group health insurance coverage” means the entire health insurance package offered by an employer including, medical, dental, or vision insurance.

(k) “Probable cause” means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person in the belief that one or more actions prohibited by s. 103.11 (11), Stats., probably has been or is being committed.

(L) “Respondent” means the person or agency alleged to have committed one or more actions prohibited by s. 103.11 (11) Stats.

(m) "Week" as used in s. 103. 11 (3) (b), Stats., means 7 consecutive days.

(2) An employer shall be deemed to be “employing at least 50 individuals on a permanent basis” within the meaning of s. 103.11 (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, actually treated at least 50 individuals as being permanent employees as to the activities, enterprises, or businesses of that employer.

(3) An employee shall be deemed to have “been employed by the same employer for more than 52 consecutive weeks” within the meaning of s. 103.11 (3) (b), Stats., if the person has actually been treated by the employer, according to the usual personnel recordkeeping practices of the employer, 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) Under s. 103.11 (3) (b), Stats., a person shall be deemed to have “worked for the employer for at least 1,000 hours during the preceding 52–week period,” 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 an employer's policy with respect to leave for the purpose of serving as a bone marrow or organ donor is to provide the same leave as granted in s. 103.11 (4), Stats., the posting of a statement to that effect together with a copy of s. 103.11, Stats., in the manner prescribed by s. 103.11 (14) (b), Stats., shall satisfy the requirements of s. 103.11 (14) (b), Stats.

(6) To the extent that an employer grants leave to an employee relating to the employee's service as a bone marrow or organ donor in a manner which is no more restrictive than the leave available to that employee under s. 103.11 (4), Stats., the leave granted by the employer shall be deemed to be leave available to that employee under s. 103.11 (4), Stats.

DWD 226.02 When and how leave taken. (1) The leave allowed under s. 103.11, Stats., may be taken in non-continuous increments. An employee may schedule and take partial absence leave 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 s. 103.11, Stats., shall be equal to the shortest increment the employer allows to be taken by that employee for any other non-emergency leave. Such partial leave must be necessary for the employee to undergo the bone marrow or organ donation procedure and to recover from it.

(2) For partial leave purposes, a "week" 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 that does not "unduly disrupt the employer's operations" within the meaning of s. 103.11 (6) (a), Stats., if all of the following apply:

1. 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.

2. The schedule under subd. 1. 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) If an employer has a written policy which requires notice of scheduled partial absences 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 bone marrow or organ donation in a reasonable and practicable manner” within the meaning of s. 103.11 (6) (b), 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 under s. 103.11 (6) (b), 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. 103.11 (6) (b), 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. 103.11 (6) (a), Stats., if all of the following apply:

(a) 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.

(b) Except where precluded by the need for health care consultation or treatment, the proposed schedule under par. (a) 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) Leave requested by an employee may be denied by an employer if the employee substantially fails to provide the employer with notice of the leave as required under s. 103.11 (6), Stats., as interpreted by this section. For purposes of this subsection, an employee is considered to have substantially failed to provide proper notice if the employee fails to do at least two of the following:

(a) Provide the notice in writing.

(b) Identify the planned dates of leave.

(c) Provide a proposed schedule for leave with reasonable promptness.

(d) Provide a proposed schedule that is sufficiently definite to allow the employer to schedule

replacements, if needed.

(7) Except where emergency health care consultation or treatment is required, an employer may deny a requested leave where the employer has made a request for certification that complies with s. 103.11 (7), Stats., as to that leave, and the employee requesting the leave fails or refuses, after that proper request, to substantially comply with s. 103.11 (7), Stats., as to certification.

(8) Leave under this section is available for only the period necessary for the employee to undergo the bone marrow or organ donor procedure or to recover from that procedure. Family or medical leave under s. 103.10, Stats., may also be available to qualified employees. An employer may not designate leave under this section to run concurrently with family or medical leave under s. 103.10, Stats.

