

## ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

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1. Type of Estimate and Analysis

Original  Updated  Corrected

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2. Administrative Rule Chapter, Title and Number

DWD 131 – Pre-employment drug testing, substance abuse treatment program and job skills assessment

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3. Subject

Pre-employment drug testing, substance abuse treatment program and job skills assessment

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4. Fund Sources Affected

GPR  FED  PRO  PRS  SEG  SEG-S

5. Chapter 20, Stats. Appropriations Affected

20.445 (1) (aL)

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6. Fiscal Effect of Implementing the Rule

No Fiscal Effect  Increase Existing Revenues  Increase Costs  
 Indeterminate  Decrease Existing Revenues  Could Absorb Within Agency's Budget  
 Decrease Cost

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7. The Rule Will Impact the Following (Check All That Apply)

State's Economy  Specific Businesses/Sectors  
 Local Government Units  Public Utility Rate Payers  
 Small Businesses (if checked, complete Attachment A)

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8. Would Implementation and Compliance Costs Be Greater Than \$20 million?

Yes  No

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9. Policy Problem Addressed by the Rule

This rule implements the requirements specified under Act 55, relating to pre-employment drug testing, substance abuse treatment program and job skills assessment. Act 55 created Wis. Stat. § 108.04 (8) (b), which provides the following:

- There is a rebuttable presumption that an individual failed, without good cause, to accept suitable work if DWD determines, based on a report submitted by an employing unit, that an employing unit required the individual to submit to a test for the presence of controlled substances as a conditional offer of employment and withdrew the conditional offer after the individual declined to submit to the test, or tested positive for one or more controlled substances without providing evidence of a valid prescription for each controlled substance.
- For an individual that declines to submit to a test, the individual shall be ineligible for benefits until the individual qualifies for benefits in accordance with the rules promulgated by DWD.
- For an individual that tests positive for the presence of controlled substances without providing evidence of a valid prescription, the individual shall be ineligible for benefits until the individual qualifies for benefits in accordance with the rules promulgated by DWD or the individual may maintain eligibility for benefits if the individual enrolls in and complies with the requirements of a substance abuse treatment program and completes a job skills assessment.

In addition, Act 55 provides that DWD shall:

- Create and provide a substance abuse treatment program for individuals who engage in the unlawful use controlled substances.
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- Specify criteria that a claimant must satisfy in order to be considered in full compliance with the substance abuse treatment program.
- Create and conduct a job skills assessment for claimants who engage in the unlawful use of controlled substances.
- Identify criteria that an individual must satisfy to be considered in full compliance with the requirements of the job skills assessment.

This rule implements the requirements specified under Act 55 and creates a process for an employing unit to voluntarily submit the positive results of a test conducted on an individual to DWD, if the following requirements are satisfied: the test was required as a condition of an offer of employment; the individual was informed that the results may be submitted to DWD; the test was conducted or confirmed by a laboratory certified by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services; and the individual tested positive for one or more controlled substances without evidence of a valid prescription. DWD is relying on standards enforced by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services to ensure that prescription information is collected and evaluated by the laboratory and presented in the laboratory report. In addition, the rule identifies the process by which the employing unit may report the positive results of a test to DWD.

An employing unit may voluntarily notify DWD that an individual declined to submit to a test for the presence of controlled substances as a condition of an offer of employment and the individual was informed before testing, that the employing unit may notify DWD if the individual declined to submit to the test.

When an employing unit submits a report showing a failed or refused pre-employment drug test, DWD shall determine whether the individual who failed or refused the test is receiving unemployment insurance benefits. If DWD determines that the individual is receiving unemployment insurance benefits, there is a rebuttable presumption that the individual failed to accept suitable work. This rule provides the individual may overcome the presumption by proving certain facts by a preponderance of the evidence.

Under this rule, an individual that fails a pre-employment drug test without presenting evidence of a valid prescription or declines to submit to a test is ineligible for benefits until the individual earns wages of at least 6 times the individual's weekly benefit rate beginning after the week in which the individual tests positive or declines to submit to the test.

