

CR 93-169

# RULES CERTIFICATE

STATE OF WISCONSIN                            )  
   ) SS  
 DEPT. OF INDUSTRY,                            )  
 LABOR & HUMAN RELATIONS                )

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Carol Skornicka, Secretary of the Department of Industry, Labor and Human Relations, and custodian of the official records of said department, do hereby certify that the annexed rule(s) relating to Settlement of Disputes and Compromise of Liabilities  
 (Subject)

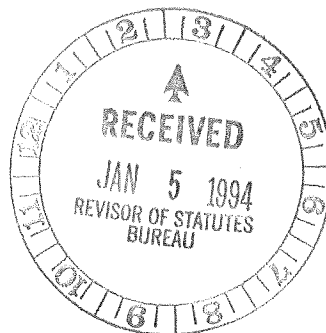
were duly approved and adopted by this department on January 5, 1994.  
 (Date)

I further certify that said copy has been compared by me with the original on file in the department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at 2:00 p.m.  
 in the city of Madison, this 5th  
 day of January A.D. 19 94.

*Carol Skornicka*  
 Secretary

ADM-6056



3-1-94

# ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s)  
101.02(1), 108.14(2), and 227.11(2), Stats.

Stats., the Department of Industry, Labor and Human Relations  creates;  amends;  
 repeals and recreates;  repeals and adopts rules of Wisconsin Administrative Code  
chapter(s):

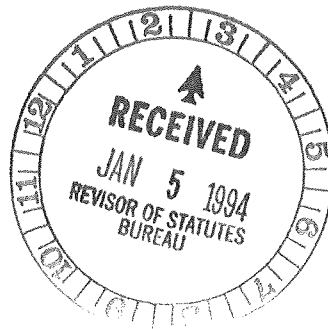
Chapter ILHR 113

(Number)

Settlement of Disputes and Compromise of Liabilities

(Title)

The attached rules shall take effect on the first day of the month following publication in the  
Wisconsin Administrative Register pursuant to section 227.22, Stats.



Adopted at Madison, Wisconsin this

date: January 5, 1994

DEPARTMENT OF INDUSTRY, LABOR AND  
HUMAN RELATIONS

A handwritten signature in cursive script, appearing to read "Lance Smith", written over a horizontal line.

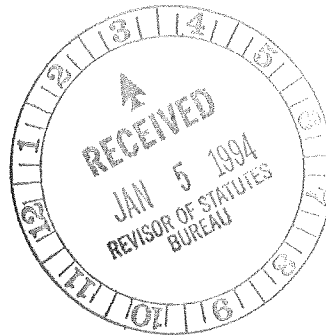
Secretary



State of Wisconsin

, Labor and Human Relations

# RULES in FINAL DRAFT FORM



**Rule No.:**

Chapter ILHR 113

**Relating to:**

Settlement of Disputes and Compromise of Liabilities

Clearinghouse Rule No. 93 - 169

## PLAIN LANGUAGE - CHAPTER 113

The Wisconsin Department of Industry, Labor and Human Relations proposes an order to create Chapter ILHR 113 relating to settlement and compromise.

Statutory Authority: Section 108.10(1), 108.10(8), and 108.14(1), Stats.

Statutes Interpreted: Section 108.10(1), 108.10(8), 108.22(5), and 108.22(9), Stats.

### Analysis of Proposed ILHR 113 Prepared by the Department of Industry, Labor and Human Relations:

#### I. **Statutory Authority**

- A. Section 108.10(8) permits the department to **settle any determination, decision or action** related to employer status or liability under s. 108.10(1) and to **compromise any liability for contributions or reimbursement of benefits or interest or penalties** established under chapter 108.
- B. Section 108.10(8) also requires the department to promulgate rules setting forth the factors to be considered in settling and compromising.
- C. Section 108.14(1) allows the department to adopt and enforce all rules found necessary or suitable to carry out the provisions of chapter 108.