NOTE: Leave under this section may run concurrently with family or medical leave for which an employee is eligible under the federal family and medical leave act, 29 USC 2601 et seq.

(9) No more than 6 weeks of bone marrow and organ donation leave may be taken in a 12-month period. Bone marrow and organ donation leave that begins in one 12-month period and ends in the subsequent 12-month period may not exceed 6 weeks. In this subsection, "12-month period" has the meaning given in s. DWD 226.01 (1) (a).

DWD 226.03 Substituting leave. (1) An employee entitled to bone marrow or organ donor leave under s. 103.11, Stats., may substitute, for any leave requested under s. DWD 226.02, any other paid or unpaid leave which has accrued to the employee.

(2) Leave substituted for leave available under this section shall be calculated as specified in s. DWD 226.02 (1).

(3) The employer may not require an employee to substitute any other paid or unpaid leave available to the employee for either bone marrow or organ donation leave under s. 103.11, Stats.

(4) If any other type of leave is substituted for bone marrow and organ donor 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.

DWD 226.031 Consecutive leave. If an employee chooses to use leave provided under s. 103.11 (4), Stats., the employee may not extend leave taken by adding leave of any other type provided by the employer, unless any of the following apply:

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

(2) The employer consents to the extension.

DWD 226.04 Continuation of insurance. (1) An 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. 103.11 (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. 103.11 (9) (c), Stats., more frequently, or in greater amounts, than was required of the employee before the leave being taken.

(3) The employer may not deny leave under s. 103.11, Stats., 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. 103.11 (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 s. 103.11, Stats.

DWD 226.05 Time to commence administrative proceedings. If an employer is not in compliance with the notice posting requirements of s. 103.11 (14) (a), Stats., when a violation occurs under s. 103. 11, 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. 11 (12) (a), Stats., at the time of the violation 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. 103.11 (14) (a), Stats., when a violation occurs under s. 103. 11, Stats., the employer has the burden of proving actual knowledge on the part of the employee within the meaning of this section.

DWD 226.06 Complaints. (1) WHO MAY FILE A 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 COMPLAINT.** (a) A complaint may be filed on the department's website, or filed in person or by mail, facsimile transmission, or email to the office of the department's equal rights division.

(b) A complaint filed by facsimile transmission shall conform with the requirements of s. DWD 226.26 (1).

NOTE: The offices of the department's equal rights division are at the following addresses:

1. Equal Rights Division, 201 East Washington Avenue, Madison, WI 53703; PO Box 8928, Madison, WI 53708. Facsimile: 608-327-6001. Email address: ERInfo@dwd.wisconsin.gov.

2. Equal Rights Division, 819 North 6th Street, Milwaukee, WI 53203. Facsimile: 414-227-4084. Email address: ERInfo@dwd.wisconsin.gov. Access to the division's Milwaukee office is on the 7th Street side of the building.

(3) **CONTENT OF COMPLAINT.** A complaint shall be submitted on a form provided by the department and 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. Complaints filed on the department's website shall be acknowledged using the certification method required in the instructions on the website. The 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 or by a date established by the administrative law judge unless good cause is shown for the failure to amend the complaint before that time. If the complaint is amended before 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 bureau of investigations to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent has violated s. 103.11, Stats., as alleged in the amended complaint or continue to hearing if both parties agree to proceed to hearing with the issues in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 226.09 (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.

DWD 226.07 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. The department may send certified or regular mail to determine whether the complainant wishes to continue pursuing the case or for other reasons determined to be appropriate by the department. If regular mail is not returned to the department, there is a presumption that it was received by the complainant.

DWD 226.08 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT. The department shall serve a copy of a complaint which meets the requirements of s. DWD 226.06 upon each respondent before 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 designated 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 there is probable cause to believe that a prohibited act has occurred based solely on the department's investigation and the information supplied by the complainant.

