

Report From Agency

**DEPARTMENT OF ADMINISTRATION
REPORT TO LEGISLATURE**

ER 1, 18, 21, 43, 46 and ER-MRS 1-22, 27-34, Wis. Adm. Code

Clearinghouse Rule 18-006

I. PROPOSED RULE AND SUMMARY:

The proposed rule, including analysis and text, are attached.

II. REFERENCE TO APPLICABLE FORMS:

There are no references to new forms.

III. FISCAL ESTIMATE AND ECONOMIC IMPACT STATEMENT:

The fiscal estimate and economic impact analysis are attached. The proposed rule will have no material impact upon the State's fiscal obligations. The proposed rule will have no material impact on the economy of the state.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

The modifications to the existing administrative rules, as found in the corresponding portions of the proposed permanent rules, are based primarily on the modifications made to Ch. 230, Wis. Stats. (Ch. 230), that occurred in 2015 Wis. Act 150 (Act 150), as well as current practices of the Department of Administration, Division of Personnel Management (DPM) and its predecessor agency, the Office of State Employment Relations. 2015 Wisconsin Act 150 revised various laws governing classified employment in state civil service. Those revisions apply to the hiring process, probationary periods, discipline and grievance procedures, layoff procedures, and reinstatement eligibility and restoration rights. The purpose of the proposed rule changes is to bring the rules into compliance with current statutory language and update processes and procedures to align with current practice. Below is an explanation of each of the proposed rule changes by chapter.

Ch. ER 1 – Force and Effect of Rules and Definitions – Definitions were updated to remove the term handicap and replace it with disability in accordance with federal language. Also, the definition for original appointment was modified to reflect its expanded application following the changes to reinstatement eligibility. Definitions for involuntary demotion and involuntary transfer were also created to provide clarity.

Ch. ER 18 – Absences – Modified references to restoration following layoff and examination, updated applicability of provisions to University of Wisconsin employees who were removed from coverage under Ch. 230 in 2015, and adjusted timelines for leave to reflect changes in probationary periods. Additional references to the state compensation plan were added to clarify the provisions for non-represented employees. Calculation of continuous service for returning employees was modified to match current statutory language. Lastly, a section was added for leave of absence to serve as election officials as is provided in statute.

Ch. ER 21 – Resignation – Updated the definition of leave credits as related to resignation. The parameters of job abandonment were updated to align the rule with statute.

Ch. ER 43 – Affirmative Action and Equal Opportunity – The term handicap is replaced with disability in accordance with federal language. Veterans were added as an affirmative action group to reflect their inclusion in a diverse workforce. The definitions and categories of Racial and Ethnic Groups were modified to reflect language used by the Federal EEOC

Ch. ER 46 – Grievance Procedure – Act 150 provided a specific procedure, with timelines, for an employee to contest an adverse employment decision. This includes 14 days to file a complaint with the agency, 14 days for the agency to review and respond to the complaint, 14 days for the employee to appeal to DPM, 30 days for DPM to review and respond to the complaint, and 14 days for the employee or employer to appeal to the Wisconsin Employment Relations Commission (WERC). The state employee grievance procedures and time limits for grievances filed relating to conditions of employment in this rule were modified to establish consistency with the aforementioned procedures for grievances relating to adverse employment decisions provided in Ch. 230.

Ch. ER-MRS 1 – Force and Effect of Rules; Definitions – The definition for original appointment was modified to reflect its expanded application following the changes to reinstatement eligibility. Definitions for involuntary demotion and involuntary transfer were also created to provide clarity

Ch. ER-MRS 6 – Recruitment and Selection – Act 150 modified the recruitment and selection process to require all applicants to the classified service to submit a resume and removed the primary reliance on an examination-based process. The Act also modified the process to shorten the hiring timeline and emphasize an open competitive process, particularly for Career Executive positions. The Act also replaced a veterans' preference point system with an alternative method of expanding veteran consideration. Additionally, prior to selecting a current state employee, a review of employment records must be completed. References in this chapter to the term examination were replaced with "competitive procedures" to align the rule with current statute. Lastly, this proposed rule updated language addressing the release of information to reflect changes to the selection process.

