

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

DCF 105

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

The Wisconsin Department of Children and Families proposes an order to create chapter DCF 105, relating to substance abuse screening, testing, and treatment for certain department work experience programs.

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 proposed rule does 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 a 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 a work experience program. If the individual refuses to answer the questionnaire or submit to a drug test, the individual is not eligible for a 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 metabolite 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 a work experience program.

During the time an individual is participating in required controlled substance abuse treatment, the individual is required to undergo one or more random substance abuse tests. An individual who tests positive during treatment without presenting evidence of a valid prescription that explains any metabolite 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 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 proposed rule permits 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 proposed rule defines 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 proposed rule defines 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 treatment. Finally, the proposed rule determines 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 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 proposed 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 proposed rules is 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 proposed rules is 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.

Agency Contact Person

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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.

SECTION 1. Chapter DCF 105 is created to read:

Chapter DCF 105

SUBSTANCE ABUSE SCREENING, TESTING, AND TREATMENT FOR CERTAIN DEPARTMENT WORK EXPERIENCE PROGRAMS

DCF 105.01 Purpose. The purpose of this chapter is to establish a process to screen for, and, if appropriate, test for the use of controlled substances by applicants for work experience programs administered by the department, 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 as required by s. 49.162, Stats.

DCF 105.02 Definitions. In this chapter:

- (1) “Administering agency” has the meaning given in s. 49.162 (1) (a), Stats.
- (2) “Confirmation test” means an analytical procedure used to quantify a specific controlled substance or its metabolite in a specimen through a test that is different in scientific principle from that of the initial test procedure and capable of providing requisite specificity, sensitivity, and quantitative accuracy to positively determine use of a controlled substance.
- (3) “Controlled substance” or “substance” has the meaning given for “controlled substance” in s. 961.01 (4), Stats.
- (4) “Department” means the department of children and families.
- (5) “Individual” means a person who has applied to participate in a work experience program or a person who has been determined eligible for the program and is participating in program activities or awaiting assignment to program activities.
- (6) “Metabolite” means a chemical present in the body when a controlled substance is being broken down through natural metabolic processes that can be detected or measured as a positive indicator that a controlled substance associated with the metabolite has been used.
- (7) “Medical review officer” means a licensed physician employed by or providing

services under contract to a drug testing vendor who has knowledge of substance abuse disorders and laboratory testing procedures and who has the necessary training and experience to interpret and evaluate an individual's positive test result in relation to the individual's medical history and current, valid prescriptions.

(8) "Reasonable suspicion" means suspicion of controlled substance abuse by an individual based on that individual's score on a screening questionnaire.

(9) "Screening" means completion of a questionnaire regarding the individual's current and prior use of controlled substances.

(10) "Specimen" means tissue, fluid, or a product of the human body capable of revealing the presence of controlled substances or their metabolites.

(11) "Treatment" means services that are conducted under clinical supervision to assist an individual through the process of recovery from controlled substance abuse and may include screening, application of approved placement criteria, intake, orientation, assessment, individualized treatment planning, intervention, individual or group and family counseling, referral, discharge planning, after care or continuing care, recordkeeping, consultation with other professionals regarding the patient's treatment services, recovery and case management, crisis intervention, client education, employment, and problem resolution in life skills functioning.

(12) "Treatment program" means a program certified to provide treatment for controlled substance abuse as a medically managed inpatient service under s. DHS 75.10, a medically monitored treatment service under s. DHS 75.11, a day treatment service under s. DHS 75.12, an outpatient treatment service under s. DHS 75.13, a transitional residential treatment service under s. DHS 75.14, or a narcotic treatment service for opiate addiction under s. DHS 75.15. (13) "Treatment provider" or "provider" means a provider of treatment services for controlled

substance abuse certified by the department of health services under the provisions of ch. DHS 75.

(13) “Work experience program” or “program” in this chapter means a work experience program providing services and benefits to noncustodial parents under s. 49.159 (1) (b), Stats.; the Transform Milwaukee Jobs program under s. 49.163, Stats.; or the Transitional Jobs program under s. 49.163, Stats.

DCF 105.03 Information about the requirement for controlled substance abuse screening, testing, and treatment. An administering agency shall provide information in a format approved by the department to any individual who expresses interest in or requests to apply to a work experience program to explain the requirement for participants in certain work experience programs to undergo screening, testing, and treatment for abuse of controlled substances.