DWD 226.09 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 s. 103.11, Stats.
- (b) Whether the respondent is subject to s. 103.11, Stats.
- (c) Whether the complaint states a claim for relief under s. 103.11, Stats.
- (d) Whether the complaint was filed within the time period set forth in s. 103.11, Stats., if that issue is raised in writing by the respondent.

(2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT. The department 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 US mail to the last known address of each party and to their attorneys of record.

(3) APPEAL OF PRELIMINARY DETERMINATION. (a) A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the department by mail, facsimile, email, or hand-delivery that satisfies all of the following:

- 1. The appeal is filed within 10 days after the date of the order.
- 2. The appeal states specifically the grounds upon which the appeal is based including evidence the complaint did, in fact, meet the requirements of sub. (1).

(b) If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties by US mail. The matter shall be referred to the bureau of hearings and mediation for review by an administrative law

judge. The administrative law judge shall issue a decision to affirm, reverse, modify, or set aside the preliminary determination. The department shall serve the decision of the administrative law judge upon all 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, the decision may be subject to review in court if it is a final decision and order that may be appealed under s. DWD 226.25 (1).

DWD 226.10 Investigations. (1) CONDUCT OF INVESTIGATION. The department shall investigate all complaints that satisfy the review under s. DWD 226.09. 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.

(2) DISMISSAL OF COMPLAINT BEFORE COMPLETION OF INVESTIGATION. (a) The department may dismiss a complaint before completion of an investigation under the any of 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 226.07.

2. The complainant signed a 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 s. 103.11, Stats.

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

(b) 1. A complainant may appeal from an order dismissing a complaint under this subsection by filing a written appeal with the department that satisfies all of the following:

a. The appeal is filed within 20 days after the date of the order.

b. The appeal states specifically the grounds upon which the appeal is based including evidence the

complaint did, in fact, meet the requirements of s. DWD 226.09 (1).

2. If a timely appeal is filed, the department shall serve a copy of the appeal upon all other parties by US mail. The matter shall be referred to the bureau of hearings and mediation 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 by US mail. 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 226.25 (1).

DWD 226.11 Initial determination. (1) GENERAL. At the conclusion of the investigation, the department shall issue a written initial determination which states whether 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 be noticed and conducted in accordance with the provisions of ss. DWD 226.15 to 226.24.

(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 226.12.

DWD 226.12 Appeal of initial determination of no probable cause. (1) An appeal shall be filed within 10 days of the date of the initial determination.

(2) If no written appeal is filed in a timely manner, the initial determination's order of dismissal shall be the final determination of the department.

(3) If an appeal under sub. (1) is filed, the department 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 226.15 and DWD 226.17 to 226.24. The parties may stipulate before 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 consolidate the hearing on probable cause and the hearing on the merits with the consent of the parties.

DWD 226.13 Private settlement and conciliation. The parties may enter into an agreement to settle the complaint at any time during the proceedings. If requested, the department may assist the parties to reach a settlement. The parties shall notify the department immediately upon reaching a settlement if it resolves all matters so the department may dismiss the matter.

DWD 226.14 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing. A complaint may be dismissed for not meeting the requirements of s. DWD 226.09 (1) or for any other procedural basis after the case is certified to hearing under s. DWD 226.11 (2) or 226.12 (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 US mail to the last known address of each party and to their attorneys of record.

DWD 226.15 Notice of hearing. (1) CONTENT. In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 226.11 (2) or an appeal of an initial determination of no probable cause under s. DWD 226.11 (3), the department shall advise the parties and their representatives and attorneys in writing by US 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. (a) The hearing shall be held in the county where the prohibited act is alleged to have 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.

(b) A hearing held using video conferencing technology is considered to be held in the county where the prohibited act is alleged to have occurred.

DWD 226.16 Answer. (1) WHEN REQUIRED. Within 10 days after the date of a notice of hearing on the merits or by a date set by the administrative law judge holding the hearing, each respondent shall file with the department's bureau of hearings and mediation 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 sent 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. Admissions or denials may be to all or part of an allegation and shall address the substance of the allegation. Any affirmative defense relied upon by a respondent, including the statute of limitations, 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 answer may, in the absence of good cause, be held to constitute a waiver of that defense.

