

Clearinghouse Rule 06-032

State of Wisconsin

Department of Workforce Development
Unemployment Insurance Division

Unemployment Insurance and Temporary Help Employers
Chapter DWD 133

The Wisconsin Department of Workforce Development proposes an order to create Chapter DWD 133, relating to unemployment insurance and temporary help employers and affecting small businesses.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 108.14 (2) and 227.11, Stats.

Statutes interpreted: Sections 108.04 (7), 108.04 (8)

Related statutes: Sections 108.02 (24m) and 108.065, Stats.

Explanation of agency authority. Section 108.14 (2), Stats., provides that the Department may adopt and enforce all rules which it finds necessary or suitable to carry out Chapter 108, Stats., regarding unemployment insurance. Section 108.04 (7), Stats., provides that if an employee terminates work with an employing unit, the employee is ineligible for unemployment insurance except under certain conditions. Section 108.04 (8), Stats., provides that if an employee fails, without good cause, to accept suitable work when offered, the employee is ineligible for unemployment insurance except under certain conditions.

Summary of proposed rule. For the purpose of unemployment insurance, an employment relationship normally ends when an employee is laid off without a definite return-to-work date, even if recall is anticipated. If a subsequent offer is refused, it is considered a refusal of new work under s. 108.04 (8), Stats. The employment relationship between a temporary help agency and its employees does not follow the patterns that apply to most other employment relationships. In the temporary help industry, it is common for employees to be assigned to a series of assignments at different locations with different duties, wages, and other conditions. It is also common for these assignments to end with little or no notice to either the employee or the employer. While the parties may fully intend to continue the relationship, the short notice that an assignment has ended may require that a short period of time pass before the employer is able to send the employee to the next assignment. This proposed rule establishes standards for determining whether the employment relationship continues or is terminated for the purpose of unemployment insurance benefit eligibility.

When an assignment from a temporary help employer ends, an employee is eligible for unemployment insurance benefits while the employment relationship continues between assignments, if he or she is otherwise qualified. Under the proposed rule, the employment relationship between a temporary help employer and the employee is considered to be a continuing relationship if all of the following conditions are met:

- On or before the end of the first full business day after the end of an assignment, the employee contacts the employer, or the employer contacts the employee, and informs the other that the assignment has ended. The department may waive the requirement for this notice or the deadline, or both, if it determines that the employee's failure to communicate was for good cause and the employer and employee have otherwise acted in a manner consistent with the continuation of the employment relationship.
- On or before the end of the first full business day after the end of an assignment, or on or before the end of the first full business day after the date notice was given under par. (a) if the deadline for the notice was waived, the employer informs the employee that the employer will provide a new assignment that will begin within 7 days of the date the employee is informed of the new assignment and either the employer provides a new assignment that does begin within 7 days or, within that same 7-day period, the employer notifies the employee of a delay in the start of the new assignment or notifies the employee of another assignment that will begin within 7 days of the new notice and the delayed or other assignment does begin within those 7 days.
- The assignment offered by the employer meets the conditions under which the individual offered to work, including the type of work, rate of pay, days and hours of availability, distance willing to travel to work, and available modes of transportation, as set forth in the individual's written application for employment with the employer submitted prior to the first assignment, or as subsequently amended by mutual agreement. The employer has the burden of proof to show that the assignment meets these requirements.

Chapter 108, Stats., provides that an employee is ineligible for unemployment insurance if the employee voluntarily separated from the employment, unless certain exceptions apply. Under the proposed rule, the employment relationship between a temporary help employer and the employee is considered to be voluntarily separated by the employee when any of the following occur:

- The employee fails to notify the employer that an assignment has ended if the employer's policy requires such notification and the employee had notice of this policy prior to the end of the assignment, provided that the employer is not aware that the assignment has ended.
- The employee refuses an assignment while the employment relationship continues.
- The employee fails to respond to an offer of work by the employer within a reasonable time period, while the employment relationship continues.
- The employer is unable to communicate an offer of work to the employee because of the employee's failure to provide the employer with a correct address,

telephone number, or other contact information while the employment relationship continues.

- Any other circumstances that would be considered separation by the employee under Chapter 108, Stats.

If an employment relationship does not continue under the terms of the proposed rule, the employment shall be considered separated by the employer unless the employee has voluntarily separated from the employment as provided in the list above or any other provision of Chapter 108, Stats.

When the employment relationship terminates, the employee's application for employment shall expire. If the employee returns to work for the employer, a new application for employment will be required for this chapter to be applicable. If the employee agrees in writing, the original application may be treated as a new application for employment.

