

Clearinghouse Rule 07-009
State of Wisconsin
Department of Workforce Development
Unemployment Insurance Division
Unemployment Insurance Technical Corrections
Chapters DWD 100 to 150

The Wisconsin Department of Workforce Development proposes an order to repeal s. DWD 120.02 and ch. DWD 145; and to amend ss. 105.03(2)(intro.), 105.03(3), 105.04(2)(intro.), 105.04(3), 107.03, 107.04(2), 107.04(3), 107.04(4), 107.05(2)(intro.), and 107.05(3), relating to an unemployment insurance technical corrections.

Analysis Prepared by the Department of Workforce Development

Statutes interpreted: Section 108.02 (12) (c), Stats., as renumbered by 1995 Wisconsin Act 118; and s. 108.02 (15) (k) 14., Stats., as repealed by 2005 Wisconsin Act 86

Statutory authority: Sections 108.02 (12) (f), 108.14 (2), 227.11 (2), Stats.

Explanation of agency authority. Section 108.02 (12) (f), Stats., provides that the department may promulgate rules to ensure the consistent application of the definition of “employee.” Section 108.14 (2), Stats., provides that the department may adopt all rules which it finds necessary to carry out the unemployment insurance program.

Summary of the proposed rules. Section 108.02 (15) (k) 14., Stats., as repealed by 2005 Wisconsin Act 86, provided that for the purpose of the UI program “employment” does not include service by an individual for an employer that was engaged in the processing of fresh perishable fruits or vegetables if the individual was employed solely during the active processing season, unless certain exceptions applied. 2005 Wisconsin Act 86 repealed this coverage exclusion, and claimants are now eligible to claim UI benefits based upon service processing fresh perishable fruits and vegetables.

The proposed rules will repeal Chapter DWD 145, which specifies the active processing seasons for fresh perishable fruits and vegetables. The proposed rules will also repeal s. DWD 120.02, which requires an employer engaged in the processing of fresh perishable fruits and vegetables to give special notice to any employee who will work during the active processing season that wages earned in processing employment may be excluded in determining his or her eligibility for unemployment insurance.

Section 108.02 (12), Stats., defines “employee” for the purpose of the unemployment insurance program. In order to be eligible to claim benefits, an individual must, in addition to other requirements, be an “employee” under this definition and not be

performing services as an independent contractor. The test for independent contractor status that existed at s. 108.02 (12) (b), 1993-94, Stats., has been renumbered to s. 108.02 (12) (c), Stats., and applies to an individual performing services for a government unit, nonprofit organization, or for any other employing unit in a capacity as a logger or trucker. A new test of independent contractor status that applies in all other cases was created at s. 108.02 (12) (b), Stats.

Chapter DWD 105, on the relationship of carriers and contract operators, and Chapter DWD 107, on employment relationships in the logging industry, have not been updated to reflect the renumbering of s. 108.02 (12) (b), Stats., to s. 108.02 (12) (c), Stats. The proposed rules will update Chapters DWD 105 and 107 to include the correct statutory references.

Summary of factual data and analytical methodologies. The proposed rule contains technical corrections to bring the rule into conformity with statutory changes.

Comparison with federal law and rules in adjacent states. The proposed rule changes are technical corrections. There are no policy changes to compare with federal law or rules in adjacent states.

Effect on small business. The proposed rules will not affect small businesses. The DWD Small Business Regulatory Coordinator is Jennifer Jirschele, (608) 266-1023, jennifer.jirschele@dwd.state.wi.us.

Agency contact person. Carla Breber, UI Disputed Benefits Claims, (608) 266-7564, carla.breber@dwd.state.wi.us.

SECTION 1. DWD 105.03 (2) (intro.) and (3) are amended to read:

DWD 105.03 (2) (intro.) If the department determines that all of the factors under sub. (1) (a) to (h) are present in the relationship between the contract operator and the carrier, the contract operator shall be deemed to be free from the carrier's direction and control in the performance of services under ~~s. 108.02 (12) (b) 1.~~ s. 108.02 (12) (c) 1., Stats. If one or more of the factors under sub. (1) (a) to (h) are not present in the relationship between the contract operator and the carrier, the department shall consider additional factors of the relationship, both under contract and in fact, including whether:

(3) If the contract operator is found to be under the carrier's direction or control under subs. (1) and (2), the contract operator shall be deemed to be an employe of the carrier under ~~s. 108.02 (12) (b) 1.~~ s. 108.02 (12) (c) 1., Stats.

