Chapter DWD 128

ABILITY TO WORK AND AVAILABILITY FOR WORK

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Note: Chapter ILHR 128 was created by emergency rule effective 1–8–84. Chapter ILHR 128 was renumbered Chapter DWD 128 under s. 13.93 (2m) (b) 1., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, June, 1997, No. 498.

DWD 128.001 Definitions. (1) Unless the context clearly indicates a different meaning, the definitions in ch. DWD 100 apply to this chapter.

(2) In this chapter:

(a) "Full–time" means work which is performed for 32 or more hours in a week.

(b) "Shift" means the arrangement of hours a claimant is required to work. "First shift" means a work period which begins and ends between 6 a.m. and 6 p.m.

(c) "Total unemployment" has the meaning specified in s. 108.02 (25), Stats.

(d) "Weekly certification" means the method used by a claimant to submit information regarding the claimant's employment status and availability for work and to establish a basis for the payment of unemployment benefits.

History: Cr. Register, September, 1995, No. 477, eff. 10–1–95; **CR 18–033: renum. to (1), cr. (2) (intro.), (2) (a) renum. from DWD 100.02 (28), (2) (b) renum. from DWD 100.02 (55), (2) (c) renum. from DWD 100.02 (62) and am., (2) (d) renum. from DWD 100.02 (72) and am. Register May 2019 No. 761, eff. 6–1–19**.

DWD 128.01 Able to work and available for work. (1) APPLICABILITY. Under s. 108.04 (2), Stats., a claimant shall be eligible for unemployment benefits for any week of total unemployment only if the claimant is able to perform suitable work and available for suitable work. Under s. 108.04 (1) (b), (7) (c), and (8), Stats., a claimant shall be eligible for unemployment benefits only if the claimant is able to perform suitable work and is available for suitable work. The department may determine the claimant's ability to perform suitable work and availability for suitable work at any time through questioning of the claimant and other procedures.

(2) PRESUMPTION. Unless evidence is obtained that in the relevant week the claimant was not able to work or available for work, a claimant is presumed able to work and available for work for any week that all of the following conditions are met:

(a) The claimant has registered for work and has complied with s. DWD 126.02, or registration is waived under s. DWD 126.03.

(b) The claimant has complied with the work search requirements of s. 108.04 (2) (a) 3., Stats., and ch. DWD 127, or a work search is waived or excused under ch. DWD 127.

(3) ABLE TO WORK. (a) Able to work means that the claimant maintains an attachment to the labor market and has the physical and psychological ability to engage in some substantial gainful employment in suitable work. During any week, a claimant is not able to work if the claimant is unable to perform suitable work due to a physical or psychological condition. In determining whether the claimant is attached to the labor market and able to perform suitable work, the department shall consider all factors relevant to the circumstances of the case, which may include the following:

1. The claimant's usual or customary occupation.

2. The nature of the restrictions caused by the claimant's physical or psychological condition.

3. Whether the claimant is qualified to perform other work within the claimant's restrictions considering the claimant's education, training, and experience.

4. Occupational information and employment conditions data and reports available to the department showing whether and to what extent the claimant is able, within his or her restrictions, to perform suitable work in his or her labor market area.

(4) AVAILABLE FOR WORK. (a) *Withdrawal from labor market.* Available for work means that the claimant maintains an attachment to the labor market and is ready to perform full–time suitable work in the claimant's labor market area. An individual who has a physical or psychological restriction and is found able to work under sub. (3) shall not be considered unavailable for work solely because of inability to work, provided the individual is available for suitable work for the number of hours the individual is able to work. During any week, a claimant is not available for suitable work if he or she has withdrawn from the labor market due to restrictions on his or her availability for work. In determining whether a claimant has withdrawn from the labor market, the department shall consider one or more of the following factors:

Example 1: A claimant has a number of physical restrictions due to recent surgery, including a restriction to work no more than 20 hours per week for 2 months. With the restrictions, the claimant cannot perform the duties of his or her usual occupation but is able to perform a number of jobs for which he or she has prior training and experience. The claimant is willing to do these jobs and is willing to work 20 hours per week. The claimant has no other restrictions to availability. Benefits will not be denied solely because of the inability to work full–time.

Example 2: A claimant is restricted to working 30 hours per week due to medical problems. The claimant is still able to perform the duties of his or her usual occupation. However, the claimant is unwilling to work more than 20 hours per week because the claimant is receiving Social Security benefits and more than 20 hours of work would reduce those benefits. Benefits will be denied until the claimant is available for 30 hours of work per week.

1. 'Salary or wages.' A claimant is considered to have withdrawn from the labor market if he or she is not available for full–time suitable work at a wage reasonably comparable to the usual wage that was paid to the claimant while working in the claimant's usual occupation. The claimant's usual wage is determined by evaluating the wage rates that were paid to the claimant in one or more previous jobs since the start of the claimant's base period. The claimant's usual occupation is determined by considering the claimant's training and experience as evidenced by the claimant's employment since the start of the claimant's base period.