Summary of factual data and analytical methodologies. In 1994 the Department responded to concerns expressed by temporary help employers and adopted a policy that considers the employment relationship between a temporary help employer and its employee to continue for a maximum of 14 days after the last day of work while the employer looks for another assignment for the employee, provided the employer guaranteed the employee an assignment to begin within that time period. Refused assignments during that 14-day extension period are considered separations by the employee.

The proposed Chapter DWD 133 codifies the informal policy that is currently in place, with minor adjustments. The proposed rule provides for an extension of the employment relationship while the employer finds a new assignment for the employee, provided that future offers of work are within the confines of the application for employment. The application for employment will be treated as a quasi-employment contract. This provides protection for the employer and the employee as both parties are put on notice as to what type of work will continue the employment relationship. If a subsequent assignment made within the confines of the application for employment is refused during the extension period, the employee is considered to have separated because the employment relationship is considered to still exist.

Comparison with federal law. There is no federal unemployment insurance law that specifically covers treatment of employees of temporary help companies.

Comparison with rules in adjacent states. Minnesota. An individual who within 5 calendar days after completion of a suitable temporary job assignment fails without good cause to affirmatively request an additional job assignment or refuses without good cause an additional suitable job assignment offered shall be considered to have quit employment. This provision applies only if at the beginning of employment with the temporary help company, the applicant signed and was provided a copy of a separate

document that informed the applicant of this paragraph and that unemployment benefits may be affected.

Iowa. An individual who fails without good cause to notify the temporary help company of the completion of an assignment and seek reassignment within 3 working days shall be considered to have voluntarily quit employment, unless the individual was not advised in writing of the duty to notify the temporary help company of the completion of an assignment.

Michigan. An individual is disqualified from receiving benefits if the temporary help company provided the employee with written notice before the employee began performing services stating that within 7 days after completion of an assignment the employee must notify the temporary help company and failure to provide notice of completion of an assignment constitutes a voluntary quit that will affect the employee's eligibility for unemployment insurance and the employee did in fact not notify the temporary help company of completion of the assignment within 7 days.

Illinois. There is a rebuttable presumption that an individual is not actively seeking work if the individual was last employed by a temporary help company and the temporary help company alleges that during the week for which the individual claimed benefits, he or she did not contact the temporary help company for an assignment. The presumption is rebutted if the individual shows that he or she did contact the temporary help company or that he or she had good cause for failure to contact the temporary help company for an assignment.

Effect on small business. The proposed rule will affect temporary help employers, some of which are small businesses. Using the best data available, the Department estimates that the number of temporary help employers in 2004 was 721. Of these, 203 had a monthly average of 1-25 employees but may involve a larger number of individuals given the temporary nature of employment provided.

There are no reporting, bookkeeping, or other procedures required for compliance with the proposed rule and no professional skills are required. The proposed rule was developed in consultation with the temporary help industry and reflects current best practices in the industry. It is not expected to qualify or disqualify more claimants of employers following these practices.

Analysis and supporting documents used to determine effect on small business. There is no data available that allows the Department to accurately determine the number of temporary help employers that meet the definition of small business in s. 227.114 (1), Stats. The data that is available on a business entity's number of employees is from the Quarterly Census of Employment and Wages (QCEW) program, which is based on UI reports and Multiple Worksite Reports (MWR). When available, MWRs provide a disaggregation of data. The data does not identify if a business is independently owned and operated, if employees are full-time or part-time, or if a business is dominant in its field.

The Department requested information on the number of temporary help employers that have gross annual sales of less than \$5 million from the Department of Revenue, but DOR was unable to provide it.

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Place where comments are to be submitted and deadline for submission.

Comments may be submitted to Elaine Pridgen, Office of Legal Counsel, Dept. of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946 or elaine.pridgen@dwd.state.wi.us. The comment deadline is May 3, 2006.

SECTION 1. Chapter DWD 133 is created to read:

Chapter DWD 133

TEMPORARY HELP EMPLOYERS

DWD 133.001 Definitions (1) Except as provided in sub. (2) and unless the context clearly indicates a different meaning, the definitions in ch. DWD 100 apply to this chapter.

(2) Notwithstanding ch. DWD 100 and unless the context clearly indicates a different meaning, in this chapter:

(a) “Assignment” means work assigned by an employer to an employee to be performed for a client company of the employer. An assignment ends when it is completed or when the employee is removed from the assignment.

(b) “Client company” means an entity that contracts with an employer for the employer to provide labor for a determinate or indeterminate time.

