

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

The Wisconsin Department of Workforce Development adopts the following order *to repeal* DWD 111.05 and Figure DWD 147.02; *to amend* DWD 102.02 (2), 102.02 (3) (am) (intro.) and 2., 103.01 (2), 132.04 (1) and (2) (intro.), 132.04 (3), 147.01 (2), 147.02, 149.001 (2) (c) 1.; *to repeal and recreate* Figure DWD 102.02 (2) and DWD 150 (title); and *to create* DWD 102.02 (3) (am) (Note) and DWD 147.02 (Note), relating to converting references from Standard Industrial Classification codes to the North American Industry Classification System codes; and other minor technical changes to the unemployment insurance program.

The Governor approved the scope statement for this rule, SS 116-21, on December 22, 2021. The scope statement was published in register No. 792B, on December 27, 2021. This rule was approved by the Governor on March 3, 2022.

Analysis Prepared by the Department of Workforce Development

Statutes Interpreted

Chapter 108, Stats.

Statutory Authority

Section 108.14 (2), Stats.

Explanation of Statutory Authority

Under s. 108.14 (2), Stats., the department may adopt and enforce all rules which it finds necessary or suitable to carry out the unemployment insurance program.

Plain Language Analysis

The Wisconsin unemployment insurance program is administered under chs. DWD 100-150. The rule replaces current references to Standard Industrial Classification (SIC) codes in chs. DWD 102 and 147 with 2022 North American Industry Classifications System (NAICS) codes. NAICS codes were first adopted in 1997 to replace the SIC code system. SIC codes have not been updated since 1987 and do not reflect modern changes in the economy.

Under s. 108.18 (2), Stats., an employer's initial contribution rate to the unemployment trust fund is based on certain factors, including whether the employer is "engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or

similar construction projects." *See* s. 108.18 (2) (c), Stats. Chapter DWD 102 requires the Department to determine whether an employer is engaged in those projects based, in part, on whether the employer's primary business activity is specified in groups assigned in the SIC manual.

In addition, certain employment may be excluded from unemployment insurance coverage, including certain service for a seasonal employer, which is an employer the Department designates as satisfying specified criteria, including being classified by the Department as primarily engaged in the following activities: agricultural production, agricultural services, forestry, or commercial fishing, hunting or trapping. Sections 108.02 (15) (k) 19. and 108.066 (3) (a) 2., Stats. Chapter DWD 147 requires the Department to determine whether an employer is primarily engaged in those activities based on specified groups assigned in the SIC manual.

The rule replaces the above references to SIC codes with NAICS codes to bring the rules up to date with current federal terminology and modern designation codes.

The rule also makes the following minor and technical changes:

- Amends s. DWD 103.01 (2) so that the rule aligns with ch. 108, Stats.
- Repeals s. DWD 111.05, related to filing certain employer reports, because it is obsolete.
- Amends s. DWD 132.04 (1) to correct cross-references to ch. 108, Stats.
- Amends s. DWD 149.001 (2) (c) 1. to correct a reference to the Labor and Industry Review Commission to be consistent with the definition of "commission" in s. DWD 100.02 (9).
- Repeals and recreates the title for ch. DWD 150 from "Miscellaneous" to "Forms" to reflect the purpose of that chapter.

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

Federal regulations require that state laws conform to and substantially comply with federal unemployment laws. 20 C.F.R. § 601.5.

Comparison with rules in adjacent states

Minnesota uses NAICS codes to determine construction industry employers (Minn. Stat. Ann. § 268.051 (5) (b)). Illinois uses SIC codes to determine tax rates (820 Ill. Comp. Stat. Ann. 405/1500 (B)). It appears that Michigan and Iowa do not reference SIC codes or NAICS codes for unemployment employer determinations or tax rates.

Summary of factual data and analytical methodologies

This rule does not depend on complex data analysis. The rule changes are largely minor and technical in nature. The Department reviewed Wisconsin statutes, administrative rules, and other states' laws to determine the use of NAICS codes instead of SIC codes.

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

The rule will have no significant economic effect on small businesses as defined in s. 227.114 (1), Stats. and there is no economic impact created by this rule because the rule changes are either minor and technical or do not affect current employers' tax rates. The Statement of Scope for the rule was posted for 14 days to solicit comments on economic impact from the public and no comments were received. The Department consulted the Unemployment Insurance Advisory Council regarding the rule.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

The rule is not expected to have a significant economic effect on small businesses, 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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Place where comments are to be submitted and deadline for submission

Mark Kunkel, Rules and Records Coordinator
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The deadline for comments was February 24, 2022, and no comments were filed.

The consent of the Attorney General was received on March 3, 2022 for the incorporation by reference of the 2022 version of the North American Industry Classification System, Sector 11 – Agriculture, Forestry, Fishing and Hunting and Sector 23 - Construction.