DCF 105.04 Administering a controlled substance abuse screening questionnaire to determine reasonable suspicion of substance abuse. (1) WHO MUST COMPLETE A SCREENING QUESTIONNAIRE. An administering agency shall administer a controlled substance abuse screening questionnaire approved by the department to any applicant for a work experience program.

(2) EFFECT OF FAILING TO COMPLETE SCREENING QUESTIONNAIRE. The applicant is required to answer all questions on the screening questionnaire, sign and date the questionnaire, and submit it to the administering agency for his or her application for a work experience program to be complete. An applicant who fails to submit a completed screening questionnaire is not eligible to participate in a work experience program, and the administering agency shall deny the application. An individual denied eligibility for a work experience program for failure to

complete a screening questionnaire may reapply at any time the individual submits a complete application, including a completed screening questionnaire.

(3) EFFECT OF SUCCESSFULLY PASSING THE SCREENING QUESTIONNAIRE. An individual whose score on the screening questionnaire does not establish a reasonable suspicion of abuse of a controlled substance has fully satisfied the requirements of this chapter and may participate in a work experience program subject to this chapter without further screening, testing, or treatment.

DCF 105.05 Requiring a test for the use of a controlled substance. (1) WHO MAY BE REQUIRED TO UNDERGO DRUG TESTING. An individual whose score on the screening questionnaire establishes a reasonable suspicion of abuse of a controlled substance shall be required to undergo a test for the use of a controlled substance.

(2) NATURE OF TESTING REQUIRED. Testing shall consist of laboratory analysis of a specimen collected from an individual by a drug testing vendor. The department shall provide to each administering agency a list of all controlled substances or metabolites of controlled substances that must be included in the test and cutoff levels for the initial test and cutoff levels for a confirmation test that may be used. The department may add or delete controlled substances or metabolites that must be included in the laboratory test to reflect changes in pre-employment drug testing practices of Wisconsin employers. A positive test result on the initial test shall be confirmed through a confirmation test from the original specimen collected from the individual.

(3) CONTRACT FOR TESTING SERVICES. Subject to the department's approval, the administering agency may contract with a qualified drug testing vendor to collect a specimen, carry out laboratory analysis of the specimen, store the specimen for confirmatory testing if required, complete confirmatory testing, and provide review by a medical review officer. The department may require the administering agency to use a specific testing service procured

through state contracting if the department determines that volume discounts or other preferential pricing terms can be achieved through a statewide contract.

(4) REFUSAL TO SUBMIT TO A TEST. An individual refuses to submit to a test if the individual does any of the following:

(a) Fails or refuses to provide a specimen during an appointment scheduled by the administering agency for that purpose.

(b) Fails or refuses to appear for a test at the time and place directed by the administering agency.

(c) Fails or refuses to complete a form or release of information required for testing, including those required by the drug testing vendor that permit the drug testing vendor to report test results to the department or administering agency.

(d) Fails or refuses to provide a valid specimen for testing.

(e) Fails or refuses to provide verification of identity to the testing drug testing vendor.

(f) Fails or refuses to cooperate with the medical review officer, including refusal to complete an interview or answer questions or refusal to provide records necessary to demonstrate possession of a valid prescription.

(5) EFFECT OF REFUSAL TO SUBMIT TO A TEST. An individual who refuses to submit to a test under sub. (4) is ineligible to participate in a work experience program until the individual submits to a test. The administering agency may direct an individual who has refused to submit to a test under sub. (4) and subsequently agrees to submit to a test to undergo drug testing on a random basis at any time within 10 business days after the individual agrees to submit to a test. The individual may not participate in a work experience program until the individual undergoes a test for the use of a controlled substance and test results have been reported to the administering

agency.

(6) REQUIREMENT FOR A CONFIRMATION TEST. If an individual tests positive for the use of a controlled substance, the drug testing vendor shall perform a confirmation test using the same specimen obtained for the initial test. All test results that are non-negative shall be interpreted as positive or negative by a drug testing vendor's medical review officer who shall be responsible for determining the presence of a controlled substance.