(c) “Employer” has the same meaning given “temporary help company,” in s. 108.02 (24m), Stats., and does not include a “professional employer organization” as defined in s. 108.02 (21e), Stats.

Note: Section 108.02 (24m), Stats., provides that “temporary help company” means “an entity which contracts with a client to supply individuals to perform services for the client on a temporary basis to support or supplement the workforce of the client in situations such as personnel absences, temporary personnel shortages, and workload changes resulting from seasonal demands or special assignments or projects, and which, both under contract and in fact:

- (a) Negotiates with clients for such matters as time, place, type of work, working conditions, quality, and price of the services;
- (b) Determines assignments or reassignments of individuals to its clients, even if the individuals retain the right to refuse specific assignments;
- (c) Sets the rate of pay of the individuals, whether or not through negotiation;
- (d) Pays the individuals from its account or accounts; and
- (e) Hires and terminates individuals who perform services for the clients.”

DWD 133.01 Purpose. The purpose of this chapter is to recognize that the employment relationship between a temporary help employer and an employee is, in

limited circumstances, unlike that of other employment relationships. An employee of a temporary help employer commonly performs multiple assignments for one or more client companies. An assignment may end with little or no advance notice. While the employer and employee may intend to continue the employment relationship, the employer may not immediately be able to provide a new assignment to the employee. This chapter establishes standards for determining whether the employment relationship continues or is terminated for the purpose of unemployment insurance benefit eligibility.

DWD 133.02 Employment relationship. (1) CONTINUATION OF EMPLOYMENT RELATIONSHIP. When an assignment ends, the employment relationship between the employer and the employee shall be considered a continuing relationship if all of the following conditions are met:

(a) On or before the end of the first full business day after the end of the assignment, the employee contacts the employer, or the employer contacts the employee, and informs the other that the assignment has ended. The department may waive the requirement for this notice or the deadline, or both, if it determines that the employee's failure to communicate was for good cause and the employer and employee have otherwise acted in a manner consistent with the continuation of the employment relationship.

(b) On or before the end of the first full business day after the end of the assignment, or on or before the end of the first full business day after the date notice was given under par. (a) if the deadline for the notice was waived, the employer informs the employee that the employer will provide a new assignment that will begin within 7 days of the date the employee is informed of the new assignment and any of the following occur:

1. The employer provides a new assignment that does in fact begin within 7 days from the date of the notice under par (a).

2. The new assignment does not begin within the 7-day period specified in par. (a), but, within that same 7-day period, the employer notifies the employee of a delay in the start of the new assignment or notifies the employee of another assignment that will begin within 7 days of the notice of the delayed or other assignment. The delayed or other assignment does in fact begin within 7 days from the date that the employer notified the employee of the assignment.

(c) The assignment offered by the employer meets the conditions under which the individual offered to work, including the type of work, rate of pay, days and hours of availability, distance willing to travel to work, and available modes of transportation, as set forth in the individual's written application for employment with the employer submitted prior to the first assignment, or as subsequently amended by mutual agreement. The employer shall have the burden of proof to show that the assignment meets the requirements of this paragraph.

(2) SEPARATION OF EMPLOYMENT BY EMPLOYER. If the employment relationship does not continue under sub. (1), the employment shall be considered separated by the employer unless the employee has voluntarily separated from the employment under sub. (3).

(3) SEPARATION OF EMPLOYMENT BY EMPLOYEE. (a) The employee voluntarily separates from the employment when any of the following occur:

1. The employee fails to notify the employer that an assignment has ended if the employer's policy requires such notification and the employee had notice of this policy

prior to the end of the assignment, provided that the employer is not aware that the assignment has ended.

2. The employee refuses an assignment while the employment relationship continues.

3. The employee fails to respond to an offer of work by the employer within a reasonable time period, while the employment relationship continues.

4. The employer is unable to communicate an offer of work to the employee because of the employee's failure to provide the employer with a correct address, telephone number, or other contact information while the employment relationship continues.

(b) Nothing in this chapter shall preclude the application of other provisions of ch. 108, Stats., to determine whether the employee separated from the employment.

DWD 133.03 Treatment of time between assignments. The employee shall be eligible for unemployment insurance benefits while the employment relationship continues between assignments pursuant to s. DWD 133.02 (1), if the employee is otherwise qualified.

DWD 133.04 Relationship following termination. When the employment relationship terminates, the employee's application for employment shall expire. If the employee returns to work for the employer, a new application for employment shall be required for this chapter to be applicable. If the employee agrees in writing, the original application may be treated as a new application for employment.

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.