

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

The Wisconsin Department of Workforce Development adopts the following emergency rule *to amend* DWD 123.01 and *to create* DWD 123.04, relating to benefit charges for initial claims related to the public health emergency declared by Executive Order 72.

The Governor approved the scope statement for this rule, SS 144-20, on October 28, 2020. The scope statement was published in register No. 779A1, on November 2, 2020. The notice of preliminary hearing and comment period on the scope statement was published on November 2, 2020, in register No. 779A1. The preliminary hearing on the scope statement was held on November 9, 2020. The Department received no comments at the preliminary hearing. The Department approved the scope statement on November 16, 2020. This rule was approved by the Governor on November 24, 2020.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

By Executive Order 72, the Governor declared a public health emergency to protect the health and well-being of the state's residents and directed state agencies to assist as appropriate in the State's ongoing response to the public health emergency. On March 13, 2020, the President declared a national emergency concerning the COVID-19 pandemic. Due to the pandemic, many businesses have temporarily or permanently closed, resulting in significant business income reduction and layoffs. On April 4, 2020, the President issued a declaration under the Stafford Act that a major disaster exists in Wisconsin, beginning January 30, 2020 and continuing, due to the COVID-19 pandemic.

Under 2019 Wisconsin Act 185, s. 50, which created s. 108.07 (5) (bm), Stats., the Department of Workforce Development is directed to charge unemployment benefits for initial claims that are related to the public health emergency first declared on March 12, 2020, by Executive Order 72, to the balancing account of the Trust Fund for contribution employers. For reimbursable employers, the Department charges such benefits to the interest and penalty appropriation. This treatment of claims charging applies to weeks of benefits payable from the week of March 15, 2020 through December 26, 2020.

2019 Act 185 also created s. 108.04 (2) (d), Stats., which requires employees and employers to "indicate whether a claim for regular benefits is related to the public health emergency declared on March 12, 2020, by executive order 72" when the Department requests. The statute does not provide a deadline for employees or employers to submit the information. That paragraph further provides that the Department "may specify the information required to be provided."

The Department's antiquated computer systems are ill-equipped to handle the changes in charges from the employers' accounts to the balancing account or interest and penalty appropriation. Each weekly claim to be recharged under new section 108.07 (5) (bm), Stats., requires Department personnel to manually change the benefit charges from the employer's account, after any federal funds have been appropriately applied, to the balancing account or interest and penalty appropriation. The Department estimates that this manual process will take approximately 15 minutes for each weekly claim. Given the high volume of claims being filed during the pandemic, the Department expects that the thousands of hours of manual work to complete the charging changes will not be completed until 2021.

Under ss. 108.02 (8), 108.02 (22), and 108.18 (4), Stats., “an employer’s contribution rate on the employer’s payroll for a given calendar year shall be based on the reserve percentage of the employer’s account as of the applicable computation date,” s. 108.18 (4), Stats., which is June 30 of each year. Section 108.02 (22), Stats., requires the Department to determine the status of an employer’s account when setting the reserve percentage for contribution purposes as of the computation date.

If the recharging of benefits from employer accounts to the balancing account is not completed by June 30, 2021 for contribution employers, those employers’ contribution rates for 2022 could be set higher than they should be under the charging relief enacted by 2019 Act 185. Contribution rates that are incorrectly set higher than they should be could adversely affect employers’ abilities to recover financially from the economic downturn caused by the pandemic.

If the recharging of benefits from employer accounts to the interest and penalty appropriation is not completed as soon as possible for reimbursable employers, those employers will continue to receive monthly bills for reimbursements that they should not be required to pay under 2019 Act 185 and that they might not be able to afford to pay due to the economic downturn caused by the pandemic. This rule sets a deadline to submit requests for charging relief to ensure that all recharging work is completed by the June 30, 2021 deadline.

Statutes Interpreted

Sections 108.04 (2) (d) and 108.07 (5) (bm), Stats., which are discussed in the above Finding of Emergency.

