

ORDER OF THE WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT EMERGENCY RULE

The Wisconsin Department of Workforce Development (the “Department”) adopts the following emergency rule *to amend* DWD 102.01 and 123.01 and *to create* DWD 102.04, 113.027, and 123.04, relating to protecting Wisconsin employers from the adverse financial effects of COVID-19.

The Governor approved the scope statement for this rule, SS 075-21, on August 26, 2021. The scope statement was published in register No. 788B, on August 30, 2021. The notice of preliminary hearing and comment period on the scope statement was published on August 30, 2021, in register No. 788B. The preliminary hearing on the scope statement was held on September 8, 2021. The Department approved the scope statement on September 9, 2021. This rule was approved by the Governor on September 17, 2021.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

On March 12, 2020, 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. On April 4, 2020, the President declared a major disaster under the federal Stafford Act in Wisconsin due to the COVID-19 pandemic. Due to the pandemic, many businesses have temporarily or permanently closed, resulting in significant business income reduction and layoffs.

Under 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4 (“Acts 185 and 4”), the Department of Workforce Development must charge unemployment benefits for initial claims that relate to the public health emergency first declared on March 12, 2020, by Executive Order 72 (the “public health emergency”) to the balancing account of the Trust Fund for contribution employers. For reimbursable employers, the Department must charge such benefits to the interest and penalty appropriation unless federal funding is available to relieve employers of benefit charges. This treatment of claims charging applies to weeks of benefits payable for the period of March 15, 2020 through March 13, 2021.

2019 Wisconsin Act 185 also created s. 108.04 (2) (d), Stats., which requires employees and employers to “indicate whether a claim for regular benefits is related to the public health emergency declared on March 12, 2020, by executive order 72” when the Department requests. The statute does not provide a deadline for employees or employers to submit the information. That paragraph further provides that the Department “may specify the information required to be provided.” 2021 Wisconsin Act 4 provides that only some employers must provide this information to the Department.

The federal Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and Continued Assistance for Unemployed Workers Act provide for 50% federal payment of unemployment insurance benefits chargeable to reimbursable employers for weeks of unemployment for March 15, 2020 through April 3, 2021. The federal American Rescue Plan Act provides for 75% federal payment of unemployment benefits chargeable to reimbursable employers for weeks of unemployment for April 4 through September 4, 2021. Federal law also provides for 100% federal funding for the first week of unemployment and for work share benefits for certain periods.

The Department's antiquated computer systems are ill-equipped to automatically transfer the charges from the employers' accounts to the balancing account, interest and penalty appropriation, or the federal funding sources. Each weekly claim to be recharged under section 108.08 (5) (bm), Stats., which was created and amended by Acts 185 and 4, requires the Department to change the benefit charges from the employer's account, after any federal funds have been appropriately applied, to the balancing account or interest and penalty appropriation. While the Department is working to automate as much of this process as possible, some manual processing of claims by Department personnel will be necessary due to the complexity of the claims charging system. Due to the high volume of claims filed during the pandemic, the Department anticipates that this project may not be completed until early 2022.

Under ss. 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.

The Department set up several new federal benefit programs during the pandemic, which delayed the programming for relieving employers of benefit charges. Because the Department was unable to complete the benefit charging changes required by Acts 185 and 4 by June 30, 2021, and Emergency Rule 2118 will expire before some employers' contribution rates for 2022 are assigned, some employers' rates will be based on benefit charges that should have been charged to the balancing account instead of the employers' accounts. This would result, for some employers subject to contribution financing, in contribution rates for 2022 that are higher than they should be unless the Department promulgates this emergency rule.

If the recharging of benefits from employer accounts to the balancing account is not completed by June 30, 2022 for contribution employers, those employers' contribution rates for 2023 could be set higher than they should be under the charging relief enacted by Acts 185 and 4. Contribution rates that are incorrect could adversely affect employers' abilities to recover financially from the economic downturn caused by the pandemic.

