

Wisconsin Department of Workforce Development

Statement of Scope

Rule No.: DWD 102, 113 and 123

Relating to: Protecting Wisconsin employers from the adverse financial effects of COVID-19

Rule Type: Emergency

Finding and nature 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 (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 (UI) 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 UI 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.

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.

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 incorrectly set higher than they should be could adversely affect employers' abilities to recover financially from the economic downturn caused by the pandemic.

If the recharging of benefits from employer accounts to the interest and penalty appropriation for reimbursable employers is not completed before the expiration of a blanket interest waiver for those employers, they will continue to receive monthly bills for reimbursements with incorrect 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. Under new state and federal laws that provide for the recharging of benefits, those employers may not actually owe the reimbursements. 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.

Description of the objective of the proposed rule:

This emergency rule will provide for interest waivers for reimbursable employers until after Department has finished the process of relieving employers of benefit charges related to the public health emergency. This rule will also waive interest for reimbursable employers for a

limited period after charging relief is completed so that employers have an opportunity to review the revised amount due and set up a payment plan, if necessary.

To achieve the policy goals of Acts 185 and 4, as well as ensure that employer contribution rates are correctly determined for 2023, this emergency rule will set a deadline by which employers must submit the information. The emergency rule will determine the information, if any, that employers must submit to request charging relief for initial claims filed while Executive Order 72 was in effect and after it expired.

This rule will also 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 rule will provide that additional initial claims will be treated as regular initial claims to ensure that employers are relieved of charging for benefits related to those claims.

This emergency rule will further provide that, to achieve the policy goals of Acts 185 and 4, and the plain language of ss. 108.02 (8), (22) and 108.18 (4), Stats., in calculating an employer's net reserve as of the computation date for 2022 rates, the Department shall assume that all benefit charges and adjustments for the period of March 15, 2020 through March 13, 2021 are related to the public health emergency so that all employer accounts are credited with those benefits under s. 108.07(5) (bm), Stats. The Department shall apply the credit as if the noncharging provisions have been implemented when calculating rates for 2022.

Description of existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Currently, s. DWD 113.025 provides limited circumstances for which employers may request a waiver or reduction of interest. Emergency Rule 2011, which expired on March 1, 2021, waived interest for reimbursable employers. Emergency Rule 2108, which expires on September 26, 2021, waives interest for reimbursable employers until the Department finishes the charging relief project.

Emergency Rule 2044, which expired on May 5, 2021, determined all of the following: 1) the information that employers must submit to request charging relief for initial claims filed while Executive Order 72 was in effect and after it expired, 2) the deadline by which employers must submit the information to the department, and 3) 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.

Emergency Rule 2112, which expires on October 2, 2021, determines, based on revisions to state statute under 2021 Wisconsin Act 4, the information that employers must submit to request charging relief unless that requirement is waived and the deadline by which the information must be submitted to DWD. Emergency Rule 2112 also determines that DWD will apply the employer charging provisions of Acts 185 and 4 to all base period employers for the claim, and that employers will be relieved of benefits for additional initial claims.

Currently, 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, which is June 30 of each year. Ultimately, however, the employer's reserve fund balance

considers all charges and credits on a rolling basis so that the employer's unemployment experience determines the contribution rate. Emergency Rule 2118, which expires on November 25, 2021, provides for the treatment of benefit charges for setting employer contribution rates for 2022.

The new policy to be included in this rule will provide a waiver of interest for employers subject to reimbursement financing until the Department finishes the charging relief project, as well as for a limited period thereafter so that employers may review and pay their revised bills.

The emergency rule will determine the information that employers must submit to request charging relief, if any, for initial claims filed while Executive Order 72 was in effect and after it expired, as well as the deadline for submitting the information. This rule will also determine the treatment of employers in a claimant's base period who are not the most recent employer of a claimant. The rule will treat additional initial claims the same as initial claims, by ensuring that charging relief applies to additional initial claims that relate to the public health emergency.

An additional new policy to be included in this rule will ensure that employers' contribution rates for 2022 and 2023 are correctly calculated, while meeting the policy goals of Acts 185 and 4. The rule will also provide instructions for employers who seek relief of charges due to the public health emergency.

The policy alternative is to do nothing, which would negatively affect most employers subject to contribution financing because their contribution rates will be higher for 2022 and 2023 than they should be. For most employers subject to contribution financing, this would result in higher contribution rates for 2022, which would not be in accordance with the legislative intent of Acts 185 and 4. Doing nothing would also negatively affect employers subject to reimbursement financing, because they would be charged interest for reimbursements that would not be due if recharging were completed.

Statutory authority for the rule, including the statutory citation and language:

The Department has statutory authority for the proposed rule.

"The department may adopt and enforce all rules which it finds necessary or suitable to carry out this chapter." Section 108.14(2), Stats.

"In limited circumstances as prescribed by rule of the department, the department may waive or decrease the interest charged under par. (a) or s. 108.17 (2c) (c)." Section 108.22(1)(cm), Stats.

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

The estimated time is 40 hours.

Description of all entities that may be affected by the proposed rule:

Employers subject to the unemployment insurance law.

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:

State law must conform to and substantially comply with federal regulations. *See* 20 C.F.R. § 601.5.

Anticipated economic impact of implementing the rule (note if the rule is likely to have an economic impact on small businesses):

The proposed rule is expected to have an economic impact on employers subject to the unemployment insurance law, which may include small businesses, because some employers might be required to submit information to the Department to receive relief of benefit charges and because those employers would be assigned contribution rates that align with the policy goals of Acts 185 and 4. The proposed rule is also expected to have an economic impact on employers subject to reimbursement financing, which may include small businesses, if those employers can take advantage of the interest waiver.

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Approval of the agency head or authorized individual:

Jennifer L. Wakerhauser, Chief Legal Counsel Date