

Chapter ILHR 101

WAGES FOR CONTRIBUTION PURPOSES

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ILHR 101.001 Definitions. In this chapter:

- (1) "Agricultural labor" has the meaning specified in s. 108.02 (2), Stats.
- (2) "Department" means the department of industry, labor and human relations.
- (3) "Employer" means any person who is or becomes subject to the reimbursement financing or contribution requirements of ch. 108, Stats., including multiemployer benefit plans and other third party payors which become liable under s. ILHR 110.06.
- (4) "FUTA" means the federal unemployment tax act, subtitle C, ch. 23 of the internal revenue code, 26 USC ss. 3301 to 3311.
- (5) "Federal payroll base" means the first \$7000 of wages which is paid during a calendar year by an employer to an employe and which is payroll under s. 108.02 (21), Stats.
- (6) "Officer" means the person in a subchapter S corporation who holds the office of president, vice president, secretary, treasurer and includes such other officers, assistant officers, and agents elected or appointed by the board of directors or chosen in such other manner as may be prescribed by the articles of incorporation or bylaws.
- (7) "Payroll" has the meaning specified in s. 108.02 (21), Stats.
- (8) "Subchapter S corporation" means a corporation which has elected, for federal income tax purposes, to be treated under subchapter S of chapter 1 of the internal revenue code, 26 USC ss. 1361 to 1379.
- (9) "Supplemental unemployment benefits plan" means a plan under which an employer or a third party payor makes a payment to supplement any unemployment benefits which may be paid to the employer's employes who become partially or totally unemployed.
- (10) "Wisconsin payroll base" means the first \$10,500 of wages which is paid during a calendar year by an employer to an employe and which is payroll under s. 108.02 (21), Stats.

History: Emerg. cr. (intro.) to (3), (5), (7) and (10), (4) renum. from ILHR 110.001 (9), (6) and (8) renum. from ILHR 110.12 (1) (a) and (b), (9) renum. from ILHR 110.001 (15) and am., eff. 2-19-93; cr. (intro.) to (3), (5), (7) and (10), (4) renum. from ILHR 110.001 (9), (6) and (8) renum. from ILHR 110.12 (1) (a) and (b), (9) renum. from ILHR 110.001 (15) and am., Register, May, 1993, No. 449, eff. 6-1-93.

## ILHR 101

**ILHR 101.01 Purpose.** The definition of wages in s. 108.02 (26) is patterned after the FUTA definition of wages found in 26 USC 3306 (b). This chapter clarifies how the department shall apply the definition of wages in s. 108.02 (26), Stats. to assess employer contributions to the unemployment compensation reserve fund. This chapter also specifies changes to the definition of wages in s. 108.02 (26), Stats., under the authority granted in s. 108.02 (26)(a), Stats., and provides interpretations which may be inconsistent with those applied to 26 USC 3306 (b), under the authority granted in s. 108.015, Stats.

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.02 Remuneration excluded from the definition of wages.** Notwithstanding s. 108.02 (26), Stats., wages shall not include:

(1) **AMOUNTS ABOVE PAYROLL BASE.** (a) For contribution purposes, that portion of an individual's wages during any calendar year which exceeds the greater of the federal payroll base or the Wisconsin payroll base.

(b) Paragraph (a) does not apply for purposes of completing the quarterly wage report or for benefit purposes.

(2) **MEDICARE REFUNDS.** The amount of any refund required under s. 421 of the Medicare Catastrophic Coverage Act of 1988, as specified in Act Dec. 19, 1989, P.L. 101-239, 103 Stat. 2473.

(3) **INDIAN FISHING RIGHTS.** Remuneration for services performed in a fishing rights-related activity of an indian tribe by a member of the tribe for another member of the tribe or for a qualified indian entity, as specified in 26 USC 7873 (a) (2).

(4) **SUPPLEMENTAL UNEMPLOYMENT BENEFITS.** Employer contributions into or payments out of a supplemental unemployment benefits plan for employes if the contributions or payments are not considered wages under FUTA, regardless of whether the unemployment compensation benefits plan is part of an employer profit-sharing plan. The employer shall demonstrate to the satisfaction of the department that such contributions or payments are not considered wages under FUTA.

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.03 Remuneration included in the definition of wages.** Notwithstanding s. 108.02 (26), Stats., wages shall include:

(1) All cash and non-cash remuneration paid for agricultural labor.

(2) The value of an employe achievement award which is compensation for services.

(3) Remuneration for services whether paid directly or indirectly by the employer.

(4) The value of tips which are wages under 26 USC 3306 (s).

