

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

The Wisconsin Department of Workforce Development ("the Department") 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 April 30, 2021.

Analysis Prepared by the Department of Workforce Development

Finding of Emergency

By Executive Order 72, on March 12, 2020, 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.

2019 Wis. Act 185, sec. 50, which created s. 108.07(5)(bm)1., Stats., directed the Department to provide employers charging relief for unemployment benefits for initial claims that are related to the public health emergency declared on March 12, 2020 by Executive Order 72, for benefits payable between March 12, 2020 and December 31, 2020. 2021 Wis. Act. 4, sec. 5, which created s. 108.07(5)(bm)1m., Stats., extended the charging relief from December 31, 2020 to March 13, 2021, and requires the Department to presume that all initial claims for benefits through that date relate to the public health emergency unless the most recent separation from unemployment is due to a labor dispute, voluntary termination of work, discharge for misconduct, or discharge for substantial fault.

Under s. 108.07 (5) (bm), Stats., the Department 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.

2019 Wis. 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 s. 108.07 (5) (bm), Stats., requires the Department to change each weekly benefit charge from the employer’s account, after any federal funds have been appropriately applied, to the balancing account or interest and penalty appropriation. The Department is working toward completing this process by June 30, 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 Wis. Act 185 and 2021 Wis. Act 4. 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 Wis. Act 185 and 2021 Wis. Act 4 and that they might not be able to afford to pay due to the economic downturn caused by the pandemic.

In order to meet the June 30, 2021 completion date, the Department needs the requested information from employers to determine whether or not they are entitled to charging relief unless the claims fall within the charging relief presumption. 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.

A permanent rule is not appropriate because the relief of charging statutes only apply for a limited time.

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

To implement the charging relief required under 2019 Wis. Ac 185, the Department promulgated EmR2044, which has an initial expiration date of May 5, 2021. Because EmR2044 was promulgated before the enactment of 2021 Wis. Act 4, which creates the presumption for charging relief for initial claims unless certain exceptions apply, the Department is promulgating this new emergency rule to be consistent with Act 4.

Plain Language Analysis

The emergency rule determines the information that employers must submit, if any, to request charging relief for initial claims that relate to the public health emergency declared on March 12, 2020, by Executive Order 72 between March 15, 2020 and March 13, 2021, to comply with s. 108.07 (5) (bm), Stats.

If a claimant's most recent employment separation is not due to a labor dispute, voluntary termination of work, 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 March 13, 2021, 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 request the relief.

An employer that paid base period wages may request charging relief if the most recent employment separation is due to a voluntary termination of work that would otherwise be charged to the employer and the claimant's initial claim is for a benefit year beginning on or after March 15, 2020 through March 13, 2021 and if the employer certifies that certain circumstances apply to the initial claim. If the most recent separation is due to a labor dispute, misconduct, substantial fault, or a voluntary termination of work, the unemployment benefits are already not charged to the employer under pre-pandemic law. An employer may meet the 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.

For those employers who do not meet the presumption that the claim is related to the public health emergency, 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 May 14, 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 March 13, 2021. The deadline 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 Wis. Act 185 and 2021 Wis. Act 4 to all base period employers for the claim.

Finally, this rule requires the Department to interpret the provisions of s. 108.07 (5) (bm), Stats., by applying the provisions of s. 108.07(5) (bm), Stats., to additional initial claims filed on or after March 15, 2020 for a benefit year that began before March 15, 2020 so that the legislative intent of 2021 Wis. Act 4 is properly applied.

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 changes to federal law to determine the information that employers must submit to receive charging relief. The recharging of claims under s. 108.07 (5) (bm), Stats., will take months to complete. By statute, the Department must complete the recharging of claims by June 30, 2021 so that employer contribution rates will be correctly set for 2022. The Department determined that the latter of May 14, 2021 or 30 days after the Department sent a notification to the employer of an initial claim for benefit years is the appropriate deadline for employers not subject to the presumption to submit the documentation in order to give employers sufficient time to request relief and for the Department to meet the June 30, 2021 statutory recharging completion date.