(7) ACCEPTING TEST RESULTS FROM ANOTHER PROGRAM. Results of a drug test performed by another state program, including a work experience program under ss.49.36, 49.45 (23) (g), 49.79 (9) (d), or 108.133, Stats., or a drug test carried out by the Wisconsin department of corrections, can be used by an administering agency to determine whether to refer an individual to treatment if the prior test results are provided directly to the administering agency, all the controlled substances and metabolites required by the department to be tested under this chapter are included in the prior test results, and the test occurred within the previous 90 days.

(8) EFFECT OF A NEGATIVE TEST. An individual who undergoes a test for the use of a controlled substance under this subsection and tests negative for use of a controlled substance or tests positive for use of a controlled substance but provides evidence of a valid prescription for each controlled substance for which the individual tests positive will have fully satisfied the requirements of this chapter and may participate in a work experience program without further screening, testing, or treatment.

(9) EFFECT OF A POSITIVE TEST. An individual whose test results are positive for a controlled substance or metabolite tested and who fails to present evidence of a valid prescription for the controlled substance shall be required to participate in treatment under s. DCF 105.06.

DCF 105.06 Requiring participation in treatment. (1) WHO MAY BE REQUIRED TO

PARTICIPATE IN TREATMENT. Every individual who undergoes a test under s. DCF 105.05 and tests positive for the use of a controlled substance without presenting evidence of a valid prescription as described in s. 49.162 (1), Stats., and as determined by the medical review officer for the drug testing vendor, shall be required to participate in treatment in order to be eligible to participate in a work experience program.

(2) REFERRAL FOR TREATMENT. The administering agency shall provide information to every individual required to participate in controlled substance abuse treatment about treatment program providers and county-specific assessment and enrollment activities required for entry into treatment. The administering agency shall monitor the individual's progress in entering and completing treatment and the results of a random test for the use of a controlled substance carried out during and at the conclusion of treatment.

(3) SUBSTANCE ABUSE EVALUATION AND ASSESSMENT. A treatment provider may conduct a substance abuse evaluation and assessment and take any of the following actions based on the evaluation and assessment:

(a) If a treatment provider determines an individual does not need treatment, the provider shall notify the administering agency of its determination.

(b) If a treatment provider determines an individual is in need of treatment, the provider shall refer the individual to an appropriate treatment program to begin treatment and shall notify the administering agency of the referral and the expected begin date and duration of treatment.

(c) If a treatment provider determines an individual is in need of treatment but is unable to refer the individual because there is a waiting list for enrollment in appropriate treatment programs, the provider shall notify the administering agency when the individual is expected to be enrolled.

(4) ELIGIBILITY OF INDIVIDUAL TO PARTICIPATE IN A WORK EXPERIENCE PROGRAM WHEN TREATMENT IS NOT NEEDED OR THE INDIVIDUAL IS PLACED ON A WAITING LIST. (a) An individual who has been determined by a treatment program after assessment not to need treatment will have fully satisfied the requirements of this chapter and may participate in a work experience program without further screening, testing, or treatment.

(b) An individual who is on a waiting list for enrollment in an appropriate treatment program is eligible to participate in a work experience program during the waiting list period, provided the individual is not eligible for immediate enrollment in another appropriate treatment program.

(5) SATISFYING THE REQUIREMENT TO PARTICIPATE IN TREATMENT THROUGH PARTICIPATION IN ANOTHER PROGRAM. An administering agency shall accept current participation in any treatment program to satisfy the requirements of this section. The individual participating in the treatment program shall execute a release of information to allow the administering agency to obtain verification of successful participation in that treatment program.

(6) REFUSAL TO PARTICIPATE IN TREATMENT. An individual refuses to participate in treatment if the individual does any of the following:

(a) Fails or refuses to complete a form or release required for program administration, including those required by a treatment provider in order to share information with the administering agency about the individual's participation in treatment.

(b) Fails or refuses to participate in a controlled substance test required by the treatment provider or the administering agency during the course of required treatment, including random controlled substance testing directed by the treatment provider or administering agency.

(c) Fails or refuses to meet any attendance or participation requirement established by the

treatment provider.

(d) Fails or refuses to complete a substance abuse assessment.

(7) EFFECT OF REFUSAL TO PARTICIPATE IN TREATMENT. (a) If the treatment provider agrees to continue treatment, an individual who refuses to participate in treatment shall be given one opportunity to participate in treatment by re-entering treatment within 30 days of the refusal to participate.

