

Report From Agency

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

IN THE MATTER OF RULEMAKING PROCEEDINGS BEFORE THE LABOR AND INDUSTRY REVIEW COMMISSION	PROPOSED ORDER OF LABOR AND INDUSTRY REVIEW COMMISSION ADOPTING RULES (CLEARINGHOUSE RULE 21-105)
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Report from agency under Wis. Stat. § 227.19(2) and (3)

1. The proposed rule and rule analysis:

The final draft of the Labor and Industry Review Commission's (commission) proposed rule, including the analysis and text, is attached (attachment A).

2. Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis is attached (attachment B).

The commission believes that the proposed rule order will not have an economic impact on the state's economy, local governmental units, specific businesses/sectors, public utility rate payers, or small businesses.

3. Copy of the Rules Clearinghouse Report:

A copy of the Rules Clearinghouse report is attached (attachment C).

4. Detailed statement explaining the basis and purpose of the proposed rule, including how the proposed rule advances relevant statutory goals or purposes:

The basis for the proposed rule order is the commission's statutory authority for promulgating and modifying its rules of procedure under Wis. Stat. § 103.04(2). The goal and purpose of the proposed rule order is to eliminate current rules that are duplicative of statutory provisions under Wis. Stat. § 227.29, to simplify the commission's procedural rules by combining them into a single chapter, to update addresses, phone numbers, and web addresses that have changed since the rule was last modified in 2006, and to make other minor changes to reflect statutory changes occurring since 2006.

In LIRC 1, the general operating rules for the commission, the proposed rule order is revised to reflect statutory changes giving the commission jurisdiction for review in worker classification compliance cases under Wis. Stat. § 103.06(6)(c) (enacted by 2009 Wis. Act 292), cases involving false statements made with respect to an unemployment insurance claim to obtain

benefits payable to another person under Wis. Stat. § 108.095(6) (enacted by 1999 Wisconsin Act 15), and cases involving certain local government duty disability benefits under Wis. Stat. § 59.88 and 62.624 (2015 Wis. Act 55, Sections 1923p and 1948L). The proposed rule also adds definitions to be used generally in the rules. In recognition of the fact that unemployment insurance decisions are subject to time lapse standards, the proposed rule shortens the time period for filing an answer to a petition from 21 to 14 days. The proposed rule also makes a number of stylistic changes to improve clarity and conform to current rule drafting practices.

The proposed rule merges LIRC 2, regarding procedural rules for filing petitions for commission review of unemployment insurance appeal tribunal decisions, with LIRC 1. The proposed rule reflects statutory changes providing that petitions may no longer be filed with the Department of Workforce Development (Wis. Stat. § 108.09(6), as affected by 2015 Wis. Act 334, Section 50). The proposed rule also reflects current LIRC practice which permits the filing of petitions for review in unemployment insurance and worker classification compliance cases in several ways including by mail, by fax, in person at the commission's office, or online at the commission's website. The rule is further revised to reflect the fact that the provisions contained in LIRC 2 also pertain to review of appeal tribunal decisions regarding worker classification compliance, pursuant to Wis. Stat. § 103.06(6)(c). The revised rule also deletes the provisions relating to judicial review that restate statutory provisions regarding appealing commission decisions to circuit court and are therefore redundant, except with respect to a provision allowing service of pleadings in actions for judicial review on the commission by mail, which is retained.

The proposed rule merges LIRC 3, regarding procedural rules for filing petitions for commission review of worker's compensation cases, with LIRC 1. The proposed rule updates the location at which petitions for commission review in worker's compensation cases may be filed to reflect statutory changes permitting petitions to be filed with the commission, the Division of Hearings and Appeals of the Department of Administration, or the Department of Workforce Development (see Wis. Stat. § 102.18(3), as affected by 2015 Wis. Act 55, Section 2831d) and clarifies that petitions may be filed in several ways including by mail, by fax, in person, or online at the commission's website. The proposed rule also provides for the remand of compromises to the Division of Hearings and Appeals to reflect amendments to Wis. Stat. §§ 102.18 (4)(d) by Wis. Act. 55, Sections 2843d, and 2847d. The revised rule also deletes the provisions relating to judicial review that restate statutory provisions regarding appealing commission decisions to circuit court and are therefore redundant, except with respect to provisions allowing service of pleadings in actions for judicial review on the commission by mail, which is retained.

The proposed rule merges LIRC 4, regarding procedural rules for filing petitions for commission review of equal rights administrative law judge decisions, with LIRC 1. The revised rule also deletes the provisions relating to judicial review that restate statutory provisions regarding appealing commission decisions to circuit court and are therefore redundant.

