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Clearinghouse Rule 22-072

**ORDER OF THE WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT**

The Wisconsin Department of Workforce Development (Department) adopts the following rule *to amend* DWD 80.02 (2) (intro.), (c) and (d), 80.49 (5) (a) 2., and 80.51 (4) and *to create* DWD 80.02 (2) (cm) and (dm) and 80.51 (5), relating to worker's compensation computation of the weekly wage for part-time employees.

The statement of scope for this rule, SS 042-22, was approved by the Governor on May 12, 2022, published in the Wisconsin Administrative Register No. 797A3 on May 16, 2022, and approved by the Secretary of the Department of Workforce Development on May 26, 2022. This rule has the same purpose as emergency rule EmR2212, which the Department promulgated based on the same statement of scope.

Analysis Prepared by the Department of Workforce Development

Statutes interpreted

Section 102.11 (1), Stats.

Statutory authority

Sections 102.11 (1), 102.15 (1) (a), and 103.005 (1), Stats.

Explanation of statutory authority

Section 102.15 (1) (a), Stats., grants the Department the specific authority to promulgate rules as necessary to carry out its duties and functions under ch. 102, Stats. Section 103.005 (1), Stats., grants the Department the general authority to adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings.

Related statutes or rules

EmR2212.

Plain language analysis

Under the previous law, the general rule was that the weekly wage for an employee who was injured while working at part-time employment was set on the basis of normal full-time employment in such a job. A part-time employee who worked as part of a class of other part-time employees had the weekly

wage expanded to 24 hours per week. A part-time employee who restricted availability in the labor market to part-time work and was not employed elsewhere was paid worker's compensation benefits based on the average weekly wage of the part-time employment. The Department's current rules cover these part-time employment scenarios.

The new law in 2021 Wisconsin Act 232 repealed s. 102.11 (am) and (f) 1., Stats, which eliminated wage expansion to a 24-hour minimum workweek for a part-time employee working as part of a class of other part-time employees.

With the new law's creation of s. 102.11 (1) (ap), Stats., the average weekly wage for a part-time employee will be calculated as the greater of the following alternatives: 1) the actual average weekly earnings of the employee for the 52 calendar weeks before the injury, or 2) the employee's hourly earnings on the date of injury multiplied by the average number of hours worked in the 52 weeks before the injury. Weeks in which no work was performed are not considered under both alternatives.

Under the new law, a part-time employee's wage will only be expanded when the employee is employed by another employer at the time of injury, or if the employee was employed at part-time employment less than 12 months before the injury. Wage expansion for part-time employees may be rebutted when there is a signed statement from the employee verifying the employee is restricting his or her employment to part-time, an employment application indicating an hour or shift preference, or other evidence to establish the employee chose to restrict employment to part-time.

The Department promulgated EmR2212 to implement the statutory changes contained in 2021 Wisconsin Act 232 that amended s. 102.11 (1), Stats. This proposed permanent rule accomplishes the same purpose as EmR2212.

Summary of, and comparison with, existing or proposed federal regulations

Employees of the Federal government who sustain work-related injuries are covered under the Federal Employees' Compensation Act (FECA), 5 USC 8101 et seq. The FECA uses a different statutory method for calculating benefit rates for employees including part-time employees. Generally, under the FECA benefit rates are based on 66 2/3% of the monthly pay of an employee who has no eligible dependent or 75% of the monthly pay of an employee who has an eligible dependent, subject to specified minimum and maximum amounts.

Summary of comments on the statement of scope and description of how the comments were taken into account in drafting the rule

A preliminary hearing on the statement of scope for both the emergency and permanent rules, SS 042-22, was held on May 16, 2022. There were no comments received at the preliminary hearing or submitted in writing following the preliminary hearing.

Comparison with rules in adjacent states

Illinois, Iowa, Michigan, and Minnesota do not have existing administrative rules pertaining to worker's compensation computation of the weekly wage for part-time employees.

Summary of factual data and analytical methodologies

The new law contained in 2021 Wisconsin Act 232 that amended s. 102.11 (1), Stats., for calculating the wage for part-time employees for purposes of worker's compensation cannot be administered with the language contained in the current rule.

Analysis and supporting documents used to determine effect on small business or in preparation of an economic impact analysis

The proposed emergency and permanent rules are intended to implement the new law for calculating the weekly wage for part-time employees for purposes of worker's compensation benefits and will have no negative net impact on business.

Fiscal Estimate

The Fiscal Estimate is attached.

Effect on small business

The proposed emergency and permanent rules do not have an economic impact on small business, as defined in s. 227.114 (1), Stats.