2. 'Shift and time restrictions.' A claimant is considered to have withdrawn from the labor market if he or she is not available for full–time suitable work during the standard hours in which work is performed in the occupations in which the claimant usually works or has prior training or experience. In determining the standard hours in which work is performed in the occupations, the department shall include the hours and the shift that the claimant worked in an occupation in one or more previous jobs since the start of the claimant's base period. For purposes of this subdivision, a claimant whose availability is restricted by an immediate family member's medical or health condition or other infirmity requiring care that is provided by the claimant is not considered to have withdrawn from the labor market, provided that the claimant remains available for full–time suitable work, regardless of the shift or hours.

3. 'Travel and transportation.' A claimant is considered to have withdrawn from the labor market if he or she is either not willing or not able to travel a reasonable distance and time to and from work. In making this determination, the department may consider the wage sought, the modes of available transportation, commuting costs, and the claimant's commuting history.

4. 'Incarceration.' A claimant who is incarcerated for more than 48 hours during any week is considered to have withdrawn from the labor market for that week unless the claimant has work release privileges that allow the claimant to meet all requirements related to availability for work.

5. 'Absence from the labor market.' A claimant who is absent from his or her labor market area for more than 48 hours during any week is considered to have withdrawn from the labor market for that week, unless the claimant shows that he or she remains continuously attached to the labor market during the absence or that the primary purpose of the absence was to seek suitable work. A claimant may show continuous attachment to the labor market by the claimant's availability to timely receive and respond to offers of work by phone or other means of communication and willingness and ability to return to the labor market within 24 hours.

6. 'Types of work sought.' A claimant is considered to have withdrawn from the labor market if the claimant does not broaden his or her availability for work to additional types of suitable work as the period of his or her unemployment lengthens.

7. 'Other unreasonable restrictions on working conditions.' A claimant is considered to have withdrawn from the labor market if he or she places other unreasonable restrictions on working conditions.

8. 'Occupational information and employment conditions data.' Occupational information and employment conditions data and reports available to the department showing the extent to which full–time suitable jobs exist in the claimant's labor market area within his or her restrictions.

(b) *Standards for suitable work distinguished.* Nothing in par. (a) may prevent the department from denying benefits to a claimant who fails, without good cause, to accept suitable work when offered, as provided in s. 108.04 (8) (a), Stats., or to a claimant who fails, without good cause, to return to suitable work with a former employer that recalls the claimant within 52 weeks after the claimant last worked for the employer, as provided in s. 108.04 (8) (c), Stats. The standards for determining a claimant's availability for suitable work and a claimant's failure, without good cause, to accept suitable work are different standards.

(5) LAWFUL RESIDENT. To be considered available for suitable work for a week, an alien must be legally authorized to work that week in the United States by the appropriate agency of the federal government. In determining whether an alien is legally authorized to work in the United States, the department will follow the requirements of 42 USC 1320b–7 (d) (2), which relates to verification of and determination of an alien's status.

Note: 42 USC 1320b–7 (d) (2) is Section 1137 (d) of the Social Security Act.

(6) JURY DUTY. The department shall consider a claimant to be available for suitable work during the time that the claimant responds to and remains under a summons for jury service, whether or not impaneled on a jury. Jury duty shall be good cause for not reporting for an eligibility review under s. DWD 128.03.

History: Cr. Register, July, 1984, No. 343, eff. 8–1–84; am. (5), Register, September, 2000, No. 537, eff. 10–1–00; CR 01–039: am. (2) (b); Register September 2001 No. 549 eff. 10–1–01; CR 07–054: r. and recr. Register March 2008 No. 627, eff. 4–1–08; CR 10–017: am. (3), (4) (a) (intro.) and 2., r. (7) Register September 2010 No. 657, eff. 10–1–10; EmR1316: emerg. am. (2) (a) eff. 9–29–13; CR 13–081: am. (2) (a) Register April 2014 No. 700, eff. 5–1–14; **CR 18–033: am. (1) Register May 2019 No. 761, eff. 6–1–19**.

DWD 128.03 Eligibility review. (1) The department may periodically review the records of any individual claiming unemployment benefits to determine whether the claimant meets the continuing eligibility requirements of chs. DWD 126 to 128 and s. 108.04, Stats. A claimant shall respond as required when notified by the department of a review of the claimant's continuing eligibility for benefits.

(2) The eligibility review may include any of the following:

(a) An interview with the claimant conducted by a representative of the department.

(b) A review of the appropriateness of the claimant's registration or waiver of registration under ch. DWD 126.

(c) A determination as to whether the claimant is able to perform suitable work and available for suitable work under this chapter.

(d) An assessment of the claimant's work search efforts under ch. DWD 127.

(e) A determination as to whether the claimant is making satisfactory progress under s. 108.04 (16), Stats., if the claimant is participating in approved training.

(f) A review of any reemployment services the claimant has received.

(g) Preparation of a reemployment plan as reasonably necessary to assist the claimant in his or her efforts to obtain work.

(3) If the claimant fails to participate in an eligibility review interview under sub. (2) (a) without good cause, the claimant shall be ineligible for benefits for the week in which the interview was scheduled.

History: Cr. Register, July, 1984, No. 343, eff. 8–1–84; CR 07–054: r. and recr. Register March 2008 No. 627, eff. 4–1–08.