

**State of Wisconsin
Department of Children and Families**

NOTICE OF PUBLIC HEARING

**Substance Abuse Screening, Testing, and Treatment for Certain Department
Work Experience Programs**

DCF 105

NOTICE IS HEREBY GIVEN that pursuant to s. 49.162 (7), Stats., as created by 2015 Wisconsin Act 55., the Department of Children and Families proposes to hold a public hearing to consider emergency and proposed permanent rules relating to substance abuse screening, testing, and treatment for certain department work experience programs.

Hearing Information

**1:30 p.m.
December 15, 2015
Tuesday**

**MADISON
GEF 1 Building, Room H306
201 E. Washington Avenue**

Interested persons are invited to appear at the hearing and will be afforded the opportunity to make an oral presentation of their positions. Persons making oral presentations are requested to submit their facts, views, and suggested rewording in writing.

If you have special needs or circumstances regarding communication or accessibility at a hearing, please call (608) 422-7074 at least 10 days prior to the hearing date. Accommodations such as ASL interpreters, English translators, or materials in audio format will be made available on request to the fullest extent possible.

Analysis Prepared by the Department of Children and Families

Statutory authority: Section 49.162 (7), Stats., as created by 2015 Wisconsin Act 55

Statutes interpreted: Section 49.162, Stats., as created by 2015 Wisconsin Act 55

Related statute or rule: Sections 49.159 (1) (b) and 49.163, Stats.; Ch. DCF 101; Sections 49.79 (9) (d) and 108.133, Stats., as created by 2015 Wisconsin Act 55

Explanation of Agency Authority

Section 49.162 (7), Stats., as created by 2015 Wisconsin Act 55, provides that “the department shall promulgate rules to implement the substance abuse screening, testing, and treatment requirements” under s. 49.162, Stats.

Section 49.162, Stats., as created by 2015 Wisconsin Act 55 requires substance abuse screening, testing, and treatment as a condition of eligibility for all of the following:

- Persons who apply to participate in the Transform Milwaukee program or the Transitional Jobs program under s. 49.163, Stats.
- Persons who apply to participate in W-2 services and benefits for noncustodial parents under s. 49.159 (1) (b), Stats.
- Persons who are ordered by a court to register for Children First because they are not meeting their child support obligations. The emergency and proposed permanent rules do not apply to the Children First program. Rules for 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 the Transform Milwaukee program, the Transitional Jobs program, and the Wisconsin Works program for services and benefits for noncustodial parents to complete a questionnaire that screens for the abuse of a controlled substance. If the administering agency determines that there is a reasonable suspicion that an individual who is otherwise eligible for the work experience program is abusing a controlled substance based on the applicant’s answers to the questionnaire, the individual must undergo a test for the use of a controlled substance to be eligible for the work experience program. If the individual refuses to answer the questionnaire or submit to a drug test, the individual is not eligible for the work experience program until the individual complies with the requirement to complete the questionnaire or undergo a test for the use of a controlled substance.

An individual who undergoes a test for the use of a controlled substance and tests negative will have satisfactorily completed the substance abuse testing requirements. An individual who tests positive but presents evidence of a valid prescription that explains any metabolites detected by the test will also have satisfactorily completed the substance abuse testing requirements. An individual who tests positive without presenting evidence of a valid prescription will be required to participate in substance abuse treatment to remain eligible for the work experience program.

During the time an individual is participating in required substance abuse treatment, he or she is required to undergo random substance abuse tests. An individual who tests positive during treatment without presenting evidence of a valid prescription that explains any metabolites detected by the test will have one opportunity to begin treatment again. The individual re-entering treatment after an unexplained positive test remains eligible for the program only if the individual does not have another unexplained positive test before successfully completing treatment. Upon completion of the substance abuse treatment program, the individual must undergo a test for substance abuse. If the test result is negative or positive for metabolites

associated with a valid prescription, the individual will have satisfactorily completed the substance abuse testing requirements.

Summary of the Proposed Rules

The purpose of this chapter is to establish a process to screen for, and, if appropriate, test for the use of controlled substances, as defined in this chapter, by applicants for work experience programs administered by the Department of Children and Families, and to refer individuals determined to be abusing a controlled substance to a treatment provider for a substance abuse assessment and evaluation and appropriate treatment.

The emergency and proposed permanent rules permit the department to approve one or more screening questionnaires that may be used to determine whether there is reasonable suspicion that an individual who is otherwise eligible for a work experience program is abusing a controlled substance, standards for concluding a reasonable suspicion of controlled substance abuse exists, and procedures for determining when an individual has refused to comply with the screening requirement. The emergency and proposed permanent rules define how individuals reasonably suspected of abusing a controlled substance will be tested for use of a controlled substance, what alternative test results may be accepted to satisfy the testing requirement, what confirmation testing may be required, 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 may consent to sharing test result information, and how refusal to submit to a test will be determined.