If the recharging of benefits from reimbursable employer accounts to the interest and penalty appropriation is not completed before the expiration of a blanket interest waiver for those employers, they will receive incorrect monthly bills for reimbursements with assessed interest charges that they should not be required to pay under Acts 185 and 4.

Because of the pandemic-related economic devastation, employers subject to reimbursement financing may be unable to pay their reimbursements for unemployment claims in full. The requirement to immediately pay their reimbursements could further jeopardize the viability of employers subject to reimbursement financing. Relieving reimbursable employers of interest charges is therefore necessary.

Statutes Interpreted

Sections 108.02 (8), 108.02 (22), 108.04 (2) (d), 108.07 (5) (bm), 108.18(4), and 108.22 (1) (cm), Stats.

Statutory Authority

Sections 108.14 (2) and 108.22 (1) (cm), 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.

Interest is assessed monthly on delinquent employer contributions and reimbursements in lieu of contributions. Section 108.22 (1) (a), Stats. The Department may promulgate rules to, in limited circumstances, “waive or decrease the interest charged.” Section 108.22 (1) (cm), Stats.

Related Statutes or Rules

To implement the charging relief required under Acts 185 and 4, the Department promulgated EmR2044, which expired, and EmR2112, which expires October 2, 2021.

Current s. DWD 113.025 permits the Department to waive or decrease interest in limited circumstances. Emergency rule EmR2011, which expired, and EmR2108, which expires September 26, 2021, waive interest for reimbursable employers in certain circumstances due to the COVID-19 pandemic.

The Department previously promulgated emergency rule EmR2018, relating to employer contribution rates for 2021, which expired, and emergency rule EmR2118, which expires November 25, 2021, relating to employer contribution rates for 2022.

Plain Language Analysis

The emergency rule determines the information that employers must submit, if any, to request charging relief for initial claims that relate to the public health emergency between March 15, 2020 and March 13, 2021, to comply with s. 108.07 (5) (bm), Stats.

If a claimant’s most recent employment separation is not due to a labor dispute, voluntary termination of work, discharge for misconduct, or discharge for substantial fault, and the claimant’s initial claim is for a benefit year beginning on or after March 15, 2020 through March 13, 2021, the Department will presume that the claim relates to the public health emergency. All employers who paid base period wages to the claimant will be relieved of the benefit charges for that claim and employers will not be required to request the relief.

An employer that paid base period wages may request charging relief if the most recent employment separation is due to a voluntary termination of work that would otherwise be charged to the employer and the claimant’s initial claim is for a benefit year beginning on or after March 15, 2020 through March 13, 2021 and if the employer certifies that certain circumstances apply to the initial claim. If the most recent separation is due to a labor dispute, misconduct, substantial fault, or a voluntary termination of work, the unemployment benefits are already not charged to the employer under pre-pandemic law. An employer may meet the requirement by certifying that any of the following conditions exist:

- The employer’s business/operations reduced, suspended, or ceased after experiencing a significant reduction in business due to a Safer at Home order or a government-issued health order that restricts business operations.
- The employer’s business/operations reduced, suspended, or ceased due to other businesses (including suppliers) having reduced, suspended, or ceased operations.

- The federal Paycheck Protection Program loan amount was used to pay employees, but the business did not yet reopen.

- The employer provides other information showing that the initial claim relates to the public health emergency.

For those employers who do not meet the presumption that the claim is related to the public health emergency, this emergency rule sets a deadline by which employers must submit the information required by section 108.04 (2) (d), Stats. The deadline is the thirtieth day after the Department sends a notification to the employer of an initial claim for benefit years beginning on or after March 15, 2020 through March 13, 2021. The deadline is necessary to ensure that all information regarding the initial claims is submitted in time for processing the recharging of benefits by the time the Department completes the work to relieve employers of charges.

This rule also determines the treatment of employers in a claimant's base period who are not the most recent employer of a claimant whose initial claim is related to the public health emergency. The Department will apply the employer charging provisions of Acts 185 and 4 to all base period employers for the claim.

