



**Clearinghouse Rule 10-017**

**State of Wisconsin  
Department of Workforce Development  
Unemployment Insurance Division**

**Unemployment Insurance Rules for Determining a  
Claimant's Ability and Availability for Work**

**Chapter DWD 128**

The Wisconsin Department of Workforce Development proposes an order to repeal ss. DWD 128.01(7); to renumber ss. DWD 128.01(3) (a), (b), (c) and (e); to renumber and amend ss. DWD 128.01(3)(intro.) and (d); to amend s. DWD 128.01(4) (a) (intro.); and to create s. DWD 128.01(3)(b), relating to unemployment insurance rules for determining a claimant's ability to work and availability for work and affecting small businesses.

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**Analysis Prepared by the Department of Workforce Development**

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

**Statutes interpreted:** Sections 108.04 (1) (b) 1., (2) (a) 1., (7) (c), and (8) (e), Stats.

**Related statutes and rules:** Sections 108.04 (2) (a) 2. and 3., and (b), Stats.; Chapters DWD 126 and 127

**Explanation of agency authority.** To be eligible to receive unemployment insurance benefits, an individual must, in addition to other requirements, be "able" to perform suitable work and be "available" for suitable work.

Section 108.04 (2) (a) 1., Stats., provides that a claimant shall be eligible for benefits for any week of total unemployment only if the claimant is able to work and available for work during the week.

Section 108.04 (1) (b) 1., Stats., provides that an employee is ineligible for benefits while the employee is unable to work, or unavailable for work, if his or her employment with an employer was suspended by the employee or by the employer or was terminated by the employer because the employee was unable to do, or unavailable for, suitable work otherwise available with the employer, or if the employee was on a leave of absence, except in certain circumstances.

Section 108.04 (7) (c), Stats., provides that the disqualification for an employee's voluntary termination of work does not apply if the department determines that the employee terminated his or her work but had no reasonable alternative because the employee was unable to do his or

her work, or if the employee terminated his or her work because of the health of a member of his or her immediate family; but if the department determines that the employee is unable to work or unavailable for work, the employee is ineligible to receive benefits while the inability or unavailability continues.

Section 108.04 (8) (e), Stats., provides that if an employee fails to accept suitable work with good cause or return to work with a former employer that recalls the employee with good cause, but the employee is unable to work or unavailable for work, the employee shall be ineligible for the week in which the failure occurred and while the inability or unavailability continues.

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.

**Plain language analysis.** Under the current Chapter DWD 128, a claimant is considered “able” to work if the claimant is able to perform “any” suitable work. Suitable work is defined as work that is reasonable considering the claimant’s training, experience, and duration of unemployment as well as the availability of jobs in the labor market. DWD §100.02 (61). If interpreted literally, this provision would mean that if a claimant can show that there is a single job that exists in the labor market that the claimant can do despite his or her restrictions, the claimant may be considered “able” to work within the meaning of the rule.

Under the current rule, one of the factors applied to determine whether a claimant is “able” to work is “whether the claimant could be qualified to perform other work within the claimant’s restrictions with additional training.” The Department has observed that this factor operates as an exception to ability to work and availability for work to an extent that is inconsistent with the basis for the “able and available” requirements -- attachment to the labor market. The application of this factor may yield results that negate the rule by excusing the claimant’s inability to work and unavailability for work during a period of training that is not “approved training” under the statutory exception to able and available, s. 108.04(16), Stats. The rule contains no limitation on the nature and extent of the training involved and might be read to excuse inability to work in cases in which the training period will be lengthy or open-ended. Deleting the factor contained in section 128.01 (3)(d) will not diminish the exception to the able to work and available for work requirements for weeks during which the claimant is enrolled in approved training under s. 108.04(16), Stats., which serves as an exception to all of the able and available requirements.

The language of the rule requiring that the claimant be “available for work” has been interpreted in a manner that is inconsistent with the intent of the rule. Currently, the rule provides that for a claimant to be “available” for work, the claimant must be available for full-time suitable work (32 hours per week). If a claimant has physical restrictions that limit the number of hours he or she can work to less than full-time work (32 hours per week), the claimant may not be found “available” for work. This result was not intended. Under the rule prior to its last revision, a claimant with a physical or psychological restriction that limited the number of hours the claimant was able to work was considered “available” for work if the claimant was available to work at least the number of hours of work as the claimant was “able” to work.

The Department proposes to amend the test for “able to work” by eliminating the word “any” from the second sentence of DWD 128.01(3). The Department proposes to delete the factor allowing consideration of whether the claimant could be qualified by additional training. These amendments will restore the focus on the factors most relevant to physical restrictions and residual capacity and assure that there is a genuine attachment to the labor market.

The Department proposes that to the extent that a worker has limitations on the number of hours she/he is able to work that are due to physical or psychological restrictions, she/he will not be regarded as unavailable for work if she/he is as available for work as the person is able to work.

