Legal Action of Wisconsin, the largest provider of free civil legal aid to low-income people in the state, is reaching out to the Department of Workforce Development (“DWD”) to share information and a legal analysis regarding the current work registration requirements for unemployment compensation claims.

On March 12, 2020, Governor Evers recognized the COVID-19 public health emergency through Executive Order #72. On March 18, 2020, Governor Evers issued Emergency Order #7, waiving the four weekly work search actions for unemployment claimants. Finally, on March 24th, and again on April 16th, Governor Evers issued Safer at Home Emergency Orders, temporarily shutting down businesses throughout Wisconsin to decrease the spread of the virus.\(^1\)

As a result, Wisconsin is facing an unprecedented increase in temporary unemployment and new unemployment compensation claims. As individuals attempt to apply for unemployment compensation, many are being denied benefits due to confusion over the work registration requirements. Legal Action of Wisconsin is concerned that these DWD unemployment compensation forfeitures may be in violation of the law, as the registration-related benefits forfeitures are the result of a DWD rule without the support of a properly promulgated regulation.

I. Widespread confusion and stress on DWD resources means that many individuals are being denied unemployment compensation for failing to timely register for work within the 14-day window.

At Legal Action, we’ve experienced a dramatic surge of calls from individuals trying to navigate the complicated unemployment system. They do not understand the distinctions between work registration and work search. The waiver of the work search requirement has been highly publicized, is well known,

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\(^1\) Each of these emergency orders shut down businesses for approximately one month, enabling DWD to determine that, within the meaning of Wisconsin Administrative Code DWD § 126.03(2), unemployment claimants had a “reasonable expectation [of] returning to employment within a period of 8 weeks, which may be extended an additional 4 weeks but may not exceed a total of 12 weeks” and therefore DWD “shall waive a claimant's work registration requirement.”
and is prominently featured on the application system. The electronic notices within the application, however, do not effectively differentiate work registration from work search, leaving many applicants confused about the requirements.

Many of the people calling Legal Action for help with an unemployment compensation application have been unable to reach DWD support staff in the local offices to answer questions and assist with technology issues, as the DWD phone systems are utterly overwhelmed. To the extent that any claimant sought clarification from a DWD employee, they would have faced an overwhelmed phone system that oftentimes would not allow them to hold, leave a call back number, or leave a message in order to ask a question. Furthermore, Legal Action of Wisconsin has gotten reports from individuals who tried to complete the work registration and were unable to submit their resume or upload it to the Wisconsin Job Service. In one circumstance, an individual was unable to complete the task and unable to reach anyone at the Job Center for assistance; a Legal Action of Wisconsin paralegal attempted to help him complete the task for an additional two hours with no success. Given the widespread confusion and stress on DWD resources, delays are occurring, and even diligent, good faith unemployment claimants are failing to register for work until they receive notice from DWD that they have been denied two full weeks of benefits.

Even in less critical periods, access to unemployment compensation is “an urgent public problem, gravely affecting the health, morals, and welfare of the people of this state.” Wis. Stat. § 108.01(1). Legal Action has conducted a legal analysis of the issue, and we are concerned that DWD may be violating the law by punishing applicants who fail to timely comply with the 14-day registration deadline by deeming benefits “forfeited” even after applicants complete the registration. Moreover, the DWD denials deprive Legal Action of Wisconsin clients and other low-income families of desperately needed income, which could prevent food insecurity and an unnecessary and destabilizing wave of evictions.

II. The law suggests that the 14-day registration deadline may not be applied to bar benefits between application and successful completion of registration because the policy of depriving eligible claimants of benefits owed to them once they comply is an unenforceable rule that DWD failed to promulgate as a regulation.

The law is clear that an agency rule may not be enforced to adversely affect a person when the rule has not been promulgated as a regulation. See, e.g., Lamar Central Outdoor, LLC v. Division of Hearing and Appeals, 2019 WI 109, ¶¶ 14-16, 389 Wis. 2d 486, 936 N.W.2d 573 (agency’s change in interpretation of an ambiguous statute must be promulgated, not adopted in a contested case); see also County of Dane v. Wisconsin Department of Health and Social Services, 79 Wis. 2d 323, 331, 255 N.W.2d 539 (1977); Mata v. Wisconsin Department of Children and Families, 2014 WI App 69, ¶ 10 354 Wis. 2d 486, 849 N.W.2d 908 (DCF policy manual provision was a rule required to be promulgated); Cholvin v. Department of Health and Family Services, 2008 WI App. 127, ¶ 34, 313 Wis. 2d 549, 758 N.W.2d 118 (Wis. App. 2008) (written instruction to agency staff on assessing applicant’s functional ability invalid and unenforceable because not promulgated); Mack v. Wisconsin Department of Health & Family Services, 231 Wis. 2d 644, 647-49, ¶¶8-10, 605 N.W.2d 651 (Wis. App. 1999) (State’s SSI recoupment policy invalid because not promulgated).

