

# **Statement of Scope**

## **Department of Children and Families**

**Rule Number:** Chapter DCF 105

**Relating to:** Drug Screening, Testing and Treatment of Individuals Participating in Certain Work Experience Programs

**Rule Type:** Emergency

### **Finding/nature of emergency (for emergency rules only)**

Section 9106(2c) of 2015 Wisconsin Act 55 permits the department to promulgate an emergency rule to implement the requirement for individuals in certain public assistance programs to participate in drug screening, drug testing, and drug treatment, without providing “evidence that promulgating a rule under this paragraph as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare” and providing “a finding of emergency for a rule promulgated under this paragraph.” This nonstatutory provision requires the department to “present the statement of scope of any emergency rules promulgated under paragraph (a) to the governor for approval under section 227.135(2) of the statutes no later than the 120<sup>th</sup> day after the effective date of this paragraph.”

### **Detailed description of the objective of the proposed rule.**

Section 49.162, Stats., as created by s. 1740 of 2015 Wisconsin Act 55 requires substance abuse screening, testing, and treatment as a condition of eligibility for: (a) persons who apply to participate in the Transform Milwaukee program or the Transitional Jobs program; (b) persons applying for W-2 services and benefits for noncustodial parents; and (c) persons who are ordered by a court to register for Children First because they are not meeting their child support obligations. The proposed emergency rule described in this scope statement applies to the Transform Milwaukee program, the Transitional Jobs program, and persons applying for W-2 services and benefits for noncustodial parent. Rules relating to the Children First program will be promulgated separately due to unique and substantial differences in how that program is administered.

Section 49.162, Stats., requires applicants to these employment programs to complete a questionnaire that screens for the abuse of a controlled substance. Based on the applicant’s answers to the questionnaire, if the department or the agency the department has contracted with to administer the program determines that there is a reasonable suspicion that an individual who is otherwise eligible for the employment program is abusing a controlled substance, the individual must undergo a test for the use of a controlled substance in order to be eligible for the employment program. If the individual refuses to answer the questionnaire or submit to a drug test, the individual is not eligible for the employment program until the individual complies with the requirement to complete the questionnaire or undergo a test for the use of a controlled substance.

The proposed emergency rule will define one or more acceptable screening questionnaires that may be used to determine if there is reasonable suspicion that an individual who is otherwise eligible for the employment program is abusing a controlled substance, standards for concluding a reasonable suspicion exists, procedures for determining when an individual has refused to comply with the screening requirement, and procedures for appealing an eligibility decision relating to the screening requirement. The proposed emergency rule will define how individuals reasonably suspected of abusing a controlled substance will be tested for use of a

controlled substance, what previous test results may be accepted to satisfy the testing requirement, what re-testing or confirmatory testing may be permitted, how test result records will be stored to assure confidentiality and compliance with federal regulations relating to diagnosis and treatment records for drug abuse, how applicants can consent to sharing test result information, how refusal to submit to a test will be determined, and what procedures for appealing an eligibility decision will be available to applicants.

For applicants who test positive, the emergency rule will define how the individual will be assessed to determine appropriate treatment, who is responsible for random drug tests during treatment and drug testing at the completion of treatment, what standards will be used to determine if an individual with a positive test result during treatment can continue or re-start treatment, who has access to and maintains records of substance abuse treatment, and what procedures for appealing an eligibility decision will be available to individuals determined to be ineligible for the employment program based on failure to successfully complete treatment. Finally, the emergency rule will determine when an individual who is ineligible for an employment program pursuant to s. 49.162 may reapply for the same program or apply for other department programs covered by the substance abuse screening and testing requirement.

**Detailed explanation of statutory authority for the rule.**

Section 49.162(7) provides that the “department shall promulgate rules to implement the substance abuse screening, testing, and treatment requirements under this section.”

Section 227.11(2)(a), Stats., expressly confers rule-making authority on each agency to promulgate rules interpreting the provisions of any statute enforced or administered by the agency.

**Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule.**

180 hours.

**List with description of all entities that may be affected by the proposed rule.**

Applicants for programs subject to the requirement, agencies administering programs subject to the requirement, testing laboratories, entities providing assessment or treatment services to individuals who test positive, courts that have ordered child support payers to participate in Children First, and county child support enforcement agencies.

**Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule.**

Section 42 U.S.C. 290ee-3 assures the confidentiality of “Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States” and allows disclosure only “for the purposes and under the circumstances expressly authorized under” the federal statute. The U.S. Department of Health & Human Services has promulgated rules (42 CFR, Chapter 1, Subchapter A, Part 2) governing restrictions on the use of records, security for written records, disposition of records, patient consent, disclosures without patient consent, and disclosures pursuant to court order. The emergency rule must assure employment programs comply with federal requirements for records covered by the federal statute and regulation.

**Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small business:**

Minimal impact; no impact on small business.

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