This rule requires the Department to interpret the provisions of s. 108.07 (5) (bm), Stats., by applying the provisions of s. 108.07(5) (bm), Stats., to additional initial claims filed on or after March 15, 2020 for a benefit year that began before March 15, 2020 so that the legislative intent of 2021 Wis. Act 4 is properly applied.

This rule also 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. 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 Acts 185 and 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 charging relief is complete.

Finally, this rule provides a waiver of interest for employers subject to unemployment reimbursement financing for each month during which this rule is in effect. Under this rule, interest is waived starting October 1, 2021 for reimbursable employers. This will give reimbursable employers an opportunity to pay their reimbursements over time if any amounts are still due after the Department completes the work to relieve employer accounts of benefit charges.

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

Federal law requires that state unemployment compensation laws conform to and comply with federal requirements. 20 C.F.R. § 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 U.S.C. § 1103 (h) (3) (B). Wisconsin’s share of the \$500 million is about \$9.457 million.

The federal CARES Act provides that states have “flexibility to reimbursing employers as it relates to timely payment and assessment of penalties and interest...” CARES Act s. 2103(a). US-DOL encourages states to “interpret or amend their state unemployment compensation laws in a manner that provides maximum flexibility to reimbursing employers as it relates to timely payments in lieu of contributions and assessment of penalties and interest.” UIPL 18-20, p. 2.

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 charged 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.”

Michigan, Illinois, and Iowa do not appear to waive interest for employers subject to reimbursement financing. Minnesota law permits the compromise of reimbursements due by employers under Minnesota Statutes 2019, s. 268.067(b).

Summary of factual data and analytical methodologies

The Department reviewed Wisconsin statutes, administrative rules, and changes to federal law to determine the information that employers must submit to receive charging relief, the options available to ensure that employer contribution rates are appropriately determined for 2022, and the options available to provide maximum flexibility to employers subject to reimbursement financing regarding assessment of interest. The recharging of claims under s. 108.07 (5) (bm), Stats., may not be complete until early 2022. Because the Department had to set up several new federal benefit programs, the Department was unable to complete the recharging of claims by June 30, 2021 so that employer contribution rates would have been correctly set for 2022. The Department determined that 30 days after the Department sent a notification to the employer of an initial claim for benefit years is an appropriate deadline for employers not subject to the presumption to submit the documentation in order to give employers sufficient time to request relief and to ensure that all requests for relief are received before the Department completes the recharging work.

In particular, the Department reviewed 2021 Wisconsin Act 4 to determine the treatment of employers in a claimant’s base period who are not the most recent employer of a claimant whose initial claim is related to the public health emergency. The Department interpreted the new legislation to apply the employer non-charging provisions Acts 185 and 4 to all employers in a

claimant's base period to be consistent with the administration of other charging provisions under ss. 108.02 (8), 108.02 (22), and 108.18 (4), Stats.

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

Acts 185 and 4 provide 100% of the unemployment insurance benefits for initial claims for benefit years beginning on or after March 15, 2020 through March 13, 2021 related to the public health emergency will be charged to the balancing account of the Trust Fund for employers subject to contribution financing. Fifty or twenty-five percent of the unemployment insurance benefits for initial claims related to the public health emergency will be charged to the interest and penalty appropriation for employers subject to reimbursement financing; the remainder will be paid by the federal government. 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, charges for the first week of unemployment and for benefits paid under work share plans will be charged to the federal government during that period.

Section 108.04 (2) (d), created by 2019 Wis. Act 185, requires claimants and employers to indicate whether a claim for regular benefits is related to the public health emergency. 2021 Wis. Act 4 extends the relief from benefit charging for employers from December 31, 2020 to March 13, 2021, and specifies that the Department must presume that all initial claims through March 13, 2021 are related to the public health emergency and are, thus, entitled to recharging relief unless the separation is due to a labor dispute, misconduct, substantial fault, and, in most cases, a voluntary termination of work. In those cases where the presumption does not apply, this rule is necessary for the Department to properly and timely apply s. 108.07 (5) (bm), Stats., which, as described above, provides for the charging of certain benefits to the balancing account or interest and penalty appropriation. Further, under s. 108.07 (5) (bm) 2. b., Stats., employers will not receive relief from benefit charges unless they timely and adequately provide the information necessary for the Department to determine how to charge the claim.