DWD 226.17 Pre-hearing conference. In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with s. 227.44 (4), Stats.

DWD 226.18 Prehearing discovery. (1) TIMING. Discovery may not be used before the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted before 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 discovery shall, not less than 10 days before 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 director of the bureau of hearings and mediation 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, unless otherwise ordered by the administrative law judge. 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 who 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 department, except as required under sub. (2).

DWD 226.19 Subpoenas and motions. (1) SUBPOENAS. Subpoenas, including subpoenas to compel the attendance of witnesses and subpoenas requiring the production of material, may be issued by the department or by an attorney of record. 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 under 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.

DWD 226.20 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.

DWD 226.21 Exchange of names of witnesses and copies of exhibits. By the tenth day before the hearing, the parties shall file with the department 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. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion under this section. This section does not apply to witnesses and exhibits offered in rebuttal which the party could not reasonably have anticipated using before the hearing.

DWD 226.22 Hearings. (1) PROCEDURE. Hearings shall be conducted in conformity with s. 103.11 and 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 or by the date set by the administrative law judge for filing motions, except where emergency circumstances arise before the hearing. The party requesting a postponement shall send a copy of the request to all other parties when the request is filed with the department.

Postponements and continuances may be granted only for good cause shown and may 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.

DWD 226.23 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 s. 103.11, Stats. 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 recorded, the original recording shall remain in the department for 5 years following the hearing, after which it may be discarded.

(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS. Any party may file a transcript of the hearing with the department. 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. If a party arranges for a transcript, the transcript will be filed with the department and the department shall provide a copy to any other party or parties at no additional cost. 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 request of a party.

DWD 226.24 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 US 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 226.25 (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 s. 103.11, Stats., depending upon the administrative law judge's findings and conclusions on the merits of the complaint. The order may award reasonable attorney fees to a complainant who prevails in a case. A certified copy of the decision and order and a notice of appeal rights shall be sent by US mail to the last known address of each party and to their attorneys of record.

(4) COMPUTATION OF INTEREST. Interest on any award made under this chapter shall be added to that award and computed at an annual rate as set forth in s. 815.05 (8), Stats. Interest shall be computed by calendar quarter.

DWD 226.25 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 department.

(2) NOTICE OF APPEAL RIGHTS. Every decision and order of an administrative law judge under s. DWD 226.24 shall be accompanied by a separate notice advising the parties of their rights to seek judicial review of the

decision under s. 103.11 (13), Stats.

DWD 226.26 Filing of documents. (1) FILING OF DOCUMENTS BY FACSIMILE TRANSMISSION. (a)

Unless otherwise directed by the department or ordered by the administrative law judge, documents may be filed by facsimile transmission. Documents filed by facsimile transmission shall include a cover sheet setting forth all of the following information:

1. The name of the sender.
2. The individual to whom the transmission is directed, if that individual is known.
3. The number of pages being transmitted, including the cover sheet.

(b) The date of transmission recorded by the department's facsimile equipment shall constitute the date of filing of a document under this section, except that documents filed by facsimile after the regular business hours of the department as established by s. 230.35 (4) (f), Stats., or on a day when the offices of the department are closed under s. 230.35 (4) (a), Stats., shall be considered filed on the next business day of the department.

(2) FILING OF DOCUMENTS BY EMAIL. Unless otherwise directed by the department or ordered by the administrative law judge, documents may be filed by email. If a party does not have the email address of the assigned equal rights officer or administrative law judge, the party may use ERInfo@dwd.wisconsin.gov.

(3) FILING OF DOCUMENTS BY US MAIL. Unless otherwise directed by the department or ordered by the administrative law judge, documents may be filed by US mail.

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

Dated this 17th day of May, 2022.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By:

Amy Pechacek, Secretary-designee