

# **STATEMENT OF SCOPE**

## **Department of Workforce Development**

### **Rule No.**

Chapters DWD 272 and 274

### **Relating to**

Minimum Wage and Hours of Work and Overtime

### **Rule Type**

Permanent

### **Detailed Description of the Objective of the Proposed Rule**

The proposed permanent rule will modify ch. DWD 272 relating to minimum wages to implement various statutory updates from the past several years and to clarify the Department's longstanding interpretation of several sections of the law.

The proposed permanent rule will also modify ch. DWD 274 relating to hours of work and overtime to conform to state statutes and to clarify the Department's longstanding interpretation of several sections of the law.

### **Description of Existing Policies Relevant to the Rule, New Policies Proposed to be Included in the Rule, and an Analysis of Policy Alternatives**

#### **Outdated definitions**

Definitions under s. DWD 272.01 for "minor employee," "opportunity employee," and "tipped employee" are outdated. The proposed rule will update these definitions or eliminate them if unnecessary under current law.

Under s. DWD 272.09 the definitions "institution," "IWRP," "sheltered workshop," "student learner," and "worker with a disability" are outdated. In addition, the language under this section references the terms "mentally ill," "mental illness, and "mental infirmity." The proposed rule will update these definitions and modernize the language to remove outdated references. The proposed rule will also revise the definition of "worker with a disability" so that it is consistent with the statutory definition.

#### **Updates to conform with statutory changes**

2015 Wis. Act 55 modified ch. 104, Stats., to change references to a "living wage" to a "minimum wage." Further, it placed minimum wage rates in the statute and removed the Department's authority to modify rates by administrative rule. Chapter DWD 272 must be modified to conform with these changes. Rates will be removed from the chapter since they are now in statute. The policy declaration and definitions will be updated to ensure conformity with the statute.

Act 55 further required the Department to promulgate rules governing the counting of tips or similar gratuities toward minimum wage. Additionally, 2021 Wis. Act 26 requires the Department to modify ch.

DWD 272 to allow an employer to require tipped employees to sign electronically or otherwise acknowledge electronically, the counting of tips to fulfill the employer's requirement to pay minimum wage.

Currently, ch. DWD 272 requires employers to keep time records for specified exempt employees. 2013 Wis. Act 286 updated s. 104.09, Stats., to clarify that employers are not required to keep a record of the hours worked by an employee not paid on an hourly basis who is exempt from the overtime requirements of s. 103.02, Stats. The proposed rule will revise ch. DWD 272 to conform to the statute.

#### **Clarification of certain provisions to conform to longstanding interpretation**

The proposed rule will update s. DWD 272.12 to clarify interpretations of hours worked provisions.

The proposed rule will update rules in ch. DWD 272 that are related to special minimum wage licenses under section 104.07, Stats., in order to clarify Department interpretations.

The proposed rule will create a rule about the use of direct deposit or payroll debit cards for an employee's paycheck and an employee having electronic access to pay stubs. The proposed rule will allow these payroll practices as long as the services are available to employees at no additional cost.

The proposed rule will eliminate irrelevant sections of ch. DWD 272 and correct typographical errors.

#### **Update of rules related to subminimum wage licensing and sheltered workshops**

The proposed rule will update s. DWD 272.09 to clarify and modernize these provisions given changes in federal laws, including the federal Workforce Innovation and Opportunity Act (WIOA).

#### **Determining applicability of overtime requirements**

The proposed rule will incorporate standards required under regulations interpreting the federal Fair Labor Standards Act (FLSA) for determining the applicability of overtime requirements to an employee compensated on a salary basis and will define the term "salary." These changes will also comport with longstanding Department interpretation.

The proposed rule will also do all of the following:

- Clarify how the "white collar" exemptions found at section DWD 274.04(1) differ from federal exemptions.
- Increase the salary minimums for the "white collar" exemptions.
- Clarify the applicability of ch. DWD 274 to nonprofit organizations.
- Eliminate state overtime exemptions for employees of motion picture theaters and taxi cabs.
- Eliminate the exemption related to "trip delivery."
- Allow hourly paid attorneys to meet the exemption, as they do under federal law.