Note: Subject to s. ILHR 101.05, employers should use the version of 26 USC 3306 (s) which is in effect at the time the remuneration is paid. Although it may have since been amended, 26 USC 3306 (s) (1991) and I.R.C. 3306 (s) (1991) define such tips as follows:

26 USC 3306 (s) Tips treated as wages.

For purposes of this chapter, the terms "wages" includes tips which are -  
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- (1) received while performing services which constitute employment, and
- (2) included in a written statement furnished to the employer pursuant to section 6053 (a).

(5) The value of certain deferred compensation and salary reduction arrangements which are wages under 26 USC 3306 (r).

Note: Even though 26 USC 3306 (r) and s. 108.02 (26) (a) (4) a to f, Stats., address deferred compensation and salary reduction agreements, the amounts considered wages under 26 USC 3306 (r) are not excluded from the definition of wages by s. 108.02 (26) (a) (4) a to f. Subject to s. ILHR 101.05, employers should use the version of 26 USC 3306 (r) which is in effect at the time the remuneration is paid. Although it may have since been amended, 26 USC 3306 (r) (1991) and I.R.C. 3306 (r) (1991) follow:

26 USC 3306(r) Treatment of certain deferred compensation and salary reduction arrangements.

(1) Certain employer contributions treated as wages. Nothing in any paragraph of subsection (b) (other than paragraph (1)) shall exclude from the term "wages" -

(A) any employer contribution under a qualified cash or deferred arrangement (as defined in section 401 (k)) to the extent not included in gross income by reason of section 402 (a) (8), or

(B) any amount treated as an employer contribution under section 414 (h) (2) where the pickup referred to in such section is pursuant to a salary reduction agreement (whether evidenced by a written instrument or otherwise).

(2) Treatment of certain nonqualified deferred compensation plans.

(A) In general. Any amount deferred under a nonqualified deferred compensation plan shall be taken into account for purposes of this chapter as of the later of -

(i) when the services are performed, or

(ii) when there is no substantial risk of forfeiture of the rights to such amount.

(B) Taxed only once. Any amount taken into account as wages by reason of subparagraph (A) (and the income attributable thereto) shall not thereafter be treated as wages for purposes of this chapter.

(C) Nonqualified deferred compensation plan. For purposes of this paragraph, the term "nonqualified deferred compensation plan" means any plan or other arrangement for deferral of compensation other than a plan described in subsection (b) (5).

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.04 Employment.** In interpreting s. 108.02 (26), Stats., the department shall apply the definition of employment found in s. 108.02 (15), Stats.

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.05 Prospective application of federal interpretations.** A final federal interpretation about whether certain payments constitute wages, either generally or as to a particular case, which differs from an earlier departmental interpretation regarding those payments or kinds of payments shall only be applied prospectively. The department may not retroactively change either its interpretation or a determination based on that interpretation due to a subsequent and different federal interpretation.

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.06 Corporate common paymasters.** Two or more related corporations concurrently employing the same individual and compensating the individual through a common paymaster which is one of such corporations shall each be considered a separate employer.

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.

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**ILHR 101.07 Subchapter corporation payments.** (1) AMOUNTS INCLUDED AS WAGES. Except as provided under sub. (2), the department shall treat as wages for contribution purposes under ch. 108, Stats., any payment made by a subchapter S corporation to an officer which is reasonable compensation for services performed for the corporation. If an officer performs services for a subchapter S corporation but receives no payment as wages, the department shall treat as wages the reasonable value of the services performed.

(2) AMOUNTS NOT INCLUDED AS WAGES. The department may not treat as wages for contribution purposes under ch. 108, Stats., any of the following payments:

(a) A distribution of earnings and profits which is in excess of any payment treated as wages under sub. (1).

History: Emerg. renum. from ILHR 110.12 (2) and (3) and am., eff. 2-19-93; renum. from ILHR 110.12 (2) and (3) and am., Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.09 Value of room and meals.** For purposes of s. 108.02 (26), Stats., the employer shall value lodging and meals at the actual value or, if the actual value is not available, the employer shall make a reasonable estimate of the value. If the actual value or reasonable estimate is not available, the department shall value lodging and meals as follows:

(1) Lodging - \$70.00 per week or \$10.00 per day; and

(2) Meals - \$57.00 per week or \$2.75 per meal

History: Cr. Register, June, 1990, No. 414, eff. 7-1-90; emerg. renum. from ILHR 110.08 and am., eff. 2-19-93; renum. from ILHR 110.08 and am., Register, May, 1993, No. 449, eff. 6-1-93.

**ILHR 101.10 Internal revenue code requirements.** When s. 108.02 (26), Stats. or FUTA requires that a payment must meet the requirements of a particular section of the internal revenue code in order to not be considered wages, the employer shall demonstrate to the satisfaction of the department that the payment meets such requirements.

History: Emerg. cr. eff. 2-19-93; cr. Register, May, 1993, No. 449, eff. 6-1-93.