Statutory Authority

Section 108.14 (2), Stats.

Explanation of Statutory Authority

The Department has specific and general authority to establish rules interpreting and clarifying provisions of ch. 108, Stats., unemployment insurance and reserves, and general authority for promulgating rules with respect to ch. 108, Stats., under s. 108.14 (2), Stats.

Related Statutes or Rules

None.

Plain Language Analysis

The emergency rule determines the information that employers must submit to request charging relief for initial claims filed while Executive Order 72 was in effect and after it expired, as permitted by section 108.04 (2) (d), Stats. This rule will affect calculation of contribution rates starting with 2022.

If a claimant's most recent employment separation is not due to a labor dispute, quit, discharge for misconduct, or discharge for substantial fault, and the claimant's initial claim is for a benefit year beginning on or after March 15, 2020 through May 16, 2020, the Department will presume that the claim relates to the public health emergency declared on March 12, 2020, by Executive Order 72. All employers who paid base period wages to the claimant will be relieved of the benefit charges for that claim and employers will not be required to submit the form requesting relief.

An employer that paid base period wages may request charging relief even if the most recent employment separation is due to a labor dispute, quit, discharge for misconduct, or discharge for substantial fault, and the claimant's initial claim is for a benefit year beginning on or after March 15, 2020 through May 16, 2020 if the employer certifies that certain circumstances apply to the initial claim. An employer may also request charging relief for any initial claim for benefit years beginning on or after May 17, 2020 through December 26, 2020 by certifying that certain circumstances apply to the claim. An employer may meet the certification requirement by certifying that any of the following conditions exist:

- The employer's business/operations reduced, suspended, or ceased after experiencing a significant reduction in business due to a Safer at Home order or a government-issued health order that restricts business operations.
- The employer's business/operations reduced, suspended, or ceased due to other businesses (including suppliers) having reduced, suspended, or ceased operations.
- The federal Paycheck Protection Program loan amount was used to pay employees, but the business did not yet reopen.
- The employer provides other information showing that the initial claim relates to the public health emergency declared on March 12, 2020 by Executive Order 72.

This emergency rule sets a deadline by which employers must submit the information required by section 108.04 (2) (d), Stats. The deadline is the latter of February 19, 2021, or 30 days after the Department sent a notification to the employer of an initial claim for benefit years beginning on or after March 15, 2020 through December 26, 2020. This is necessary to ensure that all information regarding the initial claims is submitted in time for processing the recharging of benefits before June 30, 2021, which is the computation date that the Department must use to determine contribution rates for 2022.

This rule also determines the treatment of employers in a claimant's base period who are not the most recent employer of a claimant whose initial claim is related to the public health emergency declared on March 12, 2020, by Executive Order 72. The Department will apply the employer charging provisions of 2019 Wisconsin Act 185 to all base period employers for the claim.

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

Federal law requires that state unemployment compensation laws conform to and comply with federal requirements. 20 C.F.R. § 601.5.

Under the federal Families First Coronavirus Response Act, Public Law 116-127, specifically Division D, the Emergency Unemployment Insurance Stabilization and Access Act of 2020 (EUISAA), a state may receive a share of \$500 million of federal funding for administering the state's unemployment insurance program if the "State has demonstrated steps it has taken or will take to ... non-charge[e] employers directly impacted by COVID-19 due to an illness in the workplace or direction from a public health official to isolate or quarantine workers." 42 U.S.C. § 1103 (h) (3) (B). Wisconsin's share of the \$500 million is about \$9.457 million.

Comparison with rules in adjacent states

Illinois does not charge employers for unemployment benefits "for a week of unemployment that begins on or after March 15, 2020, and before December 31, 2020, and is directly or indirectly attributable to COVID-19..." 820 ILCS 405/1502.4(A).

By Executive Order 2020-76, Michigan charges benefits to the unemployment insurance non-chargeable account, unless the employer was determined to have misclassified workers.