Agency contact person

Questions and comments related to this rule may be directed to:

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Worker's Compensation Division
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P. O. Box 7901
Madison, WI 53707-7901
Telephone: (608) 267-6704
E-mail: Jim.OMalley@dwd.wisconsin.gov

Place where comments are to be submitted and deadline for submission

Mark Kunkel, Rules and Records Coordinator
Department of Workforce Development
P.O. Box 7946
Madison, WI 53707
E-Mail: DWDAdminRules@dwd.wisconsin.gov

Comments may be submitted to the contact information listed above no later than a date to be determined. The date, time and place of the public hearing will be published in the Wisconsin Administrative Register.

Text of Rule

1 **SECTION 1.** DWD 80.02 (2) (intro.) is amended to read:

2 DWD 80.02 (2) (intro.) Except as provided in sub. (3m), for injuries under sub. (1) (a)
3 self-insured employers and insurance companies shall submit all of the following ~~reports~~ to the
4 department:

5 **SECTION 2.** DWD 80.02 (2) (c) is amended to read:

6 DWD 80.02 (2) (c) ~~The~~ For injuries occurring before April 10, 2022, the wage information
7 required by form WKC-13-A if the wage is less than the maximum wage as defined by s. 102.11 (1),
8 Stats. The WKC-13 required in par. (b) and the WKC-13-A shall be submitted together, except that if
9 the wage information required by form WKC-13-A is not available at the time the WKC-13 is
10 submitted, the insurance carrier or self-insured employer shall estimate on the WKC-13 the date by
11 which the WKC-13-A will be submitted.

12 **SECTION 3.** DWD 80.02 (2) (cm) is created to read:

13 DWD 80.02 (2) (cm) For injuries occurring on or after April 10, 2022, the wage information
14 required by the form WKC-13-A1 if the wage is less than the maximum wage as defined by s. 102.11 (1),
15 Stats. The WKC-13 required in par. (b) and the WKC-13-A1 shall be submitted together, except that if
16 the wage information required by form WKC-13-A1 is not available at the time the WKC-13 is
17 submitted, the insurance carrier or self-insured employer shall estimate on the WKC-13 the date on which
18 the WKC-13-A1 will be submitted.

19 **SECTION 4.** DWD 80.02 (2) (d) is amended to read:

20 DWD 80.02 (2) (d) ~~For injuries occurring before April 10, 2022, if~~ applicable, a signed
21 statement from the employee verifying that the employee restricts his or her availability on the labor
22 market to part-time employment, and is not actively employed elsewhere. The employee's self-restriction
23 statement shall accompany the WKC-13-A, but no statement is required if the employee is under the age
24 of 16.

1 **SECTION 5.** DWD 80.02 (2) (dm) is created to read:

2 DWD 80.02 (2) (dm) For injuries occurring on or after April 10, 2022, if applicable, a signed
3 statement from the employee verifying that the employee restricts his or her availability to part-time
4 employment, an employment application indicating an hour or shift preference, or other evidence to
5 establish the employee chose to work less than full-time. The employee's self-restriction statement,
6 employment application, or other evidence to establish the employee chose to work less than full-time
7 shall accompany the WKC-13-A1.

8 **SECTION 6.** DWD 80.49 (5) (a) 2. is amended to read:

9 DWD 80.49 (5) (a) 2. The employee's average weekly wage is calculated pursuant to the part-
10 time wage rules in s. 102.11 (1) (f), Stats., or s. DWD 80.51 (4) or (5) and the employee's average weekly
11 wage for compensation purposes exceeds the gross average weekly wages of the part-time employment.

12 **SECTION 7.** DWD 80.51 (4) is amended to read:

13 DWD 80.51 (4) The 24-hour minimum workweek under s. 102.11 (1) (f) 1, 2019 Stats., does not
14 apply to a part-time employee unless the employee is a member of a regularly scheduled class of
15 part-time employees. In all other cases part-time employment is on the basis of normal full-time
16 employment in such job. However, this subsection does not apply to part-time employees ~~defined~~
17 described in s. 102.11 (1) (f), Stats., who restrict availability on the labor market. As to the employees so
18 defined, those wages will be expanded to the normal part-time or full-time wages unless the employer or
19 insurance company complies with s. DWD 80.02 (2) (d). This subsection does not apply to employees
20 who are injured on or after April 10, 2022.

21 **SECTION 8.** DWD 80.51 (5) is created to read:

22 DWD 80.51 (5) Computation of the weekly wage for an employee who is injured while employed
23 at part-time employment shall be made pursuant to s. 102.11 (1) (ap), Stats. This subsection applies to
24 employees who are injured on and or after April 10, 2022.

25 **SECTION 9. EFFECTIVE DATE.** This rule takes effect on the first day of the month following publication
26 in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

Signed this ____ day of _____, 2022.

Amy Pechacek, Secretary-designee