

STATEMENT OF SCOPE

Department of Administration

Rule No.: ER 10; ER 18

Relating to: Limited Term Appointments; Absences

Rule Type: Emergency

1. Finding/nature of emergency (Emergency Rule only):

The Department of Administration, Division of Personnel Management (DPM) seeks to modify provisions in Chapters ER 10 and ER 18 in order to provide necessary leave options for employees who need to be out of work in order to suppress and control the spread of the infectious coronavirus disease ("COVID-19") or to care for children while schools are closed and other child care providers are unavailable.

DPM has determined that modifying its rules to allow paid time off for LTEs and to relax restrictions on the use of accrued sick leave during the COVID-19 global pandemic is necessary to protect the public health, safety and welfare. If LTEs are forced to choose between following state public health guidance related to COVID-19 and losing their next paycheck, many will have no choice but to put themselves and their communities at risk by continuing to come to work in those circumstances. If parents who have sick leave available are unable to use that leave to stay home to care for their children while schools and childcare facilities are closed, they may be forced to eventually take leave without pay, which could jeopardize the health and safety of these employees and their families. In order to effectively encourage employees to comply with all applicable guidance from the Wisconsin Department of Health Services and the CDC, immediate modification of provisions of this administrative rule are necessary.

Similar policies are already in place due to the Governor's suspension of provisions of chs. ER 10 and ER 18 under the authority of Executive Order #72. However, because the impacts of the COVID-19 pandemic are likely to remain beyond the expiration of the emergency declaration, revising chs. ER 10 and ER 18 through the emergency rulemaking process is necessary to protect the health, safety, and welfare of state employees as described above.

2. Detailed description of the objective of the proposed rule:

ER 10

Currently, ch. ER 10 prohibits LTEs from receiving pay except for "actual hours worked." The emergency rule will create a new limited exception that allows state agencies to approve LTEs to stay home without loss of pay where the employee's continued presence at the worksite compromises the safety or security of the employee, other persons, the public or the worksite. For the exception to apply, the reason for absence must specifically be related to the COVID-19 global pandemic.

ER 18

Currently, ch. ER 18 limits the authorization for employees to use accrued sick leave to care for immediate family members only when the family member is ill or injured and in need of emergency
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medical care. Additionally, prior approval is currently required for any use beyond 5 working days. The emergency rule will create a new limited exception that allows employees to use sick leave for the care of individuals who require the employee's general care, regardless of whether they are sick or not. The emergency rule will also create a limited exception to the requirement for "prior approval" to use sick leave longer than 5 working days. For the exceptions to apply, the reason for care must specifically be related to the COVID-19 global pandemic.

3. Description of the existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

The new policies which will be proposed in the rules will establish limitations similar to those that are currently in effect and published in DPM policy bulletins DPM-0518-CC/POL and DPM-0520-CC/POL due to the suspension of the current administrative code provisions, with approval of the Governor, for the duration of the public health emergency declared by the Governor in Executive Order #72. These policy bulletins are published online at <https://dpm.wi.gov/Bulletins/DPM-0518-CC-POL.pdf> and <https://dpm.wi.gov/Bulletins/DPM-0520-CC-POL.pdf>.

4. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Section 227.11(2)(a), Wis. Stats., reads: (2) Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Section 230.04 (1), Stats., reads: (1) The administrator is charged with the effective administration of this chapter. All powers and duties, necessary to that end, which are not exclusively vested by statute in the commission, the division of equal rights, the director or appointing authorities, are reserved to the administrator.

Section 230.04 (5), Stats., reads: (5) The administrator shall promulgate rules on all matters relating to the administration of the division and the performance of the duties assigned to the administrator, except on matters relating to those provisions of subch. II for which responsibility is specifically charged to the director.

Section 230.35 (2), Stats, reads in part: (2) Leave of absence with pay owing to sickness and leave of absence without pay, other than annual leave and leave under s. 103.10, shall be regulated by the rules of the administrator, except that unused sick leave shall accumulate from year to year.”

5. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The estimated time to be spent by state employees is 20 hours.

6. List with description of all entities that may be affected by the proposed rule:

The rule revisions will affect state employees covered by the rules, and agencies and appointing authorities who implement and/or make decisions based on them.

7. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

The Families First Coronavirus Response Act (FFCRA) provided federal Emergency Paid Sick Leave (EPSL) and Expanded FMLA leave (EFMLA) for state employees beginning April 1, 2020. These leave provisions are in addition to any leave programs offered by the state. The emergency rules being proposed are intended to work in conjunction with these federal leave provisions and to provide coverage where gaps in the federal leave may occur.

8. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

These rule revisions are not likely to have a significant economic impact on small businesses. The economic impact of these proposed rule revisions will be dependent on the actual usage by state employees.

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