Iowa is currently not charging unemployment benefits related to COVID-19 to employer accounts.

By Emergency Executive Order 20-05, Minnesota will "not use unemployment benefits paid as a result of the COVID-19 pandemic in computing the future unemployment tax rate of a taxpaying employer."

Summary of factual data and analytical methodologies

The Department reviewed Wisconsin statutes, administrative rules, and recent changes to federal law to determine the information that employers must submit to receive charging relief. The Department determined that February 19, 2021 is the appropriate deadline for employers to submit the documentation because that date is more than a month after the last day that the Department would notify employers that a timely initial claim that qualifies for charging relief was filed. Employers may still request relief for late initial claims because the deadline is 30 days after the Department notifies the employer of the initial claim. The recharging of claims under section 108.07 (5) (bm), Stats., will be manual and is expected to take many months to complete. The Department must complete the recharging of claims by June 30, 2021 so that employer contribution rates will be correctly set for 2022. The February 19, 2021 deadline for employers to submit the information is necessary to ensure that all required work to change the charging of the claims is completed by June 30, 2021.

In particular, the Department reviewed Wisconsin statutes and the possible effects of charging benefits under section 108.07 (5) (bm), Stats., to determine the treatment of employers in a claimant's base period who are not the most recent employer of a claimant whose initial claim is related to the public health emergency declared on March 12, 2020, by Executive Order 72. The Department determined that the employer non-charging provisions of 2019 Wisconsin Act 185

apply to all employers in a claimant's base period because section 108.07 (5) (bm) does not permit only some employers in a base period to receive charging relief.

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

Under 2019 Wisconsin Act 185, s. 50, 100% of the unemployment insurance benefits for initial claims related to the public health emergency declared on March 12, 2020 by Executive Order 72 will be charged to the balancing account of the Trust Fund for employers subject to contribution financing. Fifty percent of the unemployment insurance benefits for initial claims related to the public health emergency declared on March 12, 2020 by Executive Order 72 will be charged to the interest and penalty appropriation for employers subject to reimbursement financing; the other 50% will be paid by the federal government. The charging relief for employers under state law is effective for state unemployment insurance benefits paid for the period of March 15, 2020 through December 26, 2020. However, charges for the first week of unemployment and for benefits paid under work share plans will be charged to the federal government during that period.

Section 108.04 (2) (d), which was created by Act 185, requires claimants and employers to indicate whether a claim for regular benefits is related to the public health emergency declared on March 12, 2020, by Executive Order 72. This is necessary for the Department to properly apply section 108.07 (5) (bm), Stats., which, as described above, provides for the charging of certain benefits to the balancing account or interest and penalty appropriation. Further, under section 108.07 (5) (bm) 2. b., Stats., employers will not receive relief from benefit charges unless they timely and adequately provide the information necessary for the Department to determine how to charge the claim. Because the claim charging provisions of section 108.07 (5) (bm), Stats., will involve manual processes, the Department needs enough time to complete the work before the June 30, 2021 computation date, which will determine contribution rates for 2022.

Fiscal Estimate and Economic Impact Analysis

The Fiscal Estimate and Economic Impact Analysis is attached.

Effect on small business

This emergency rule is expected to have a positive economic impact on employers subject to contribution financing, which may include small businesses, if those employers are required to submit information to the Department to request charging relief, do so by the deadline set by this emergency rule, and receive charging relief as a result.

Agency contact person

Questions related to this rule may be directed to:

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Place where comments are to be submitted and deadline for submission

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Comments will be accepted until a date to be determined.