Text of Rule

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SECTION 1. DWD 102.02 (2) is amended to read:

DWD 102.02 (2) The department shall examine the factors enumerated in this section to determine whether an employer is “engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing or similar construction projects” within the meaning of s. 108.18 (2) (c), Stats. The department shall first determine whether the employer’s primary type of business activity is one of the activities specified in Figure DWD 102.02 (2), which enumerates certain business activities listed in ~~Major Group 17 – Construction – Special Trade Contractors in the Standard Industrial Classification (SIC) Manual furnished by the Federal government~~ the 2022 version of the North American Industry Classification System, Sector 23 – Construction. [See Figure DWD 102.02 (2) following]

SECTION 2. DWD Figure 102.02 (2) is repealed and recreated to read:

238110 POURED CONCRETE FOUNDATION AND STRUCTURE CONTRACTORS Grouting (i.e., reinforcing with concrete)
238150 GLASS AND GLAZING CONTRACTORS Glass coating and tinting (except automotive) contractors
238160 ROOFING CONTRACTORS Solar reflecting coating, roof, application
238190 OTHER FOUNDATION, STRUCTURE, AND BUILDING EXTERIOR CONTRACTORS Awning installation Epoxy application contractors Ornamental metal work installation contractors
238210 ELECTRICAL CONTRACTORS AND OTHER WIRING INSTALLATION CONTRACTORS Burglar alarm system, electric, installation only Cable splicing, electrical or fiber optic Cable television hookup contractors Communication equipment installation Electronic control system installation

Fire alarm system, electric, installation only
Intercommunication (intercom) system installation
Sound equipment installation
Telecommunications equipment and wiring (except transmission line) installation
Telephone installation contractors

238220 PLUMBING, HEATING AND AIR-CONDITIONING CONTRACTORS

Air system balancing and testing
Air-conditioning system (except window) installation
Boiler, heating, installation
Dust collecting and bag house equipment installation
Fuel oil burner installation
Gas line installation, individual hookup, contractors
Heating equipment installation
Heating contractors
Lawn sprinkler system installation
Refrigeration system (e.g., commercial, industrial, scientific) installation
Water system balancing and testing contractors

238290 OTHER BUILDING EQUIPMENT CONTRACTORS

Boiler and pipe insulation installation
Dismantling large-scale machinery and equipment
Gasoline pump, service station, installation
Lightning rod and conductor installation
Machinery and equipment, large-scale, installation
Machine rigging
Millwrights
Motor vehicle garage and service station mechanical equipment (e.g., gasoline pumps, hoists) installation
Power generating equipment installation

238310 DRYWALL AND INSULATION CONTRACTORS

Fireproofing buildings

238320 PAINTING AND WALLCOVERING CONTRACTORS

Electrostatic painting, on-site, contractors
Paint and wallpaper stripping
Paperhanging or removal contractors
Ship painting contractors
Wallpaper stripping
Whitewashing contractors

238330 FLOORING CONTRACTORS

Linoleum, installation only
Parquet flooring installation
Resilient floor tile or sheet (e.g., linoleum, rubber, vinyl), installation only

Vinyl flooring contractors

238340 TILE AND TERRAZZO CONTRACTORS

Ceramic tile installation

Tile (except resilient) laying and setting

238350 FINISH CARPENTRY CONTRACTORS

Countertop, residential-type, installation

Ship joinery contractors

238390 OTHER BUILDING FINISHING CONTRACTORS

Bathtub refinishing, on-site

Building fixture and fitting (except mechanical equipment) installation

Caulking (i.e., waterproofing) contractors

Coating concrete structures with plastics

Dampproofing contractors

Concrete coating, glazing or sealing

Waterproofing contractors

Weather stripping installation

Window shade and blind installation

238910 SITE PREPARATION CONTRACTORS

Boring, for building construction

Core drilling and test boring for construction

Grave excavation contractors

Test boring for construction

238990 ALL OTHER SPECIALTY TRADE CONTRACTORS

Artificial turf installation

Cable splicing (except electrical or fiber optic)

Cleaning building interiors during and immediately after construction

Dewatering contractors

Fence installation (except electronic containment fencing for pets)

House moving (i.e., raising from one site, moving, and placing on a new foundation)

Manufactured (mobile) home set up and tie-down work

Posthole digging

Sandblasting, building exterior

Scaffold erecting and dismantling

1 **SECTION 3.** DWD 102.02 (3) (am) (intro.) and 2. are amended to read:

2 **DWD 102.02 (3) (am)** (intro.) The department shall determine that the provisions of s.

3 108.18 (2) (c), Stats., apply to an employer whose primary type of business activity in this state is

4 listed in ~~Major Group 15—Building Construction—General Contractors and Operative Builders~~ or

1 ~~in Major Group 16 Heavy Construction Other Than Building Construction Contractors in the~~
2 ~~Standard Industrial Classification (SIC) Manual or is listed in Major Group 17~~ the 2022 version of
3 the North American Industry Classification System, Sector 23 – Construction but not in Figure
4 DWD 102.02 (2), if any of the following factors apply:

5 2. Employers within the same listing in the ~~Standard Industrial Classification (SIC)~~
6 ~~Manual~~ 2022 version of the North American Industry Classification System, Sector 23 –
7 Construction as the employer customarily suspend or significantly curtail business operations in
8 this state for regularly recurring periods because of climatic conditions or because of the seasonal
9 nature of the employment.