#### II. **Basic Structure of Proposed ILHR 113**

- A. Establishes the required distinction between "settle" and "compromise".
  - 1. Settlement applies to pending appeals which have been referred to the Bureau of Legal Affairs for department representation.
  - 2. Compromise applies to liabilities which are final, either because no appeal was filed or the appeal is completed.
- B. Establishes separate factors and requirements for making settlements and compromises.
- C. Does not disturb the existing settlement process under s. 108.10(1) used by the Bureau of Tax and Accounting to informally resolve first step appeals by identifying department errors, employer errors or misunderstandings and new facts.
- D. Does not disturb the existing process under 108.10(6) which, in effect, allows the department to reopen a final ID, ATD or LIRC decision where preexisting facts

were not before the decision maker when the decision was issued.

- E. Provides specific provisions for compromise of individual liability for the debts of a corporation.
- F. Establishes procedures for settlement and compromise processes.
- G. Provides a technical mechanism for disposition of department liens covering compromised liability which sidesteps the requirement in 108.22(5) of full payment of the amount of any outstanding warrant.
- H. Provides protection against concealment of assets or otherwise false applications for compromise.

### III. Specific Provisions Summary

#### A. Settlement:

- 1. Limited to cases referred to hearing process to permit Tax & Accounting to continue informal resolution of cases based on the factors listed in s. 108.10(1), i.e. subsequent information, mistake and error of law.
- 2. Requires advice of counsel for the department because factors for settlement are expanded to include legal analyses and evaluation of the employer's legal arguments and defenses and of the likely evidence on both sides. These are codification of factors now in use.
- 3. Formalizes the methods which may be used to implement a settlement. These are codification of existing practice.

#### B. Compromise with the liable employer:

- 1. Limited to cases in which liability is established by a final determination or decision. This distinction is made for several reasons:
  - a. The statute itself divides the granted powers into two categories: Settlement and Compromise. The context of the two terms in the statute provides the clues to the reasonable definitions established by the rule.
  - b. The division between settlement and compromise provides a natural and efficient division of administrative resources and first line responsibility along existing lines, i.e., between the Tax and Accounting Collections unit and the Legal Affairs Enforcements unit.
  - c. The existence of the division can reasonably be interpreted to mean that different factors are to be applied for settlement and for

compromise, as would seem to be appropriate for a taxing authority and fiduciary, in each circumstance.

2. The primary factor for compromise is the ability or inability of the employer to pay. This is the primary factor used by all taxing authorities which have authority to compromise unpaid liabilities. It is rooted in the premise that the agency acts as fiduciary for all taxpayers to ensure that everyone subject to a tax pays their required share, except where circumstances make full payment an unrealistic requirement.
  3. Requires a sworn application and, if required by the department, a sworn financial statement.
- C. The rule establishes additional specific factors under which compromise will or will not be considered:
- a. Compromise is not available to a government unit. The reason is that Ch. 108 requires that government units budget sufficient funds to pay all UC liabilities, therefore, there can be no inability to pay.
  - b. Compromise is not permitted for the nondischargeable liabilities of a bankrupt employer unless there are insufficient assets in a liquidation case to pay those nondischargeable debts. Generally, secured tax debts, unsecured employment taxes less than 3 years old and taxes incurred during the bankruptcy are not discharged and in reorganization cases, are required to be paid in full as a condition of court approval of the reorganization plan. The simple rationale here is that it would be a breach of fiduciary duty to compromise that portion of a debt which would be paid because of the requirements of the bankruptcy code.
  - c. Compromise with a nonprofit reimbursement employer is conditioned on application of the employer's required guarantee or assurance against the liability. This is nothing more than is required by statute in the event of nonpayment by such an employer.
  - d. Compromise with a business still operating after creation of the liability is limited in 3 ways:
    - (1) Any offer of compromise must at minimum provide for the payment of the tax principal. This tracks IRS policy and is based on the premise that a going business cannot be certified as uncollectible without doing violence to the fiduciary concept. DILHR already has power to waive penalties and also waives interest in cases of department delay because the employer could raise a legal challenge in such a case. The rule would broaden the grounds for waiver of both penalties and interest to a collectibility

standard. Arguably, compromise of interest and penalties does not violate the fiduciary duty because those funds are not a part of the UC Fund. The ability to compromise interest would seem significant because we get many requests for "deals" by employers in which they would pay the tax if we would forego the interest.