#### **Update of overtime rule given age of current rule**

With respect to ch. DWD 274, which has not been updated since the 1970s, the Department will update and modernize the chapter's archaic language.

The proposed rule will also correct obvious typographical errors in ch. DWD 274.

### **Policy alternatives**

The policy alternative is to do nothing, which would leave unchanged rules in chs. DWD 272 and 274 that are inconsistent with changes to federal and state statutes, do not conform to longstanding Department interpretations, and contain outdated and archaic language and typographical errors. Also, rules in ch. DWD 272 would continue to fail to address direct deposit, payroll debit cards, and electronic access to paystubs.

### **Detailed Explanation of Statutory Authority for the Rule (Including the Statutory Citation and Language)**

*Section 104.035(7) and (8), Stats.*, provide:

"(7) MINIMUM WAGE ESTABLISHED BY DEPARTMENT. The department shall promulgate rules providing the minimum wage for all of the following:

- (a) An employee or worker with a disability covered under s. 104.07.
- (b) A student learner.
- (c) A student employed by an independent college or university for less than 20 hours per week.

(8) EMPLOYMENT EXEMPTED BY DEPARTMENT. The department shall promulgate rules exempting from the minimum wage requirements under subs. (1) to (7) all of the following:

- (a) A person engaged in casual employment in and around an employer's home on an irregular or intermittent basis for not more than 15 hours per week.
- (b) A person who resides in the home of an employer who, due to advanced age or physical or mental disability, cannot care for his or her own needs, for the purpose of companionship and who spends not more than 15 hours per week on general household work for the employer.
- (c) An elementary or secondary school student performing student work-like activities in the student's school."

*Section 104.045, Stats.*, provides:

"104.045 Tips, meals, lodging, and hours worked. The department shall promulgate rules governing all of the following:

- (1) The counting of tips or similar gratuities toward fulfillment of the employer's obligation under this under s. 104.035 (3). The rules promulgated under this subsection shall allow an employer to require a tipped employee to use an electronic signature or other electronic means that uniquely identifies the employee to acknowledge the counting of tips or similar gratuities for purposes of s. 104.035 (3). In this subsection, "electronic signature" has the meaning given in s. 137.11 (8).
- (2) The deduction of meals or lodging provided by an employer to an employee from the employer's obligation under this chapter.
- (3) The determination of hours worked by an employee during which the employee is entitled to the minimum wage established under s. 104.035."

*Section 104.07 (1) and (2), Stats.*, provide:

"104.07 Rules; license to employ; student learners; sheltered workshops. (1) The department shall promulgate rules, and, except as provided under subs. (5), (6), and (7), grant a license to any employer who employs any employee for whom the minimum wage established under s. 104.035 is not commensurate with the employee's ability. Each license so granted shall establish a wage for any such employee of the licensee.

(2) The department shall promulgate rules, and, except as provided under subs. (5), (6), and (7), grant a license to a sheltered workshop, to permit the employment of workers with disabilities at a wage that is commensurate with their ability and productivity. A license granted to a sheltered workshop under this subsection may be issued for the entire workshop or a department of the workshop."

*Section 103.005 (1), Stats.* provides:

"The department shall 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."

**Estimate of Amount of Time that State Employees Will Spend Developing the Rule and of Other Resources Necessary to Develop the Rule**

The total amount of staff time is estimated to be 120 hours.

**List with Description of All Entities that May Be Affected by the Proposed Rule**

The proposed permanent rule will affect employers, employees, and organizations who are subject to minimum wage and hours of work and overtime requirements.

**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 FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments. There are no federal regulations related to direct deposit, payroll debit cards or access to employee paystubs electronically. The proposed rule will modify and update ch. DWD 272 and ch. DWD 274 to clarify the relationship between federal and state laws.

**Anticipated Economic Impact of Implementing the Rule (Note if the Rule is Likely to Have a Significant Economic Impact on Small Businesses)**

It is anticipated that the proposed rule would make regulatory compliance easier for small businesses. The rule will not have a significant economic impact on a substantial number of small businesses.

**Contact Person:** Jim Chiolino, DWD Equal Rights Division (608) 405-4585 or [Jim.Chiolino@dwd.wisconsin.gov](mailto:Jim.Chiolino@dwd.wisconsin.gov).