The intent of the unemployment statute and rules is that *all* claimants must be able to work and available for work. The current language of DWD 128.01 (7) appears to suggest that a claimant who is partially unemployed *need not meet the “able and available” requirement unless* “there is a definite indication that the claimant is not genuinely interested in working full-time” or the claimant missed work available with a current employer. The Department proposes to repeal this provision to assure that the standard is applied uniformly.

In 2009 Wis. Act 11, the Legislature amended the exception to the quit disqualification that is applied when an individual quits work to care for an ill or disabled family member. sec. 108.04(7)(c), Stats. The amendment was adopted to comply with the requirements for unemployment insurance modernization incentive funds as provided in the Assistance for Unemployed Workers and Struggling Families Act, Title II of Division B of P.L. 111-5, enacted February 17, 2009. The exception no longer requires that the claimant must demonstrate that he or she had “no reasonable alternative” to quitting. A claimant now must demonstrate that the immediate family member has a verified illness or disability that necessitates care for a period of time that is longer than the employer is willing to grant leave. The language in the current rule requires that for a claimant to be considered available for work, a claimant caring for a family member must demonstrate that the condition requires “essential” care that is “uniquely and actually” provided by the claimant. s. DWD 128.04(1)(a)2. The Department is concerned that the words “essential” and “uniquely and actually” may constitute a “no reasonable alternative” standard for availability. Under the current rule, a claimant may quit a job to care for a family member, but could be found unavailable for work on the required shifts because the claimant did not need to provide the care and had other alternatives. This interpretation is contrary to the intent of the statutory amendment. The Department proposes to amend this provision to be consistent with the amended quit exception in sec. 108.04(7)(c), Stats.

These amendments are consistent with the Department’s intent in adopting the revisions to DWD 128 that took effect in April 2008. Those revisions made a very substantial change to Wisconsin’s unique approach to the “able and available” requirements. The intent was to move to a concept more like that found in other states.

**Summary of, and comparison with, existing or proposed federal regulations.** The Department of Labor issued a rule on the able and available requirement on January 16, 2007. The federal rule codified the longstanding interpretation that the Social Security Act and the

Federal Unemployment Tax Act require states to limit payment of unemployment insurance to individuals who are able and available for work. This interpretation had not previously been comprehensively addressed in the federal regulations.

The federal regulation provides that a state may consider an individual to be able to work during the week of unemployment claimed if the individual is able to work for all or portion of the week, provided any limitation on his or her ability to work does not constitute a withdrawal from the labor market.

A state may consider an individual to be available for work during the week of unemployment claimed under any of the following circumstances: (1) the individual is available for any work for all or a portion of the week, provided any limitation does not constitute a withdrawal from the labor market; (2) the individual limits his or her availability to work which is suitable as determined under state law; and (3) the individual is on temporary lay-off and is available to work only for the employer that has temporarily laid-off the individual.

A state may consider an individual available for work if the state finds the individual able to work despite illness or injury.

A state must not deny unemployment benefits to an individual for failure to be available for work if the individual is in approved training. An alien must be legally authorized to work to be considered available for work in the United States.

**Comparison with rules in adjacent states.** Iowa's rules provide that to be able to work an individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation. An individual must be able to work in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available in the labor market where the individual resides. An individual is available for work if he or she is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse. An individual may have shift restrictions if the individual is available for the same shift in which his or her wage credits were earned and the individual has a reasonable expectation of securing employment. If a part-time worker is available to the same degree and to the same extent as when his or her wage credits were earned, the individual meets the availability requirement. An individual is available while serving on jury duty. An individual may not be eligible for benefits if the individual has imposed restrictions that leave the individual with no reasonable expectation of securing employment, including restrictions such as type of work, hours, wages, location, or physical restrictions.

The Illinois rules provide that an individual is able to work when physically and mentally capable of performing work for which the individual is otherwise qualified. The focus for ability to work is on the individual's condition; the employers' willingness to hire is irrelevant. The focus also is on any work the individual is currently qualified for and can perform, and is not limited to the individual's usual or most recent job. The rule provides that the best evidence that an individual is able to work in a particular occupation is that the individual has performed such work. An individual is available for work unless a condition so narrows opportunities that he has no reasonable prospect of securing work. An individual is unavailable if: domestic

circumstances prevent an individual from working during “normal” days and hours in the occupation, the individual demands a wage that is unreasonable, the individual unreasonably restricts the distance the individual is willing to travel to work, or an individual’s personal habits are inconsistent with the type of work the individual is seeking. An individual will not be unavailable for refusing to consider work that would violate sincerely held religious or moral convictions. If the individual is self-employed, availability depends on the nature and extent of the self-employment. Whether a seasonal worker is available during the off-season is determined by whether there is some prospect of obtaining work in the individual’s customary occupation. When an individual appears to be imposing a condition on acceptance of work, it must be established whether this is a preference or an actual condition on availability. The best evidence that an individual is available for work is that the individual readily secures work despite the imposition of a condition.

Michigan and Minnesota do not have rules on ability and availability for work.