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.

Because the Department had to implement a variety of new federal benefit programs, it was unable to complete the charging changes required by Acts 185 and 4 by June 30, 2021. Without an emergency rule, most employers' contribution rates for 2022 would have been based on benefit charges that should have been charged to the balancing account instead of the employers' accounts. This would have resulted, for most employers subject to contribution financing, in contribution rates for 2022 that were 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. This will have the effect of aligning employer contribution rates for 2022 with the policy goals of Acts 185 and 4.

Finally, reimbursable employer businesses that do not receive full charging relief under state and federal law (because, for example, the claims were for weeks of unemployment after the state law relief period ended) may find it difficult to pay their reimbursements timely during the COVID-19 pandemic due to a reduction in business income. Under this rule, businesses subject to reimbursement financing will not be assessed interest for tardy reimbursements and would therefore be given extra time to pay their bills.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

This emergency rule is expected to have a positive economic impact on employers subject to the Wisconsin unemployment insurance law, which may include small businesses, if those employers are required to submit information to the Department to request charging relief, do so by the deadline set by this emergency rule, and receive charging relief as a result. The emergency rule is expected to have a positive economic impact on employers subject to unemployment insurance contribution financing by providing those employers with contribution rates that align with the policy goals of Acts 185 and 4. Businesses subject to unemployment insurance reimbursement financing would receive the benefit of a waiver of interest and potentially additional time to pay their reimbursements under this emergency rule.

Summary of comments on the statement of scope and description of how the comments were taken into account in drafting the rule

A preliminary public hearing on the statement of scope was held on September 8, 2021; comments were received at the hearing and by email. Commenters generally supported promulgating a rule creating policies like those established by the Department in prior unemployment insurance emergency rules related to COVID-19. One commenter indicated support for the charging relief and emergency rules the Department had promulgated in the past and indicated that the Department should continue to not require employers to submit a form to request charging relief for claims related to laid off workers. Another commenter supported the waiver of interest for reimbursable employers and asked to have the interest waived until after Department has relieved all employers of benefit charges related to the public health emergency as well as for some time afterward so that employers may review the revised bill and set up a payment plan.

Agency Response: The Department considered all relevant comments received. The Department agrees that the intent of the new rule will be to continue to not require employers to submit a form to request charging relief for claims related to laid off workers but that there would continue to be some circumstances that require the form to be submitted to request benefit charging relief, such as for quits that would otherwise remain charged to employers. The Department has drafted the emergency rule to provide for an interest waiver for each month during which the rule is in effect for any part of the month. This is expected to provide an interest waiver for reimbursable employers after the Department completes the charging relief for reimbursable employer accounts, assuming that the emergency rule is in effect for at least 150 days.

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 categories
3 of employers. This chapter also provides the treatment of benefit claims and adjustments for determining
4 employer contribution rates for 2022.

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

6 **DWD 102.04 2022 Employer Contribution Rates.** When calculating 2022 employer
7 contribution rates, all benefit charges for weeks of unemployment for the period of March 15, 2020
8 through March 13, 2021 and all benefit adjustments processed during the period of March 15, 2020
9 through March 13, 2021 shall be disregarded.

10 **SECTION 3.** DWD 113.027 is created to read:

11 **DWD 113.027 Waiver of Interest for Employers Subject to Reimbursement Financing.** The
12 department shall waive interest for amounts owed by reimbursable employers, as defined in s. 108.155 (1)
13 (b), Stats., to ensure correct employer billing and to provide reimbursable employers the opportunity to
14 pay their reimbursements over time. This waiver shall apply to each month during which this rule is in
15 effect for any part of the month.