A second premise here is that a going business which is not able to pay its taxes or other debts should seek relief in one of two ways:

- (a) Recapitalization
  - (b) Bankruptcy liquidation or reorganization
- (2) Interest, penalties and costs may be compromised if the department is satisfied that the continued viability of the employer would be threatened by use of available funds for such payments. The idea is to open the door here to encourage compromises which will at least result in the payment of the tax.
- (3) A requirement of recent history of payment of taxes or reimbursements. This shows good faith and a degree of viability which makes the compromise a better risk.
- e. The department makes the final determination of what amount is an acceptable compromise based on review of financial statements and whatever other factors seem relevant to a given case.
- f. There are 3 exceptions to the general rule requiring payment of tax principal and interest by a going business:
- (1) If the liability is for taxes on wages for domestic service and subsequently the "employer" agrees to have a fiscal agent take over responsibility for UC reporting and payments, the existing tax liability may be compromised. In such a case the existence of the fiscal agent transfers employer responsibility so that the delinquent individual may be viewed as no longer in business. Also, such persons are generally elderly with no potential for increased income and little or no prospect of payment.
  - (2) Interest which may be collectible but which was incurred due to undue delay on the part of the department may be compromised. This matches a standard in the settlement provisions.

- (3) Also matched is the provision permitting compromise of principal if department counsel finds that the employer could have raised valid equitable defenses of undue delay after the employer is informed of a problem or department action on which an employer reasonably relies to its detriment.

D. Compromise of officer or 20% shareholder liability for debts of a corporate employer. (Liability arises under s. 108.22(9)).

1. Based on ability to pay and requires a sworn application and financial statement.
2. Same limitations on compromise for debtors in bankruptcy as the general compromise section.
3. Allows department to consider current and prospective income.
4. Does not affect personal liability of any others who may also be liable for same debt.
5. Requires disclosure of any other actual or potential personal liability of the individual.
6. A compromise of personal liability prevents compromise of subsequently incurred liabilities of any nature.

E. Procedure

1. Permits department to request whatever relevant information it needs to evaluate the compromise offer and to examine persons under oath for the same purpose.
2. Requires the department to acknowledge receipt of a compromise offer. Requires the concurrence of the UC Fund Treasurer to validate a compromise. Requires payment within 30 days unless an installment arrangement is agreed to and requires payment to be in cash equivalent form.
3. Permits installment payment arrangements which, if not kept, will void the compromise.
4. Makes clear that a pending offer does not halt collection proceedings but allows the department to agree to do so if state's interest will be protected.
5. Department has right to reject frivolous or stalling applications for compromise.

F. Warrant Disposition - Existing law allows satisfaction of a warrant only when the



warrant amount has been paid in full. Rule allows a full release of the warrant to carry out the compromise. This is a technical method around a language problem.

- G. Department may void any compromise which is based on false application, concealment of assets or disposition of assets prior to application.



**STATUTORY AUTHORITY.** Pursuant to the authority vested in the Department of Industry, Labor and Human Relations by ss. 101.02(1), 108.10(8) and 108.14(2), Stats., the Department of Industry, Labor and Human Relations hereby proposes to create rules relating to settlement of disputes and compromise of liabilities:

SECTION 1. Chapter ILHR 113 is created to read:

**CHAPTER ILHR 113**

**SETTLEMENT OF DISPUTES AND COMPROMISE OF LIABILITIES**

ILHR 113.001 Definitions  
ILHR 113.01 Purpose  
ILHR 113.02 Settlement  
ILHR 113.03 Compromise of employer liability  
ILHR 113.04 Compromise of personal liability  
ILHR 113.05 General procedural provisions  
ILHR 113.06 Disposition of warrants  
ILHR 113.07 Reopening compromised liability

**ILHR 113.001 DEFINITIONS.** In this chapter, unless a different meaning is expressly provided or the context clearly indicates a different meaning:

- (1) "Action" means a circuit court proceeding for judicial review of a commission decision or an appeal to either the court of appeals or the supreme court.
- (2) "Commission" means the labor and industry review commission.
- (3) "Compromise" means department agreement to accept payment of less than the full amount of contributions, payments in lieu of contributions, interest, penalties and costs, as applicable, owed by an employer, former employer or by an individual liable for corporate liabilities, in complete fulfillment of the outstanding liability.
- (4) "Decision" means a written adjudication of a determination by an appeal tribunal, or a written adjudication of a petition for review by the commission or a written adjudication of an action for judicial review by a court of competent jurisdiction.
- (5) "Department" means the department of industry, labor and human relations.
- (6) "Determination" means an initial determination issued under s. 108.10(1), Stats.
- (7) "Employer", in addition to the meaning contained in s. 108.02(13), Stats., includes an employing unit which was formerly an employer under s. 108.02(13), Stats.