1 **SECTION 1.** DWD 123.01 is amended to read:

2 **DWD 123.01 Purpose.** Pursuant to ss. 108.04 (13), 108.09 (1), and 108.14 (2), Stats., in order to
3 determine benefit claims, the department requires employers to provide information about claimants'
4 employment separations, dates of work, wages and other payments, and other issues that may be
5 disqualifying. This chapter specifies the benefit reports that must be filed by employers and the filing
6 requirements for those reports. This chapter also interprets ss. 108.04 (2) (d) and 108.07 (5) (bm), Stats.,
7 consistently with 42 USC 1103 (h) (3) (B) for determining the information that employers must submit to
8 request charging relief for initial claims filed while Executive Order 72 was in effect and after it expired,
9 the deadline by which employers must submit the information to the department, and the treatment of
10 employers in a claimant's base period who are not the most recent employer of a claimant whose initial
11 claim is related to the public health emergency declared on March 12, 2020, by Executive Order 72.

12 **SECTION 2.** DWD 123.04 is created to read:

13 **DWD 123.04 Requests for Charging Relief. (1)** Under s. 108.07 (5) (bm), Stats., the
14 department shall presume that an initial claim for benefit years beginning on or after March 15, 2020
15 through May 16, 2020 relates to the public health emergency declared on March 12, 2020, by Executive
16 Order 72 unless the claimant's most recent separation from employment is due to a labor dispute, quit,

1 discharge for misconduct, or discharge for substantial fault. An employer is not required to submit a
2 request for charging relief under s. 108.07 (5) (bm), Stats. for initial claims described in this subsection.

3 (2) An employer may submit a request for charging relief under s. 108.07 (5) (bm), Stats., to the
4 department if any of the following apply:

5 (a) The employer paid base period wages to a claimant whose most recent separation from
6 employment is due to a labor dispute, quit, discharge for misconduct, or discharge for substantial fault,
7 and whose initial claim is for benefit years beginning on or after March 15, 2020 through May 16, 2020.

8 (b) The claimant's initial claim is for benefit years beginning on or after May 17, 2020 through
9 December 26, 2020.

10 (3) An employer may receive charging relief under s. 108.07 (5) (bm), Stats., for benefits for
11 initial claims described in sub. (2) if it provides all information that the department requires on a form that
12 the department specifies.

13 **Note:** The required department form for requesting charging relief is UCB-18823-E, available
14 online at <https://dwd.wisconsin.gov/uitax/relief-of-charging.htm>.

15 (4) An employer seeking charging relief under s. 108.07 (5) (bm), Stats., for benefits for initial
16 claims described in sub. (2) may receive charging relief if it certifies that any of the following
17 circumstances apply to the initial claim:

18 (a) The employer's business/operations reduced, suspended, or ceased after experiencing a
19 significant reduction of income due to a Safer at Home order or a government-issued health order that
20 restricts business operations.

21 (b) The employer's business/operations reduced, suspended, or ceased due to other businesses
22 (including suppliers) having reduced, suspended, or ceased operations.

23 (c) The federal Paycheck Protection Program loan amount was used to pay employees, but the
24 business did not yet reopen.

25 (d) The employer provides other information showing that the initial claim relates to the public
26 health emergency declared on March 12, 2020 by Executive Order 72.

1 (5) Under s. 108.04 (2) (d), Stats., an employer that is required to submit a request for that relief
2 under this section in order to receive relief under s. 108.07 (5) (bm), Stats., must submit the request for
3 relief so that the department receives it by letter of February 19, 2021 or 30 days after the department sent
4 a notification to the employer of an initial claim for benefit years beginning on or after March 15, 2020
5 through December 26, 2020.

6 (6) If the department determines that an initial claim relates to the public health emergency
7 declared on March 12, 2020, by Executive Order 72 and that s. 108.07 (5) (bm) 1., Stats., applies to the
8 claim, the department shall apply the provisions of s. 108.07 (5) (bm) 3., Stats., to all the employers that
9 paid base period wages to the claimant for that claim.

10 **Section 3. EFFECTIVE DATE.** This rule shall take effect on December 7, 2020, or upon
11 publication in the official state newspaper as provided in s. 227.24 (1) (c), Stats., whichever is later.

Dated this ____ day of November, 2020.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By: _____
Robert Cherry, Deputy Secretary