In particular, the Department reviewed recently enacted state law affecting 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 to apply the employer non-charging provisions 2019 Wis. Act 185 and 2021 Wis. Act 4 to all employers in a claimant’s base period to be consistent with the administration of other charging provisions under ss. 108.02 (8), 108.02 (22), and 108.18 (4), Stats.

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

Under 2019 Wis. Act 185, s. 50 and 2021 Wis. Act 4, 100% of the unemployment insurance benefits for initial claims for benefit years beginning on or after March 15, 2020 through March 13, 2021 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 or twenty-five 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 remainder 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 March 13, 2021. 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), created by 2019 Wis. 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. 2021 Wis. Act 4 extends the relief from benefit charging for employers from December 31, 2020 to March 13, 2021, and specifies that the Department must presume that all initial claims through March 13, 2021 are related to the public health emergency and are, thus, entitled to recharging relief unless the separation is due to a labor dispute, misconduct, substantial fault, and, in most cases, a voluntary termination of work. In those cases where the presumption does not apply, this rule is necessary for the Department to properly and timely apply s. 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 s. 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 s. 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, 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
3 order to determine benefit claims, the department requires employers to provide information about
4 claimants' employment separations, dates of work, wages and other payments, and other issues
5 that may be disqualifying. This chapter specifies the benefit reports that must be filed by employers
6 and the filing requirements for those reports. This chapter also interprets ss. 108.04 (2) (d) and
7 108.07 (5) (bm), Stats., consistently with 42 USC 1103 (h) (3) (B), for determining the information
8 that employers must submit to request charging relief for initial claims filed for benefit years
9 beginning on or after March 15, 2020 through March 13, 2021, related to the public health
10 emergency declared on March 12, 2020 by Executive Order 72, the deadline by which employers
11 must submit the information to the department, and the treatment of employers in a claimant's
12 base period who are not the most recent employer of a claimant whose initial claim is related to
13 the public health emergency declared on March 12, 2020, by Executive Order 72.

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

15 **DWD 123.04 Requests for Charging Relief. (1)** Under s. 108.07 (5) (bm) 1m., Stats.,
16 the department shall presume that an initial claim for benefit years beginning on or after March

1 15, 2020 through March 13, 2021 relates to the public health emergency declared on March 12,
2 2020 by Executive Order 72 unless the claimant's most recent separation from employment is due
3 to a labor dispute, voluntary termination of work, discharge for misconduct, or discharge for
4 substantial fault. For separations from employment that are not due to a labor dispute, voluntary
5 termination of work, discharge for misconduct, or discharge for substantial fault, the employer
6 does not need to comply with subs. (3) and (4) to receive charging relief under s. 108.07 (5) (bm),
7 Stats.

8 (2) An employer may submit a request for charging relief under s. 108.07 (5) (bm), Stats.,
9 to the department if the employer paid base period wages to a claimant whose most recent
10 separation from employment is due to a voluntary termination of work for which s. 108.04 (7) (h),
11 Stats., does not apply and whose initial claim is for benefit years beginning on or after March 15,
12 2020 through March 13, 2021.

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

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

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

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

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

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

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

7 (5) Under s. 108.04 (2) (d), Stats., an employer that is required to submit a request for that
8 relief under this section in order to receive relief under s. 108.07 (5) (bm), Stats., must submit the
9 request for relief so that the department receives it by letter of May 14, 2021 or 30 days after the
10 department sent a notification to the employer of an initial claim for benefit years beginning on or
11 after March 15, 2020 through March 13, 2021.

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

16 (7) The department shall interpret the provisions of s. 108.07 (5) (bm), Stats., by applying
17 the provisions of s. 108.07(5)(bm), Stats., to additional initial claims filed on or after March 15,
18 2020 for a benefit year that began before March 15, 2020.

19 **Section 3. EFFECTIVE DATE.** This rule shall take effect upon publication in the official
20 state newspaper as provided in s. 227.24 (1) (c), Stats.

Dated this 30th day of April, 2021.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT

By:

Amy Pechacek, Secretary-designee