(8) "Penalty" includes any tardy payment fee or late filing fee provided for in Ch. 108, Stats., and a forfeiture assessed under s. 108.04(11)(c), Stats., but does not include any fine or restitution arising under s. 108.24, Stats.

(9) "Same business or operation" means operation under the same unemployment compensation employer account, including any account transferred under s. 108.16(8), Stats., with no intervening final determination of account termination under s. 108.02(13)(i), Stats., provided, however, that "same business or operation" shall not be deemed to extend beyond the date as of which the account would have been terminated under s. 108.02(13)(i), Stats., and s. ILHR 110.16 but for an unpaid liability, unless the account was reopened under s. ILHR 110.17.

(10) "Settle" means to resolve a pending determination, decision or action by agreement.

**ILHR 113.01 PURPOSES.** (1) As required under s. 108.10(8), Stats., this chapter establishes standards for: (a) The settlement of disputes between the department and parties to determinations, decisions or actions.

(b) The compromise of liabilities for contributions, reimbursements in lieu of contributions, interest, penalties and costs assessed under Ch. 108, Stats.

(2) This chapter does not affect the application of ss. 108.10(1) and (6), Stats.

**ILHR 113.02 SETTLEMENT.** (1) Under s. 108.10(8), Stats., the department may settle in whole or in part:

(a) Any determination which has been appealed, which has not become final and which has been referred from the bureau of tax and accounting to the bureau of legal affairs; and

(b) Any decision or action which has not become final.

(2) Settlement shall be based upon advice of counsel for the unemployment compensation division, who shall certify that, after having fully investigated the matter, it is his or her opinion that one or more of the following conditions exists:

(a) The department has made an error of law or fact which, if corrected, would negate or change the initial determination issued in the case.

(b) Given the available evidence, there is significant doubt as to the ability of the department to prevail in the dispute with respect to one or more specific issues and there is little or no likelihood of producing sufficient additional evidence in favor of the department regarding the issues prior to or at a hearing under s. 108.10(2), Stats.

(c) Prior to a hearing under s. 108.10(2), Stats., the department has discovered additional relevant and material evidence which would negate or change the initial determination in the case.

(d) Given the evidence in the record or the nature of a decision at a lower level, or both, there is significant doubt as to the ability of the department to prevail on appeal with respect to one or more specific issues.

(e) All or part of any interest liability was incurred as a result of undue delay on the part of the department such that there is valid reason to cancel that liability.

(f) There are valid legal defenses of estoppel or laches against the department as to all or part of the initial determination(s).

(3) A settlement may be implemented by any one or more of the following methods:

(a) Under s. 108.10(1), Stats., the department may amend any initial determination affected by the settlement prior to a hearing on the determination(s).

(b) Under s. 108.10(1), Stats., the department may set aside the applicable initial determination(s) prior to a hearing on the determination(s) and issue whatever new initial determination(s) are necessary to reflect the terms of the settlement.

(c) The department and the opposing party may enter into a written stipulation which sets forth the terms of the settlement. The stipulation is subject to the approval of the administrative law judge assigned to the case.

(d) The opposing party may withdraw all or part of the appeal of the department's initial determination(s).

