
Wisconsin Legislative Council



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Director

TO: SENATOR DEVIN LEMAHIEU

FROM: Margit Kelley, Senior Staff Attorney

RE: Waiver of Waiting Period for Unemployment Benefits

DATE: February 16, 2021

This memorandum briefly describes the status of the “waiting period” that is required under state law before a person may receive unemployment benefits, and identifies any rulemaking authority that the Department of Workforce Development (DWD) may cite to temporarily waive the one-week waiting period. As discussed below, current law does not permit waiving the statutory waiting period by rule.

WAITING PERIOD FOR UNEMPLOYMENT BENEFITS

A person who has been laid off and has a sufficient history of wages from covered employment may be eligible for unemployment benefits and is typically eligible to receive benefits for up to 26 weeks within the person’s 52-week benefit year. [s. 108.06, Stats.]

However, the statutes provide that benefits are not immediately paid for the first week, referred to as a waiting period, but are paid out when the person has reached the 26th week of benefits. [ss. [108.02 \(26m\)](#) and [108.04 \(3\)](#), Stats.]

2019 Wisconsin Act 185 temporarily waived the one-week waiting period for benefit years beginning after March 12, 2020, and before February 7, 2021. [SECS. 37 and 38.]

FEDERAL FUNDING FOR WAITING PERIOD

The temporary waiver of the one-week waiting period under Act 185 allowed the state to be eligible for certain grants and additional funding under both the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. To that end, Act 185 directed DWD to seek the maximum amount of federal reimbursement for benefits for the first week of a claimant’s benefit year that were payable during the time period of the waiver.

First, the FFCRA provided two grants to states for emergency administration of unemployment benefits. The first grant, referred to as allotment 1, did not include any requirements relating to the waiting period. To qualify for the second grant, referred to as allotment 2, the state was required to demonstrate steps taken to ease access to unemployment benefits. The specific steps included waiving the waiting week, waiving work search requirements, and removing responsibility for benefit payments from employers who were directly impacted by COVID-19. The grant funds for allotment 2 have been

received by the state, and a one-year report on the emergency administration grant funding will be due by March 18, 2021. [P.L. 116-127, SEC. 4102.]

Second, the CARES Act provided full reimbursement to states for the first week of regular unemployment benefits that were paid without a waiting week. The reimbursement equaled 100 percent of the regular benefits paid for each person's first week, and 100 percent of any additional administration expenses incurred in providing the first week of benefit payments. Reimbursement under the CARES Act terminated with the week ending on December 26, 2020. [P.L. 116-136, SEC. 2105.]

The Consolidated Appropriations Act, 2021, extended the federal reimbursement for the first week of regular unemployment benefits that are paid without a waiting week through the week ending on March 13, 2021. For weeks ending between December 31, 2020, and March 13, 2021, reimbursement is 50 percent of the regular benefits paid for each person's first week, and 50 percent of any additional administration expenses incurred in providing the first week of benefit payments. [P.L. 116-260, Div. N, SEC. 204.]

Because the Act 185 waiver of the waiting period expired on February 6, 2021, the state is not eligible for the extended federal reimbursement between February 7, 2021, and March 13, 2021.

RULEMAKING AUTHORITY

Under current law, all authority for administrative rulemaking is conferred by statute. An agency may promulgate rules interpreting the provisions of a statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation. In particular, an agency may not promulgate a rule that conflicts with state law.¹ [ss. [227.10 \(2\)](#) and [227.11 \(2\) \(a\)](#), Stats.]

DWD has general authority to adopt administrative rules that are necessary or suitable in carrying out the unemployment insurance program. DWD also has specific authority to modify or suspend any unemployment statutes, by rule, in circumstances where the modification or suspension is necessary to permit continued certification of the state's unemployment insurance program, or to obtain the maximum federal tax rate credit for employers. As discussed below, the specific authority to modify or suspend an unemployment statute does not apply in this circumstance. [s. [108.14 \(2\)](#) and [\(13\)](#), Stats.]

DISCUSSION

DWD has published a scope statement for its intent to promulgate an emergency rule temporarily waiving the waiting period, in order to maximize the federally funded unemployment benefits.² You asked if DWD may waive this requirement through rulemaking.³ Very briefly, the answer is no.

In its scope statement, DWD cites its general authority to adopt administrative rules that are necessary or suitable in carrying out the unemployment insurance program. However, that rulemaking authority

¹ In addition, a conflict with state law is grounds for the Joint Committee for Review of Administrative Rules to suspend an administrative rule, including an emergency rule. [ss. [227.19 \(4\) \(d\) 4.](#) and [227.26 \(2\) \(d\)](#), Stats.]

² See scope statement [SS 014-21](#), approved by the Governor on February 12, 2021.

³ In addition, the Governor has authority to take certain actions during a declared public health emergency, but that authority does not apply to a waiver of the waiting period. The emergency powers allow waiver of administrative rules, but not waiver of statutes, and the Governor has not issued an executive order to waive the waiting period. [s. [323.12 \(4\) \(d\)](#), Stats.]

does not extend to a rule that would conflict with state law. In this case, the statutes specify that “no benefits are payable” in the first week of a person’s benefit year. A waiver of that provision would directly conflict with the required waiting period.

DWD’s specific authority to modify or suspend an unemployment statute, by rule, also does not apply in this circumstance and DWD does not cite this provision in its scope statement. DWD authority to suspend an unemployment statute is limited to circumstances where the modification or suspension is necessary to permit continued certification of the state’s unemployment program, or to obtain the maximum federal tax rate credit for employers. The federal funding for the waiting period under the Consolidated Appropriations Act, 2021, does not affect either of these circumstances.

In summary, DWD does not have general or specific authority to waive the statutory waiting period by rule. Act 185 provided a statutory temporary waiver of the waiting period, and required DWD to seek the maximum amount of federal reimbursement for benefits for the first week of a claimant’s benefit year that were payable during the time period of the waiver. Both the waiver and the directive to seek the maximum amount of federal reimbursement for the waiting period ended on February 6, 2021.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

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