Ch. ER-MRS 7 – Appointing Procedures for Unskilled Labor and Service Classifications – Replaced the term examination to align the rule with current statute.

Ch. ER-MRS 8 – Procedures for Corrections and Entry Professional Positions – Replaced the term examination and removed reference to promotional and servicewide recruitments to align the rule with current statute. References to Department of Health Services were also removed to align rule with current statute.

Ch. ER-MRS 10 – Limited Term Appointments – Modifications were made to provide for exclusions and responses to violations to align the rule with statute and current practice.

Ch. ER-MRS 11 – Employment Registers – Removed promotional registers to align the rule with current statute and update management of registers to account for new statutory timelines for recruitment.

Ch. ER-MRS 12 – Certification and Appointment – Removed certification from promotional and restoration registers and replaced examination with competitive procedures to align the rule with current statute. Added reference to exceptional hiring methods and non-competitive appointment statutory provisions.

Ch. ER-MRS 13 – Probationary Periods – Act 150 extended the length of original and promotional probationary periods from 6-months to 12-months, which may then be extended for an additional 12-months. Additionally, the ability to waive any portion of a supervisory probation was eliminated. This rule was modified to provide consistency with probationary changes in Ch. 230. All probationary periods will have a minimum duration of 12-months. The proposed changes also update language relevant to extending a probation due to absence from employment as a result of the base probationary period being twice as long as prior probations. Mandatory extensions are due to absences during required probations only.

Ch. ER-MRS 14 – Promotion – Modifications to clarify that promotional appointments are a result of open competition and remove reinstatement language to align the rule with current statute. Removed duplicate language for pay on new promotion.

Ch. ER-MRS 15 – Transfer – Added language specifying procedures for authorization of, and probation matters related to, involuntary transfers to differentiate from voluntary transfers.

Ch. ER-MRS 16 – Reinstatement and Restoration – This chapter was modified to update the period of eligibility and conditions for reinstatement and restoration to align the rule with current statute. Changes include elimination of restoration for employees who are laid off on or after July 1, 2016 and establishing a 3-year reinstatement eligibility period exclusively for this category of employees.

Ch. ER-MRS 17 – Demotion – Removed reference to restoration and clarified the assignment of a probationary period for voluntary demotion.

Ch. ER-MRS 22 – Layoff Procedures – A number of changes were necessary in this rule to conform with current statute. Act 150 revised the provisions for determining the order of layoffs, specifically that the order must be primarily based on performance, and then thereafter disciplinary records, seniority and ability. The Act also included a requirement that supervisors provide classified state employees an annual performance review. The Act also removed the requirement that limited term and probationary employees must be released prior to the layoff of permanent employees. Displacement as an alternative to layoff and restoration following layoff after July 1, 2016 were eliminated and reinstatement eligibility was updated to align the rule with current statute. Other changes to the rule included modification to the definition of reasonable offer to reflect current practices. Alternatives to termination from the service as a result of layoff were modified by removing employing unit variables from transfer and demotion transactions, providing expanded options for employees. Additionally, the required amount of time to provide notice to employees affected by layoff was increased from 15 to 60 calendar days.

Ch. ER-MRS 27 – Exceptional Methods and Kinds of Employment – Replaced examination with selection procedures to align the rule with current statute.

Ch. ER-MRS 30 – Career Executive Employment – Modifications were made to provide consistency with recruitment, selection, probation, reinstatement and restoration changes made elsewhere and to align the rule with current statute. Waiver of any portion of a trial period was eliminated. Added permissive probation for movement between agencies by career executive employees who have completed a trial period. Clarified career executive reassignment and prohibited reassignment between agencies while serving a trial period. Updated technical terminology to remove restoration language.

Ch. ER-MRS 32 – Acting Assignments – Modifications were made to procedures to align rule with current practices relating to requests made to the Director for extensions and included language pertaining to safeguarding the competitive selection process for the vacant position.

