

**ORDER OF THE WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EMERGENCY RULE**

The Wisconsin Department of Workforce Development adopts the following emergency rule *to amend* DWD 102.01 and *to create* DWD 102.04, relating to employer contribution rates for 2022.

The Governor approved the scope statement for this rule, SS 046-21, on May 14, 2021. The scope statement was published in register No. 785A3, on May 17, 2021. The notice of public hearing and comment period on the scope statement was published on May 24, 2021 in register No. 785B. The public hearing on the scope statement was held on May 27, 2021. The scope statement was approved by the Department on May 28, 2021. This rule was approved by the Governor on June 10, 2021.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

By Executive Order 72, the Governor declared a public health emergency to protect the health and well-being of the state's residents and directed state agencies to assist as appropriate in the State's ongoing response to the public health emergency. On March 13, 2020, the President declared a national emergency concerning the COVID-19 pandemic. Due to the pandemic, many businesses temporarily or permanently closed, resulting in significant business income reduction and layoffs.

Under 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4, which created and then amended s. 108.07 (5) (bm), the Department of Workforce Development is directed to charge unemployment benefits for initial claims that are related to the public health emergency declared by Executive Order 72 to the balancing account of the Trust Fund for contribution employers. This treatment of claims charging applies to weeks of benefits payable beginning the week of March 15, 2020 through March 13, 2021.

The Department's antiquated computer systems are ill-equipped to handle the changes in charges from the employers' accounts to the balancing account. Each weekly claim to be charged to the balancing account under s. 108.07 (5) (bm), Stats., requires the Department to change the benefit charges from the employer's account to the balancing account of the Trust Fund after any federal funds have been appropriately applied. Given the high volume of claims filed during the pandemic, the work to complete the charging changes will not be completed by June 30, 2021.

Under sections 108.02(8), 108.02(22), and 108.18(4), Stats., "an employer's contribution rate on the employer's payroll for a given calendar year shall be based on the reserve percentage of the employer's account as of the applicable computation date," s. 108.18(4), Stats., which is June 30 of each year. Section 108.02(22), Stats., requires the Department to determine the status of an employer's account when setting the reserve percentage for contribution purposes as of the computation date.

Because the Department is not able to complete the benefit charging changes required by 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4 by June 30, employers' contribution rates for 2022 may be based, in part, on benefit charges that should have been charged to the balancing account instead of the employers' accounts. If contribution rates are set before recharging is completed, the result for most employers subject to contribution financing would be higher contribution rates for 2022 than they should be.

An emergency rule is needed to prevent employers from being subject to 2022 rates that are higher than they should be under 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4. Without a rule, employers may not see the benefit of charging relief under Acts 185 and 4 until rates are set for 2023 after recharging is completed.

The Department does not contemplate promulgating a permanent rule because the recharging will be accomplished to set appropriate rates that only apply for a limited time. This emergency rule will meet the policy goals of 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4 to address the public health emergency and protect the welfare of the economy through charging relief for contribution employers.

Statutes Interpreted

Sections 108.02 (8), 108.02 (22), 108.07 (5) (bm), and 108.18 (4), Stats., which are discussed in the above Finding of Emergency.

Statutory Authority

Section 108.14 (2), Stats.

Explanation of Statutory Authority

The Department has specific and general authority to establish rules interpreting and clarifying provisions of ch. 108, Stats., unemployment insurance and reserves, and general authority for promulgating rules with respect to ch. 108, Stats., under s. 108.14 (2), Stats.

Related Statutes or Rules

Sections 108.02 (8), 108.02 (22), 108.07 (5) (bm), and 108.18 (4), Stats.

The Department previously promulgated emergency rule EmR2018, relating to employer contribution rates for 2021.

Plain Language Analysis

This rule provides that the Department, in calculating an employer's net reserve as of the June 30, 2021 computation date, shall disregard all benefit charges and benefit adjustments for the period of March 15, 2020 through March 13, 2021.

The Department will, in effect, assume that all benefit charges and adjustments were related to the public health emergency declared by Executive Order 72. This assumption applies only for the purposes of setting the contribution rates for 2022. This rule will ensure that employers' contribution rates for 2022 are calculated based on reserve fund balances as of June 30, 2021 without taking charges related to the public health emergency into account so that the policy goals of 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4 are met. This rule will only affect calculation of contribution rates for 2022. Contribution rates for 2023 will be calculated in 2022 after all recharging is complete.