5. Summary of public comments and the commission's responses; explanation of modifications to proposed rules prompted by public comments:

On December 9, 2021, the commission distributed copies of its proposed rule order to the director of legal affairs in the Unemployment Division in the Department of Workforce Development, the director of legal services in the Worker's Compensation Division in the Department of Workforce Development, the director of the Office of Worker's Compensation Hearings in the Division of Hearings and Appeals, and the administrator of the Equal Rights Division in the Department of Workforce Development, for distribution to the appropriate advisory councils and staff members. Except as set out below, no comments have been received.

On December 15, 2021, the commission received a public comment that suggested:

1. Modifying the proposed rule order to add references to Wis. Stat. § 108.095(6), which provides for commission review in cases involving false statements made with respect to an unemployment insurance to obtain benefits payable to another person, to the list of statutory sections under which the commission has jurisdiction in LIRC 1.02 (Section 2 of the proposed rule order) and to the definition of "unemployment insurance case" in LIRC 1.015 (6) (Section 5 of the proposed rule order).
2. Modifying Section 14 of the proposed rule order, which as originally proposed would have amended LIRC 1.051 (as renumbered) to provide that the commission need not consider an answer filed after the commission has reached a decision in a case, to instead provide a shortened 14-day period to file an answer.

The commission modified the proposed rule order to make both changes.

On January 22, 2022, the commission presented the proposed rule order to the Unemployment Insurance Advisory Council at one of its scheduled meetings, but received no comments or questions from council members.

On January 26, 2022, the commission held a public hearing and received comments from James O'Malley, Director of Legal Services, Department of Workforce Development, Worker's Compensation Division. Mr. O'Malley later summarized his comments in an email which is attached (attachment D). His comments were:

1. A request to modify proposed LIRC 1.025 (1m) (c) 3. in section 7 of the proposed rule order to use the Worker's Compensation Division's "litigated" fax number, (608) 260-3053, as the number for filing a petition for review in worker's compensation cases with the Department of Workforce Development by facsimile transmission.
2. A request to modify proposed LIRC 1.13 (renumbered from current LIRC 2.04) which deals with the remand of cases when compromise settlements in worker's compensation cases are received while pending on appeal at the commission or in court. Section 21 of the proposed rule order amends LIRC 1.13 to include a reference to the Division of Hearings and Appeals, a change made necessary by the amendment of Wis. Stat. §§ 102.18 (1) (d) and 102.24 (2) (d) by 2015 Wis. Act 55. The language in the proposed rule order states that when compromises are received in cases pending on appeal, the commission

shall remand the case to the Division of Hearings and Appeals or the Department of Workforce Development, as appropriate, for consideration of the compromise.

Mr. O'Malley suggested the "as appropriate" language could be made clearer by specifying that such cases be remanded to the agency—the Department of Workforce Development or the Division of Hearings and Appeals—that issued the order that was appealed.

The commission considered Mr. O'Malley's suggested changes. The rule order has been modified to make Mr. O'Malley's first suggested change. Regarding the second, the commission decided instead to delete the words "as appropriate" which the rule order proposed to add to LIRC 1.13 by amendment. Those words do not appear in Wis. Stat. §§ 102.18 (1) (d) and 102.24 (4), leading to the commission's concern that added wording might constitute a substantive change exceeding the commission's general rule-making authority under Wis. Stat. § 103.04 (2), which is limited to rules governing its procedure.

6. List of persons who appeared or registered for or against the proposed rule at the public hearing:

The following person was appeared at the public hearing by videoconferencing and offered the comments discussed in section 5 above:

James T. O'Malley, Director of Legal Services, Department of Workforce Development, Worker's Compensation Division

The following person was present at the public hearing by videoconferencing but did not comment:

Andrew J. Rubsam, Department of Workforce Development, Unemployment Insurance Division

7. Changes to the rule summary or fiscal estimate

The fiscal estimate has not changed.

The rule summary was changed to reflect the minor modifications made in light of the public comment described in section 5 above.

8. Response to Legislative Council Rules Clearinghouse staff recommendations:

The commission took the following actions based on Rules Clearinghouse recommendations:

2. Form, Style and Placement in Administrative Code

- a. Accepted proposed change.
- b. Accepted proposed change.
- c. Accepted proposed change.

- d. Did not accept proposed change, as the commission believed it would result in adding 5 sections to the rule order in order to comply with Administrative Rules Procedure Manual, Section 1.03(2)(c)2.
- e. The proposed change was rendered moot by a change in the rule order which shortened the period for filing an answer from 21 to 14 days. See first paragraph of section 7 above.
- f. Accepted proposed change.
- g. Accepted alternative proposed change, which the commission felt was more consistent with the current process for providing hearing records to the commission for review.

9. Additional information:

No additional information is required to be submitted under Wis. Stat. § 227.19 (3) (e) to (h) because the proposed rule will not have an effect on small business, no energy impact report was required under Wis. Stat. § 227.117 (2), no housing report was required under Wis. Stat. § 227.115, and the Small Business Regulatory Review Board did not prepare a report on this rule proposal under Wis. Stat. § 227.14 (2g).

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