Ch. ER-MRS 34 – Project Appointments – This rule was updated to align reinstatement provisions in the rule with current reinstatement provisions in statute.

V. SUMMARY OF PUBLIC COMMENTS, APPEARANCES AT THE PUBLIC HEARING, AND MODIFICATIONS TO PROPOSED RULES PROMPTED BY PUBLIC COMMENTS:

The notice for public hearing was posted on the DPM website on January 23, 2018 and in the January 29, 2018 issue of the Wisconsin Administrative Register. A public hearing was held on February 20, 2018 in Madison. No members of the public attended

the hearing and no written comments were received during the comment period that concluded February 20, 2018. No modifications were made following the hearing, as no public comments or testimony were received.

VI. CHANGES TO RULE ANALYSIS AND FISCAL ESTIMATE:

No changes to the Fiscal Estimate were made, as no public comments or testimony were received. The Rule Analysis was updated to address comments from the Legislative Council Rule Clearinghouse and to provide clarity as identified by the agency.

VII. RESPONSE TO LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT:

The Legislative Council Rules Clearinghouse submitted comments on August 21, 2017 relating to “Statutory Authority,” “Form, Style, and Placement in Administrative Code,” “Adequacy of Reference to Related Statutes, Rules and Forms,” and “Clarity, Grammar, Punctuation, and Use of Plain Language”. A copy of the Rules Clearinghouse Report is attached. The department responds to or rejects specific recommendations by the Legislative Council Rules Clearinghouse as discussed below. Changes to the proposed rule were made to address all remaining recommendations not mentioned.

- Item 1.a., “In the rule summary, the agency cites to ss. 227.11 (2), 230.04 (5), and 230.05 (5), Stats., as statutory authority for the proposed rule. However, ch. 230, Stats., contains statutes that provide specific rulemaking authority to the agency for parts of the proposed rule and, thus, should also be cited as statutory authority. Examples include ss. 230.04 (14), 230.24 (1), and 230.34 (2) (b), Stats.” The department has updated the summary to include all statutory authority for the rules being updated.
- Item 1.b., “Section ER 43.02 (2) (d) adds veteran groups to the definition of "affirmative action group". However, in the statutory definition of "affirmative action" under s. 230.03 (2), Stats., veteran groups are not included in the list of affirmative action groups. The agency should explain its statutory authority for including veteran groups in its definition of "affirmative action groups".” The department has removed this from the proposed rule changes.
- Item 1.c., “Section ER-MRS 11.03 (2) allows the director to reactivate a register up to one year from the date it was established. Section 230.25 (3) (a), Stats., allows the administrator to reactivate a register for up to three years from the date it was established. Why is the proposed rule more restrictive than the statute?” The department addressed this comment by adding language to clarify that this rule is not intended to be more restrictive than statute. The new language establishes a best practice of reactivation of one-year, which is more appropriate in a modern recruiting environment, but maintains the flexibility to reactivate up to the statutory limit of three years.
- Item 1.d., “In s. ER-MRS 16.025 (2) and (3), the three- and five-year time periods end with the last day of the third or fifth year after the date of separation or layoff.

Does the agency intend the end date to always occur on December 31st? If so, this interpretation appears to be inconsistent with s. 230.31, Stats., which provides a three- or five-year period from the date of separation or layoff and does not appear to extend to December 31st of the year in which that period expires.” The department has modified this language to clarify that the period of eligibility is three or five years respectively and the intention was not meant to extend the eligibility period to December 31st of the corresponding years.