10 **SECTION 4.** DWD 102.02 (3) (am) (Note) is created to read:

11 **DWD 102.02 (3) (am) Note:** The North American Industry Classification System
12 standard is available at <https://www.census.gov/naics/>. The 2022 version is on file with the
13 legislative reference bureau and with the bureau of legal affairs of the department's division of
14 unemployment insurance at 201 E. Washington Ave, E-300, Madison, Wisconsin 53703.

15 **SECTION 5.** DWD 103.01 (2) is amended to read:

16 **DWD 103.01 (2) UNPAID MANAGERS OF A LIMITED LIABILITY COMPANY.** Under s. 108.02
17 (15) (k) 8., Stats., service as an unpaid manager of a limited liability company is not
18 “employment”, but all paid managers of a limited liability company are in “employment” under
19 ch. 108, Stats., subject to ~~s.~~ ss. 108.02 (12), 108.02 (15) (L), and 108.068, Stats.

20 **SECTION 6.** DWD 111.05 is repealed.

21 **SECTION 7.** DWD 132.04 (1) and (2) (intro.) are amended to read:

22 **DWD 132.04 (1) SCOPE.** Under s. ~~108.04 (17) (a), (b) and (c)~~ 108.04 (17) (a) to (i), Stats.,
23 a claimant is ineligible for benefits based upon services provided to or on behalf of an educational

1 institution for weeks of unemployment which occur between academic years or terms or during an
2 established and customary vacation period or holiday recess if the claimant performed the services
3 in the first such year or term or in the year or term immediately before the vacation period or
4 holiday recess and if there is reasonable assurance that the claimant will perform such services for
5 any educational institution in the year or term immediately following the academic year, term,
6 vacation period or holiday recess.

7 (2) STANDARD. (intro.) Except as provided under sub. (3), the terms and conditions of the
8 employment for which the claimant receives assurance from an educational institution under s.
9 ~~108.04 (17) (a), (b) and (c)~~ 108.04 (17) (a) to (i), Stats., for the academic year or term immediately
10 following the weeks of unemployment which occurred between academic years or terms or during
11 an established and customary vacation period or holiday recess are reasonably similar if all of the
12 following apply:

13 **SECTION 8.** DWD 132.04 (3) is amended to read:

14 **DWD 132.04 (3) EFFECT ON ELIGIBILITY.** (a) If the employment for which the claimant
15 receives assurance is not reasonably similar under sub. (2), the claimant is eligible for benefits
16 based on services provided to or on behalf of an educational institution between academic years
17 or terms or during established and customary vacation periods or holiday recesses under s. ~~108.04~~
18 ~~(17) (a), (b) and (c)~~ 108.04 (17) (a) to (i), Stats., if otherwise qualified.

19 (b) If the employment for which the claimant receives assurance is reasonably similar under
20 sub. (2), the claimant is not eligible for benefits based on services to or on behalf of an educational
21 institution between academic years or terms or during established and customary vacation periods
22 or holiday recesses under s. ~~108.04 (17) (a), (b) and (c)~~ 108.04 (17) (a) to (i), Stats.

23 **SECTION 9.** DWD 147.01 (2) is amended to read:

1 **DWD 147.01 (2)** This chapter ~~enumerates which employers~~ specifies the industries that
2 the department shall consider to be primarily engaged in agricultural production, agricultural
3 services, forestry, or commercial fishing, hunting, or trapping.

4 **SECTION 10.** DWD 147.02 is amended to read:

5 **DWD 147.02 Affected employers.** An employer shall be considered to be primarily
6 engaged in agricultural production, agricultural services, forestry, or commercial fishing, hunting,
7 or trapping if the department determines that the employer’s primary type of business activity is
8 one of those specified in ~~figure DWD 147.02 and assigns the employer one of the Standard~~
9 ~~Industrial Classification (SIC) codes listed in that figure.~~ [see ~~Figure 147.02 following~~] the 2022
10 version of the North American Industry Classification System, Sector 11 – Agriculture, Forestry,
11 Fishing and Hunting.

12 **SECTION 11.** DWD 147.02 (Note) is created to read:

13 **DWD 147.02 Note:** The North American Industry Classification System standard is
14 available at <https://www.census.gov/naics/>. The 2022 version is on file with the legislative
15 reference bureau and with the bureau of legal affairs of the department's division of unemployment
16 insurance at 201 E. Washington Ave, E-300, Madison, Wisconsin 53703.

17 **SECTION 12.** Figure DWD 147.02 is repealed.

18 **SECTION 13.** DWD 149.001 (2) (c) 1. is amended to read:

19 **DWD 149.001 (2) (c) 1.** Information about the organization of the department’s
20 unemployment insurance division and the ~~labor and industrial review~~ commission.

21 **SECTION 14.** DWD 150 (title) is repealed and recreated to read:

22 **DWD 150 (Title) FORMS**

1 **SECTION 15. EFFECTIVE DATE.** This rule shall take effect on the first day of the
2 month following publication in the Wisconsin administrative register, as provided under s.
3 227.22 (2) (intro.), Stats.

Signed this _____ day of _____, 2022.

Amy Pechacek, Secretary-designee