(b) An individual who does not re-enter treatment within 30 days of a refusal to participate or who refuses a second time to participate in treatment shall be ineligible to participate in a work experience program subject to s. 49.162, Stats., for a period of 12 months.

(8) CONTROLLED SUBSTANCE TESTING DURING REQUIRED TREATMENT. (a) An individual who is participating in treatment shall undergo a minimum of one randomly administered test for the use of a controlled substance as directed by the administering agency during the course of treatment. Additional tests during required treatment may be directed by the administering agency if recommended by the treatment provider or required under par. (c).

(b) An individual who tests positive for use of a controlled substance during treatment without presenting evidence of a valid prescription for the controlled substance may be eligible to re-enter the treatment program. The individual may re-enter treatment only once as a result of a positive test for use of a controlled substance. The treatment provider shall determine the terms of the individual's re-entry into treatment based on an assessment of the individual's treatment needs at the time the individual re-enters treatment. Based on its assessment, the provider may take any action described in subsection (3).

(c) An individual who re-enters treatment under par. (b) shall undergo a minimum of one randomly administered test for the use of a controlled substance during the course of continued

treatment following re-entry. After re-entering a treatment program, a confirmed positive test for use of a controlled substance without evidence of a valid prescription for the controlled substance shall result in the individual being ineligible to participate in a work experience program.

(d) An individual who is determined to be ineligible to participate in a work experience program as a result of a second positive test for the use of a controlled substance under par. (c) is not eligible to participate in a department program subject to s. 49.162, Stats., for a period of 12 months.

(9) TESTING FOR USE OF A CONTROLLED SUBSTANCE AT THE CONCLUSION OF REQUIRED TREATMENT. (a) All individuals participating in treatment under this section shall undergo testing for use of a controlled substance at the completion of the treatment program.

(b) If an individual tests negative for the use of a controlled substance, or tests positive for the use of a controlled substance but presents evidence of a valid prescription for each controlled substance for which the individual tests positive, the individual will have satisfactorily completed the treatment and testing requirements under this section and may participate in a work experience program without further screening, testing, or treatment.

(c) An individual who refuses a test or tests positive for use of a controlled substance at the completion of controlled substance abuse treatment without presenting evidence of a valid prescription for each controlled substance for which the individual tests positive is not eligible to participate in a work experience program administered by the department for a period of 12 months.

(10) PARTICIPATION IN WORK EXPERIENCE PROGRAM ACTIVITIES WHILE IN TREATMENT. An administering agency may place individuals in program activities during treatment if program activities will not interfere with participation in treatment. An individual who is not in treatment

following a positive test during treatment or a refusal to participate and prior to re-entering treatment may not participate in program activities until the individual re-enters treatment.

DCF 105.07. Effect of completing, voluntarily withdrawing, or being terminated from a work experience program. An individual who completes or voluntarily withdraws from a work experience program is no longer subject to s. 49.162, Stats., or this chapter as of the date the individual completes or withdraws from the program. An individual who is terminated from a program for reasons unrelated to substance abuse screening, testing, and treatment is no longer subject to s. 49.162, Stats., or this chapter, as of the date of termination from the program.

DCF 105.08. Confidentiality of records. Screening questionnaires, testing results, and treatment records relating to this chapter may not be disclosed unless for purposes connected with the administration of a work experience program unless disclosure is otherwise authorized by law or by written consent from the individual who is the subject of the record. The department may establish administrative, physical, and technical safeguard procedures administering agencies may be required to follow to assure compliance with state and federal laws relating to public assistance program records, drug testing and treatment records, and medical records.

DCF 105.09. Appeals of decisions under this chapter. (1) An adverse decision under this chapter affecting an individual's participation in a work experience program providing services and benefits to noncustodial parents under s. 49.159 (1) (b), Stats. may be appealed following the procedure under s. 49.152, Stats., and s. DCF 101.22.

(2) An adverse decision under this chapter affecting an individual's participation in the Transform Milwaukee Jobs program under s. 49.163, Stats., or the Transitional Jobs program under s. 49.163, Stats (b), Stats. may be appealed under s. 227.42, Stats., by filing a request for a contested case hearing with the department within 30 days after the effective date of the adverse

decision.

SECTION 2. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Administrative Register as provided in s. 227.22 (2) (intro.), Stats.