- Item 2.a., “Sections ER 1.02 (8) and (46) and ER-MRS 1.02 (5) and (33) provide, in the definitions of "demotion" and "transfer", that a demotion or transfer directed by the appointing authority shall be considered involuntary. It appears the provisions relating to involuntary demotions or transfers might be better placed in any sections of the rules where involuntary demotions and transfers are referenced, rather than as a potential substantive provision in the definitions. [s. 1.01 (7) (b), Manual.]” The department determined that the definitions for “demotion” and “transfer” would not be modified but rather definitions for “involuntary demotion” and “involuntary transfer” would be created.
- Item 2.b., “Sections ER 1.02 (22) and ER-MRS 1.02 (18) specify that "original appointment" does not include certain appointments for purposes of s. ER-MRS 13.03. Because that part of the definition only applies to s. ER-MRS 13.03, that part might be better placed ins. ER-MRS 13.03, rather than the general definitions in chs. ER 1 and ER-MRS 1. [s. 1.01 (7) (a), Manual.]” The department removed the addition of this language from ss. ER 1.02 (22) and ER-MRS 1.02 (18). The language is not needed in s. ER-MRS 13.03 as the provisions of s. ER-MRS 13.045 provide the necessary information.
- Item 2.g., “In s. ER 18.02 (5) (a), the hyphen after "160" should be underscored because it is new material. [s. 1.06 (1), Manual.]” A hyphen was not included in the proposed text submitted but rather a comma was stricken. This was meant to be an insertion and the comma has been modified to be underscored.
- Item 2.r., “In ss. ER-MRS 6.08 (2) (intro.), 8.04 (2), and 22.035 (1) (intro.), "but is not limited to" or "but not limited to" should be stricken-through because the word "includes" is sufficient. Similarly, ins. ER-MRS 6.09 (1), "but not limited to" should be omitted. [s. 1.01 (9) (f), Manual.]” The department has rejected this recommendation only for ER-MRS 22.035 (1) (intro.) as that section does not use the word “includes” and removal of this language would modify the intent of this provision.
- Item 2.bb., “SECTION 116 appears twice in the proposed rule. The second instance could be numbered as SECTION 116m or the following SECTIONS could be numbered as 117 and the sequence adjusted.” All SECTION numbers have been updated due to sections being added or deleted. Any SECTION numbers mentioned in this final report refer to the proposed rules submitted to Legislative Council Rules Clearinghouse and may not be reflective of the final proposed rule text.
- Item 4.a., “Section ER 18.02 (2) references s. 230.08 (2) (k), Stats., but that statutory section was repealed as the note in sub. (2) (a) indicates. It appears that the proposed rule should delete the reference to the repealed statute.” The department has determined this reference is needed as this section applies to

historical employment history. The reference was updated to “s. 230.08 (2) (k), 2013 Stats.” for consistency with other historical references.

- Item 5.a., “In s. ER 46.09 (2), are the additional procedures established by the administrator promulgated as rules? If not, why not?” Modifications were made to this section based on the comment to exclude the terms “additional procedures.” The intent of this subsection is to make the “reasonable, yet limited, period of time without loss of pay for the employee” at the discretion of the DPM Administrator rather than mandatory.
- Item 5.c., “In s. ER-MRS 10.04 (2), are the standards established by the director promulgated as rules? If not, why not?” The standards being established, as applied by the appointing authority, may vary depending on the particular situation. They are meant to ensure merit principles are present but the methods available for limited term employment are broader than recruitment and selection for other positions. Wis. Stat. s. 227.01(13) (a) states that the definition of a rule excludes items that might otherwise qualify as a rule if it “concerns the internal management of an agency and does not affect private rights or interests.” Work rules and procedures do not constitute rules that “affect private rights and interests.” *Rossie v. DOR*, 133 Wis.2d 341, 349-50 (Ct. App. 1986). Therefore, the department has determined there is no need for the standards to be promulgated as rules.
- Item 5.f., “Should s. ER-MRS 15.04 (2) specify that the subsection applies to an employee is who involuntarily transferred after serving a probationary period?” Modifications were made to clarify when this subsection applies. As a result of review of this comment, additional changes were made to s. ER-MRS 15.07 to clarify the probationary status of an employee who is involuntarily transferred.

VIII. Report from the SBRRB and Final Regulatory Flexibility Analysis:

The Small Business Regulatory Review Board did not prepare a report on this rule proposal.