SECTION 2. DWD 105.04 (2) (intro.) and (3) are amended to read:

DWD 105.04 (2) (intro.) If the department determines that all of the factors under sub. (1) (a) to (c) are present in the relationship between the contract operator and the carrier, the contract operator shall be deemed to be performing services in an independently established business in which the contract operator is customarily engaged under ~~s. 108.02 (12) (b) 2.~~ s. 108.02 (12) (c) 2., Stats. If one or more of the factors under sub. (1) (a) to (c) are not present in the relationship between the contract operator and the carrier, the department shall consider additional factors including whether:

(3) If the contract operator is found to be free from the carrier's direction or control but not engaged in an independently established business under subs. (1) and (2), the contract operator shall be deemed to be an employe of the carrier under ~~s. 108.02 (12) (b) 1. and 2.~~ s. 108.02 (12) (c) 1. and 2., Stats. If the contract operator is found to be free

from the carrier's direction or control and engaged in an independently established business, the contract operator shall be deemed to be an independent contractor and not an employe of the carrier under ~~s. 108.02 (12) (b) 1. and 2.~~ s. 108.02 (12) (c) 1. and 2., Stats.

SECTION 3. DWD 107.03 is amended to read:

DWD 107.03 Effect. If a piece cutter or skidding operator has been found, under ss. DWD 107.04 and 107.05, to be free from the direction and control of a logging contractor or forest products manufacturer and to be engaged in an independently established business, the piece cutter or skidding operator is an independent contractor and not an employee of the logging contractor or forest products manufacturer under ~~s. 108.02 (12) (b)~~ s. 108.02 (12) (c), Stats.

SECTION 4. DWD 107.04 (2) (intro.), (3), and (4) are amended to read:

DWD 107.04 (2) (intro.) If the department determines that all of the factors under sub. (1) (a) to (e) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be free from the direction and control of the logging contractor or forest products manufacturer in the performance of services under ~~s. 108.02 (12) (b) 1.~~ s. 108.02 (12) (c) 1., Stats. If one or more of the factors under sub. (1) (a) to (e) are not present, the department shall consider additional factors of the relationship, both under contract and in fact, including whether:

(3) If the department determines that all of the factors under sub. (2) (a) to (d) are present in the relationship between the piece cutter or skidding operator and the logging

contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be free from the direction and control of the logging contractor or forest products manufacturer in the performance of services under ~~s. 108.02 (12) (b) 1.~~ s. 108.02 (12) (c) 1., Stats. If one or more of the factors under sub. (2) (a) to (d) are not present, the piece cutter or skidding operator may be deemed to be free from the direction and control of the logging contractor or forest products manufacturer under ~~s. 108.02 (12) (b) 1.~~ s. 108.02 (12) (c) 1., Stats.

(4) If the piece cutter or skidding operator is found to be under the direction or control of the logging contractor or forest products manufacturer under subs. (1) and (2), the piece cutter or skidding operator shall be deemed to be an employee of the logging contractor or forest products manufacturer under ~~s. 108.02 (12) (b) 1.~~ s. 108.02 (12) (c) 1., Stats.

SECTION 5. DWD 107.05 (2) (intro.) and (3) are amended to read:

DWD 107.05 (2) (intro.) If the department determines that all of the factors under sub. (1) (a) to (f) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be performing services in an independently established business in which the piece cutter or skidding operator is customarily engaged under ~~s. 108.02 (12) (b) 2.~~ s. 108.02 (12) (c) 2., Stats. If one or more of the factors under sub. (1) (a) to (f) are not present in the relationship between the piece cutter or skidding operator and logging contractor or forest products manufacturer, the department shall consider additional factors including whether:

(3) If the department determines that all of the factors under sub. (2) (a) to (e) are present in the relationship between the piece cutter or skidding operator and the logging contractor or forest products manufacturer, the piece cutter or skidding operator shall be deemed to be performing services in an independently established business in which the piece cutter or skidding operator is customarily engaged under ~~s. 108.02 (12) (b) 2.~~ s. 108.02 (12) (c) 2., Stats. If one or more of the factors under sub. (2) (a) to (e) are not present, the piece cutter or skidding operator may be deemed to be performing services in an independently established business in which the piece cutter or skidding operator is customarily engaged under ~~s. 108.02 (12) (b) 2.~~ s. 108.02 (12) (c) 2., Stats.

SECTION 6. DWD 120.02 is repealed.

SECTION 7. DWD 145 is repealed.

SECTION 8. 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.