**ILHR 113.03 COMPROMISE OF EMPLOYER LIABILITY.** (1) Under s. 108.10(8), Stats., the department may compromise the liability of any employer as established in any final determination, decision or action, together with any subsequent collection costs, if:

(a) The employer makes a sworn application for the compromise of the employer's liability to the department, including a financial statement if requested, in such form as the department prescribes;

(b) The employer is not a government unit;

(c) The employer is not the debtor in a case under the United States bankruptcy code with respect to any liability under ch. 108, Stats, which is not dischargeable in bankruptcy unless:

1. In a case under chapter 7 of the bankruptcy code, there are insufficient assets to pay the liability in full under with the statutory order of distribution; or

2. In a case under chapter 11 or 12 of the bankruptcy code, the confirmed plan of reorganization provides for the sale of or distribution to creditors of all of the property of the employer and there are insufficient assets to pay the liability.

(d) With respect to an employer that is a nonprofit organization and whose liability or any part of whose liability was incurred while subject to reimbursement financing status under s. 108.151(2), Stats., the employer's assurance of reimbursement has either been applied to the liability or the application for compromise provides for such assurance; and

(e) The department finds that the employer is unable to pay the full amount of the contributions or payments in lieu of contributions, interest, penalties and costs, except, with respect to an employer still in the same business or operation as when the liability sought to be compromised was incurred:

1. The employer's application for compromise must offer payment in an amount not less than the unpaid contributions or unpaid payments in lieu of contributions, including any contributions owed as a successor under s. 108.16(8)(f), Stats.;
2. The required payment of all interest, penalties or costs would pose an immediate threat to the financial viability of the employer; and
3. Current contributions or payments in lieu of contributions are being paid.

(2) If the conditions of sub. (1) are satisfied, the department shall determine the amount that the employer is able to pay and may issue an acceptance of the application for compromise in the determined amount.

(3) Notwithstanding the exception in sub. (1)(e), the department may compromise unpaid contributions on wages for domestic service arising under s. 108.02(13)(d), Stats., for any time period prior to the effective date of the existence of a fiscal agent or fiscal intermediary under s. 46.27(5)(i), Stats.

(4) Notwithstanding sub. (1)(e), in determining the amount of the accepted compromise, the department may consider whether:

- (a) Any part of any interest liability was incurred as a result of undue delay on the part of the department such that there is valid reason to compromise the interest liability.
- (b) In the opinion of counsel for the unemployment compensation division, the employer could have raised valid legal defenses of estoppel or laches against the initial determination(s).

**113.04 COMPROMISE OF PERSONAL LIABILITY.** (1) The department may compromise the liability of any individual whose liability for the unpaid contributions, interest, penalties and costs of a corporation has been finally established under s. 108.22(9), Stats., if:

- (a) The individual makes a sworn application to the department for the compromise of the individual's liability, including a financial statement if requested, in such form as the department prescribes;
- (b) The individual is not the debtor in a case under the United States bankruptcy code with respect to any liability under ch. 108, Stats., which is not dischargeable in bankruptcy unless:
  1. In a case under chapter 7 of the bankruptcy code, there are insufficient assets to pay the liability in full under the statutory order of distribution; or
  2. In a case under Chapter 11 or 12 of the bankruptcy code the confirmed plan of reorganization provides for the sale of or distribution to creditors of all of the property of the individual and there are insufficient assets to pay the liability; and

- (c) The department finds that the individual is unable to pay the full amount of the liability.
- (2) If the conditions of sub. (1) are satisfied, the department shall determine the amount that the individual is able to pay and may issue an acceptance of the application for compromise in the determined amount.
- (3) In making its finding that the individual is unable to pay the full amount of the liability under sub. (1)(c) and its determination of the amount that the individual is able to pay, the department shall consider the individual's present and prospective income.
- (4) The department's acceptance of a compromise under this section shall not affect the liability of any other entity against which the department may issue or has issued a determination of liability for the unpaid contributions of the same corporation.
- (5) In an application for compromise under this section, an individual liable or potentially liable at the time of application for the liabilities of more than one corporation under s. 108.22(9), Stats., shall disclose all such liabilities, including any liabilities which are not final. Failure to make such disclosure shall make the individual ineligible for compromise of the undisclosed liability in any later application for compromise under this section.
- (6) An individual granted a compromise under this section shall not be eligible for a compromise of any liabilities, of whatever nature, incurred for tax periods subsequent to the acceptance of the compromise.

**113.05 GENERAL PROCEDURAL PROVISIONS.** (1) The department may request additional information and may also examine the employer and such other persons as it deems necessary, under oath, regarding the employer's application.