**Summary of factual data and analytical methodologies.** The Department prepared preliminary statistics of the experience with DWD 128 from April 2008, when the revised rule became effective, and September 2008. These statistics were presented to the Unemployment Insurance Advisory Council at its meeting on October 2, 2008. Although these reflect experience with the rule over a short period of time, the statistics and the anecdotal experience with adjudicators and decisions from administrative law judges show that decisions finding claimants “able” under the new rule have increased, and there have been decisions denying benefits to claimants who are not “available” for full-time suitable work (32 hours per week) because of physical restrictions that limit the hours they are able to work.

**Analysis used to determine effect on small businesses.** The proposed rule will alter somewhat how the department will determine whether a claimant is able and available for work. The proposed rule does not add or change any requirements for small businesses. There are no reporting, bookkeeping, or other procedures required for compliance with the proposed rule and no professional skills are required of small businesses.

**Effect of rule on small businesses.** The rule will affect small businesses but will not have a significant economic impact on a substantial number of small businesses.

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**Place where comments are to be submitted and deadline for submission.** Comments may be submitted to Tracey Schwalbe, Research Attorney, Unemployment Insurance Bureau of Legal Affairs, Department of Workforce Development, P.O. Box 8942, Madison, WI 53708, or [tracey.schwalbe@wiscosin.gov](mailto:tracey.schwalbe@wiscosin.gov). The comment deadline is March 10, 2010.

**SECTION 1. DWD 128.01 (7) is repealed.**

~~(7) PARTIAL UNEMPLOYMENT. The department may require a claimant who is partially unemployed to comply with the requirements of this chapter if any of the following apply:~~

~~(a) There is a definite indication that the claimant is not genuinely interested in working full-time.~~

~~(b) During any week, the claimant was not able to perform or not available for work available with an employing unit.~~

**SECTION 2. DWD 128.01 (3) is amended as follows:**

(3) ABLE TO WORK. (a) Able to work means that the claimant maintains an attachment to the labor market and has the physical and psychological ability to engage in some substantial gainful employment in-perform suitable work. During any week, a claimant is not able to work if the claimant is unable to perform ~~any~~ suitable work due to a physical or psychological condition. In determining whether the claimant is attached to the labor market and able to perform suitable work, the department shall consider all factors relevant to the circumstances of the case, which may include the following:

~~(e1)~~ The claimant's usual or customary occupation.

~~(e2)~~ The nature of the restrictions caused by the claimant's physical or psychological condition.

~~(e3)~~ Whether the claimant is qualified to perform other work within the claimant's restrictions considering the claimant's education, training, and experience.

~~(e)~~ Whether the claimant could be qualified to perform other work within the claimant's restrictions with additional training.

~~(e4)~~ Occupational information and employment conditions data and reports available to the department showing whether and to what extent the claimant is able, within his or her restrictions, to perform suitable work in his or her labor market area.

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**SECTION 3. DWD 128.01 (4) (a) (intro.) is amended to read:**

(4) AVAILABLE FOR WORK. (a) *Withdrawal from labor market.* Available for work means that the claimant maintains an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market area. An individual who has a physical or psychological restriction and is found able to work under sub. (3) shall not be considered

unavailable for work solely because of inability to work, provided the individual is available for suitable work for the number of hours the individual is able to work. During any week, a claimant is not available for suitable work if he or she has withdrawn from the labor market due to restrictions on his or her availability for work. In determining whether a claimant has withdrawn from the labor market, the department shall consider one or more of the following factors:

Note: **Example 1:** A claimant has a number of physical restrictions due to recent surgery, including a restriction to work no more than 20 hours per week for 2 months. With the restrictions, the claimant cannot perform the duties of his or her usual occupation but is able to perform a number of jobs for which he or she has prior training and experience. The claimant is willing to do these jobs and is willing to work 20 hours per week. The claimant has no other restrictions to availability. Benefits will not be denied solely because of the inability to work full-time.

**Example 2:** A claimant is restricted to working 30 hours per week due to medical problems. The claimant is still able to perform the duties of his or her usual occupation. However, the claimant is unwilling to work more than 20 hours per week because the claimant is receiving Social Security benefits and more than 20 hours of work would reduce those benefits. Benefits will be denied until the claimant is available for 30 hours of work per week.

**SECTION 4. DWD 128.01 (4) (a) 2. is amended to read:**

2. 'Shift and time restrictions.' A claimant is considered to have withdrawn from the labor market if he or she is not available for full-time suitable work during the standard hours in which work is performed in the occupations in which the claimant usually works or has prior training or experience. In determining the standard hours in which work is performed in the occupations, the department shall include the hours and the shift that the claimant worked in an occupation in one or more previous jobs since the start of the claimant's base period. For purposes of this subdivision, a claimant whose availability is restricted by an immediate family member's medical or health condition or other infirmity requiring ~~essential~~ care that is ~~uniquely and actually~~ provided by the claimant is not considered to have withdrawn from the labor market, provided that the claimant remains available for full-time suitable work, regardless of the shift or hours.

**SECTION 5. INITIAL APPLICABILITY.** This rule first applies to weeks of unemployment beginning after the effective date of this rule.

**SECTION 6. 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.

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