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

Federal law requires that state laws conform to and comply with federal requirements. 20 CFR 601.5.

Under the federal Families First Coronavirus Response Act, Public Law 116-127, specifically Division D, the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA), a state may receive a share of \$500 million of federal funding for administering the state's unemployment insurance program if the "State has demonstrated steps it has taken or will take to ... non-charge[e] employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers." 42 USC 1103(h)(3)(B). Wisconsin's share of the \$500 million is about \$9.457 million.

Comparison with rules in adjacent states

Illinois does not charge employers for unemployment benefits "for a week of unemployment that begins on or after March 15, 2020, and before December 31, 2020, and is directly or indirectly attributable to COVID-19...." 820 ILCS 405/1502.4(A).

By Executive Order 2020-76, Michigan charges benefits to the unemployment insurance non-chargeable account, unless the employer was determined to have misclassified workers.

Iowa did not charge unemployment benefits related to COVID-19 to employer accounts until June 12, 2021.

By Emergency Executive Order 20-05, Minnesota will "not use unemployment benefits paid as a result of the COVID-19 pandemic in computing the future unemployment tax rate of a taxpaying employer."

Summary of factual data and analytical methodologies

The Department reviewed Wisconsin statutes, administrative rules, and recent changes to federal law to determine the options available to ensure that employer contribution rates are appropriately determined for 2022.

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

An employer's contribution rate on the employer's payroll for a given calendar year is based on the reserve percentage of the employer's account as of the applicable computation date, June 30 of each year. Ultimately, however, the employer's reserve fund balance takes into account all charges and credits on a rolling basis so that the employer's unemployment experience determines the contribution rate.

Under 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4, the unemployment insurance benefits related to the public health emergency declared on March 12, 2020 by Executive Order 72 will be charged to the balancing account of the Trust Fund for employers subject to contribution financing. The charging relief for employers under state law is effective for state unemployment insurance benefits paid for the period of March 15, 2020 through March 13, 2021. However, some charges for the first week of unemployment and for benefits paid under work share plans will be charged to the federal government.

Because the Department will not be able to complete the charging changes required by 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4 by June 30, 2021, most employers' contribution rates for 2022 will be based on benefit charges that should have been charged to the balancing account instead of the employers' accounts. This would result, for most employers subject to contribution financing, in contribution rates for 2022 that are higher than they should be.

This rule, in effect, directs the Department to assume that all benefit charges and benefit adjustments for the period of March 15, 2020 through March 13, 2021 relate to the public health emergency declared by Executive Order 72. This will have the effect of aligning employer contribution rates for 2022 with the policy goals of 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

The proposed rule is expected to have a positive economic impact on employers subject to contribution financing, which may include small businesses, to provide those employers with contribution rates that align with the policy goals of 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4.

Agency contact person

Questions related to this rule may be directed to:

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Place where comments are to be submitted and deadline for submission

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Comments will be accepted until a date to be determined.

1 **SECTION 1.** DWD 102.01 is amended to read:

2 **DWD 102.01 Purpose.** This chapter specifies the initial contribution rates for certain
3 categories of employers. This chapter also interprets ch. 108, Stats., for determining employer
4 contribution rates for 2022.

5 **SECTION 2.** DWD 102.04 is created to read:

6 **DWD 102.04 Employer Contribution Rates for 2022.** When calculating an employer's
7 reserve percentage for the June 30, 2021, computation date for purposes of determining employer
8 contribution rates under s. 108.18 (4), Stats., the department shall disregard all benefit charges for
9 weeks of unemployment for the period of March 15, 2020 through March 13, 2021 and all benefit
10 adjustments processed during the period of March 15, 2020 through March 13, 2021, unless the
11 department has applied s. 108.07 (5) (bm) to the benefit charge or benefit adjustment. This section
12 only applies to the June 30, 2021, computation date.

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SECTION 3. EFFECTIVE DATE. This rule shall take effect on June 29, 2021.

Dated this 14th day of June, 2021.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By:

Amy Pechacek, Secretary-designee