16 **SECTION 4.** DWD 123.01 is amended to read:

17 **DWD 123.01 Purpose.** Pursuant to ss. 108.04 (13), 108.09 (1), and 108.14 (2), Stats., in order to
18 determine benefit claims, the department requires employers to provide information about claimants'
19 employment separations, dates of work, wages and other payments, and other issues that may be
20 disqualifying. This chapter specifies the benefit reports that must be filed by employers and the filing
21 requirements for those reports. This chapter also determines the information that employers must submit

1 under ss. 108.04 (2) (d) and 108.07 (5) (bm), Stats., if any, to request relief of unemployment benefit charges
2 for initial claims filed for benefit years beginning on or after March 15, 2020 through March 13, 2021, the
3 deadline by which employers must submit the information, if any, to the department, and the treatment of
4 payors of base period wages.

5 **SECTION 5.** DWD 123.04 is created to read:

6 **DWD 123.04 Requests for Charging Relief. (1)** Under s. 108.07 (5) (bm) 1m., Stats., for
7 separations from employment that are not due to a labor dispute, voluntary termination of work, discharge
8 for misconduct, or discharge for substantial fault, an employer does not need to submit information to the
9 department to receive relief of benefit charges under s. 108.07 (5) (bm), Stats.

10 **(2)** An employer that paid base period wages to a claimant whose most recent separation from
11 employment is due to a voluntary termination of work for which s. 108.04 (7) (h), Stats., does not apply
12 and whose initial claim is for benefit years beginning on or after March 15, 2020 through March 13, 2021
13 may receive relief of benefit charges under s. 108.07 (5) (bm), Stats., by submitting a request for relief
14 under this section.

15 **(3)** An employer may be relieved of unemployment benefit charges under s. 108.07 (5) (bm), Stats.,
16 for benefits for initial claims described in sub. (2) if it provides the information specified by the department
17 in the form required by the department.

18 **Note:** The required department form for requesting charging relief is UCB-18823-E, available
19 online at <https://dwd.wisconsin.gov/uitax/relief-of-charging.htm>.

20 **(4)** An employer described in sub. (2) may receive benefit charging relief if it certifies that any of
21 the following circumstances apply to the initial claim:

22 **(a)** The employer's business/operations reduced, suspended, or ceased after experiencing a
23 significant reduction of income due to a Safer at Home order or a government-issued health order that
24 restricts business operations.

25 **(b)** The employer's business/operations reduced, suspended, or ceased due to other businesses
26 (including suppliers) having reduced, suspended, or ceased operations.

1 (c) The federal Paycheck Protection Program loan amount was used to pay employees, but the
2 business did not yet reopen.

3 (d) The employer provides other information showing that the initial claim relates to the public
4 health emergency declared on March 12, 2020 by Executive Order 72.

5 (5) An employer that must submit a request for relief under this section to receive relief under s.
6 108.07 (5) (bm), Stats., must submit the request to the department by the thirtieth day after the department
7 sent a notification to the employer of an initial claim for benefit years beginning on or after March 15, 2020
8 through March 13, 2021.

9 (6) If an initial claim relates to the public health emergency declared on March 12, 2020, by
10 Executive Order 72 and s. 108.07 (5) (bm) 1., Stats., applies to the claim, the provisions of s. 108.07 (5)
11 (bm) 3., Stats., apply to all the employers that paid base period wages for the claim.

12 (7) The department shall apply s. 108.07 (5) (bm), Stats., to additional initial claims filed on or
13 after March 15, 2020 through March 13, 2021 for any benefit years that began before March 15, 2020.

14 **Section 6. EFFECTIVE DATES.** This rule shall take effect on October 3, 2021, or upon publication
15 in the official state newspaper, as provided in s. 227.24 (1) (c), Stats., whichever is later, except that
16 Sections 1 and 2 of this rule shall take effect on November 26, 2021.

Dated this 20th day of September, 2021.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: _____
Amy Pechacek, Secretary-designee