For applicants who test positive for use of a controlled substance without evidence of a valid prescription that explains all controlled substances identified in the test, the emergency and proposed permanent rules define how the individual will be assessed to determine the need for treatment, how random drug tests during treatment and at the completion of treatment will be carried out, what standards will be used to determine if an individual with a positive test result during or after treatment can continue or re-start treatment, and who has access to and maintains records of substance abuse treatment. Finally, the emergency and proposed permanent rules determine whether an individual who is ineligible for a work experience program may reapply for the same program or apply for other department programs covered by the substance abuse screening, testing, and treatment requirement.

Summary of Factual Data and Analytical Methodologies

The emergency and permanent rules were developed with the assistance of agencies administering the W-2 program under the department's 2013-2016 contracts and agencies administering the Transform Milwaukee Jobs program. Agencies offered examples, descriptions of their eligibility determination processes, and information about drug testing practices of employers with whom they work to place participants in subsidized or unsubsidized employment.

Summary of Related Federal Requirements

Drug Testing of Welfare Recipients

Pursuant to 21 USC 862b, the federal government may not prohibit states from requiring drug tests for welfare recipients nor from sanctioning welfare recipients who fail such tests. Pursuant to 42 USC 608 (b), states are permitted to require substance abuse treatment as a component of an individual responsibility plan and to apply a penalty for noncompliance in the absence of good cause.

Confidentiality

Confidentiality of records relating to drug testing and treatment is governed by regulations specific to drug testing and treatment programs that are federally assisted under 42 CFR Part 2 and by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR Parts 160 and 164, Subparts A and E. Programs subject to both sets of rules must comply with both, and they are generally compatible. Both sets of rules are directed toward assuring patient records remain private and are not disclosed unless the patient voluntarily consents to their release.

Comparison to Rules in Adjacent States

The only adjacent state planning drug testing is Michigan. In 1999, Michigan passed a law requiring all applicants for Michigan's Temporary Assistance for Needy Families program, the Family Independence Program, to undergo drug testing. That law was declared unconstitutional in a decision that held Michigan law authorizing suspicionless drug testing of welfare recipients was unconstitutional because it was not intended to address public safety, and the state's desire to address substance abuse as a barrier to employment was not a special need sufficient to justify departure from the Fourth Amendment requirement of individualized suspicion. While initially reversed on appeal to the 6th Circuit Court of Appeals, the initial decision was vacated when the 6th Circuit Court decided to hear the case en banc. The full court split 6-6 without decision, and the effect was to affirm the District Court's decision and order.

In 2014, the Michigan legislature authorized a new three-county pilot project to evaluate drug testing of applicants for public assistance based on suspicion, and the bills were signed into law in December 2014. There are no administrative rules for this project, which is scheduled to run for one-year ending September 2016.

Other states that have adopted administrative rules relating to drug testing and treatment of recipients of public assistance include North Carolina, Tennessee, and Missouri. Unlike Wisconsin where the enabling statute addresses participation in work experience programs, the North Carolina, Tennessee, and Missouri rules determine eligibility to receive cash benefits.

Effect on Small Business

None. The emergency and proposed permanent rules impose no compliance or reporting requirements on small businesses.

Analysis Used to Determine Effect on Small Business or in Preparation of Economic Impact Analysis

The impact of these emergency and proposed permanent rules are limited to agencies administering the W-2 program, the Transform Milwaukee Jobs program, or the Transitional Jobs program and families and individuals participating in those programs. No current W-2 agency or agency administering the Transform Milwaukee Jobs program is an independently owned and operated business entity with fewer than 25 employees or less than \$5,000,000 in gross annual sales, as specified in s. 227.114 (1), Stats. The primary impact of the emergency and proposed permanent rules are on applicants to, and participants in, the W-2 program who are receiving benefits and services to noncustodial parents, the Transform Milwaukee Jobs program, and the Transitional Jobs program. All reporting and compliance requirements apply only to agencies administering these programs and participants in these programs.

The Department's Small Business Regulatory Coordinator is Elaine Pridgen, (608) 422-7077, elaine.pridgen@wisconsin.gov.

Agency Contact Person

Margaret McMahon, Director, Bureau of Working Families, Division of Family and Economic Support, Department of Children and Families, (608) 422-6273, margaret.mcmahon@wisconsin.gov.

Place Where Comments are to be Submitted and Deadline for Submission

Comments may be submitted to Leah Watson, Bureau of Working Families, Division of Family and Economic Security, Department of Children and Families, 201 E. Washington Avenue, A200, Madison, WI, 53703 or Leah.Watson@wisconsin.gov. The comment deadline is December 16, 2015.