An individual that tests positive for controlled substances without presenting evidence of a valid prescription may maintain benefit eligibility by enrolling in and complying with a substance abuse treatment program, and completing a job skills assessment.

This rule also identifies the parameters for a substance abuse treatment program for individuals that test positive for the presence of one or more controlled substances (without a valid prescription). In addition, this rule does all of the following:

- Requires an individual to schedule an assessment with a substance abuse treatment provider within 5 working days as directed by DWD.

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- Requires an individual to comply with all conditions of a treatment plan developed by a substance abuse treatment provider.
- Specifies that the substance abuse treatment provider will determine if an individual is in compliance with the substance abuse treatment program requirements, and inform DWD on a weekly basis of the individual's compliance.
- Provides that DWD will pay the reasonable costs associated with the substance abuse treatment plan requirements for each week that the individual is otherwise eligible for unemployment insurance benefits under Chapter 108.
- Requires an individual to complete a job skills assessment as directed by DWD.

The substance abuse treatment and job skills assessment provisions under this chapter only apply to circumstances of pre-employment drug testing.

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10. Summary of the businesses, business sectors, associations representing business, local governmental units, and individuals that may be affected by the proposed rule that were contacted for comments.

The Unemployment Insurance Advisory Council, whose members represent businesses and labor groups, were contacted for comments. The Unemployment Insurance Advisory Council unanimously approved the final draft rule on September 15, 2016.

The proposed rule was also posted for economic comments for 14 days and none were received.

DWD held one public hearing in Madison, WI on July 7, 2016. No one provided oral testimony at the hearing.

One person, Genie Ogden, submitted written comments on the rule. Ms. Ogden's comments do not provide specific feedback on the text of the rule, but suggest that the rule should not be implemented due to the cost to the state. Ms. Ogden also disagrees with requiring individuals to be drug tested as a condition for receiving unemployment benefits. In response to Ms. Ogden's comments, DWD is required by statute to promulgate a rule on pre-employment drug testing, substance abuse treatment program and job skills assessment. In addition, this rule does not permit DWD to test individuals as a condition of receiving unemployment insurance benefits.

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11. Identify the local governmental units that participated in the development of this EIA.

No local governmental units participated in the development of this EIA.

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12. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred)

The rule's economic and fiscal impact on businesses and the state's economy is that it will potentially result in fewer people using controlled substances. The use of controlled substances causes a financial burden on the economy because drug users are unable to work in certain occupations when they fail employers' drug tests.

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13. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule

The benefits of implementing the rule are that people who use controlled substances may receive state-funded drug treatment and a job skills assessment.

The policy alternative is to do nothing. If DWD does not promulgate the proposed rule, DWD's administrative rules will be inconsistent with statutory requirements.

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14. Long Range Implications of Implementing the Rule

Indeterminate.

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15. Compare With Approaches Being Used by Federal Government

No existing or proposed federal statutes or regulations relate to voluntary reporting of pre-employment drug testing results to states for the purpose of determining unemployment insurance benefit eligibility.

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16. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

Michigan law previously provided that an individual would be disqualified from receiving unemployment insurance benefits if an employer withdrew a conditional offer of employment after the individual failed or refused to take a pre-employment drug test. Mich. Comp. Laws Ann. § 421.29(1)(e). The failed or refused pre-employment drug test would be considered a failure to accept suitable work. Michigan law did not provide drug treatment as an option for claimants to maintain benefit eligibility. Michigan's law was in effect from October 29, 2013 until October 29, 2014.

DWD is not aware of any unemployment insurance disqualification for a failed pre-employment drug test in Illinois, Minnesota or Iowa.

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17. Contact Name

Janell Knutson

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18. Contact Phone Number

608-266-1639

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**ATTACHMENT A**

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1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

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2. Summary of the data sources used to measure the Rule's impact on Small Businesses

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3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
  - Less Stringent Schedules or Deadlines for Compliance or Reporting
  - Consolidation or Simplification of Reporting Requirements
  - Establishment of performance standards in lieu of Design or Operational Standards
  - Exemption of Small Businesses from some or all requirements
  - Other, describe:
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4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

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5. Describe the Rule's Enforcement Provisions

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6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes     No
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