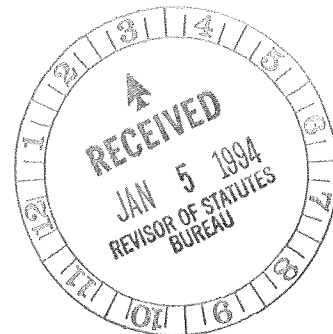
- (2) The department shall acknowledge in writing the receipt of an application for compromise within 30 days of such receipt. The department's acceptance of the application for compromise shall be in writing and be issued with the concurrence of the treasurer of the unemployment compensation fund or his or her designee. The acceptance shall be effective only if the amount determined in the acceptance is paid to the department within 30 days from the date of the acceptance, except as otherwise provided under an installment arrangement under sub. (3). Payment must be in cash or by guaranteed instrument payable only to the department.
- (3) The department may allow payment of the determined amount by installment payments upon such conditions as the department shall prescribe. In the event of failure to make any installment payment when due, which failure is not excused in writing by the department, the department may declare its acceptance of the application for compromise to be null and void and may proceed to collect the balance of the original liability using whatever remedies are available to it by law.
- (4) The submission of an application for compromise shall not operate to stay collection proceedings. However, the department may defer collection during the pendency of an application if it is satisfied that the interests of the state will not be jeopardized.
- (5) Frivolous or incomplete applications and applications submitted for the purpose of delaying collection of the liability shall be immediately rejected.

**113.06 DISPOSITION OF WARRANTS.** Upon timely payment of the amount set forth in the department's acceptance of compromise, the department shall issue a release of any outstanding warrant against the employer or individual.

**113.07 REOPENING COMPROMISED LIABILITY.** The department may declare a compromise void at any time if it ascertains that:

- (1) The employer or individual submitted a materially false application for compromise; or
- (2) Prior to its acceptance of the application for compromise the employer or individual concealed or disposed of income or property which could have been used to pay any part of the original liability.

SECTION 2. **EFFECTIVE DATE.** Pursuant to s. 227.22(2), Stats., this rule shall take effect on the first day of the month following the date of publication in the Wisconsin Administrative Register, except that ss. ILHR 113.03 and 113.04 are also applicable to installment payment agreements entered on or after January 7, 1990.



Tommy G. Thompson  
Governor

Carol Skornicka  
Secretary



Mailing Address:  
201 E. Washington Avenue  
Post Office Box 7946  
Madison, WI 53707-7946

Telephone (608) 266-7552

## State of Wisconsin Department of Industry, Labor and Human Relations

January 5, 1994

Gary Poulson  
Assistant Revisor of Statutes  
Suite 800  
131 W. Wilson St.  
Madison, Wisconsin 53703-3233

Douglas LaFollette  
Secretary of State  
10th Floor  
30 West Mifflin Street  
Madison, Wisconsin 53703

Dear Messrs. Poulson and LaFollette:

### TRANSMITTAL OF RULE ADOPTION

CLEARINGHOUSE RULE NO.: 93 - 169

RULE NO.: Chapter ILHR 113

RELATING TO: Settlement of Disputes and Compromise of Liabilities

Pursuant to section 227.20, Stats., agencies are required to file a certified copy of every rule adopted by the agency with the offices of the Secretary of State and the Revisor of Statutes.

At this time, the following material is being submitted to you:

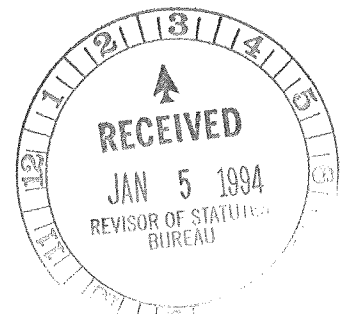
1. Order of Adoption.
2. Rules Certificate Form.
3. Rules in Final Draft Form.

Pursuant to section 227.114, Stats., a summary of the final regulatory flexibility analysis is included for permanent rules. A fiscal estimate and fiscal estimate worksheet is included with an emergency rule.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'Carol Skornicka'.

Carol Skornicka  
Secretary



ADM-7239