Wisconsin Statute § 227.01(13) defines the five elements of a rule: (1) a regulation, standard, statement of policy, or general order (2) of general application that (3) has the force of law and that is (4) issued by an agency (5) to implement, interpret, or make specific legislation enforced or administered by the agency or

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2 This meets the standard for requiring DWD waiver of the work registration requirement, as claimants are “unable to complete registration due to circumstances which the department determines are beyond the claimant’s control.” Wis. Stat. §108.04(2)(b)(6) and Wis. Admin. Code DWD § 126.03(7).
to govern the organization or procedure of the agency. The Court of Appeals has held that a rule has “the effect of law” where “the interest of individuals in a class can be legally affected through enforcement of the agency action.” Cholvin v. DHFS, 208 WI App 127, ¶26. Cholvin directs courts to look to the language of a challenged practice or policy to determine whether the text functions as a directive. See id at ¶26, citing Milwaukee Area Joint Plumbing Apprenticeship Comm. v. DILHR, 172 Wis.2d 299, 321 n. 12, 493 N.W.2d 744 (WI App 1992) (“[P]rovisions using express mandatory language are more than informational. In those provisions, the agency speaks with an official voice intended to have the effect of law.”).

Under Cholvin and Wis. Stat. § 227.01(13), DWD’s policy of denying benefits between the initial unemployment insurance application and successfully completing registration to applicants who do not meet the 14-day registration deadline constitutes a rule. The denial is a “statement of policy” “of general application” “with the effect of law” “issued by the agency” “to implement specific legislation enforced or administered by the agency.” It applies to all applicants, it affects the legal interests of a class by its enforcement, and it is used to implement the statutory registration requirement.

While work registration is required by statute for the payment of benefits, DWD is merely authorized to require that registration be accomplished “in the manner prescribed by the department by rule.” Wis. Stat. § 108.04(2)(a)2. DWD has promulgated a regulation with respect to registration in Wis. Admin. Code. DWD Chapter 126. It states, “a claimant who is unemployed is eligible for unemployment benefits for any given week only if the claimant has registered for work.” Wis. Admin. Code DWD § 126.01. Additionally, Wis. Admin. Code DWD §126.02 states, “A claimant shall be considered registered for work with respect to any given week if the claimant has filed an application … for registration for work as prescribed by the department and within a time-frame specified by the department.” Critically, it is silent about the consequences of otherwise eligible claimants who come into compliance after the DWD’s deadline has passed.

The statute authorizing the DWD regulation is also ambiguous with respect to the consequences of failing to meet its deadline. A claimant cannot receive benefits under the statute until the claimant is registered for work. But the statute does not say whether a failure to timely register precludes a claimant from curing that failure and becoming eligible for the withheld benefits after the curing action. If the statute and the regulation are ambiguous, DWD cannot “fix” that ambiguity by creating by creating practices that reflect the agency’s preferred interpretation. If Wis. Stat. § 108.04 and Wis. Admin. Code DWD Ch 126 do not plainly and unambiguously require forfeiture, the law is clear that DWD must formally promulgate its interpretation of the statute in order to deny benefits to claimants who, eventually, do register for work. Lamar Cent. Outdoor, LLC v. Div. of Hearings & Appeals, 2019 WI 109, ¶ 38, 389 Wis. 2d 486, 513, 936 N.W.2d 573, 586 (“Therefore, because § 84.30(11) does not plainly and unambiguously require the Department’s no-cure interpretation, Schoolway Transp. Co. does not provide an exemption from the rulemaking requirement.”).

The DWD mandate to deny benefits to applicants who fail to register for work within the 14-day window appears in other places, such as in portions of its website and in the claimant’s handbook. But Wisconsin courts have made it clear that public dissemination and public availability were not an adequate legal substitute for promulgation. In Mack, the case striking down the State’s SSI recoupment policy, the court clarified:

The requirement of formal rulemaking requires administrative agencies to follow a rational, public process. This requirement ensures that administrative agencies will not issue public policy of general application in an arbitrary, capricious, or oppressive manner. Many public policy concerns could be illuminated through the rulemaking process. For example, the fact that State SSI is a subsistence level program, whose
benefits are exempt even from post-judgment garnishment might bear on the wisdom of reducing current State SSI payments.

Mack, 231 Wis. 2d at 549. If the forfeiture policy is an unpromulgated rule, then the fact that it is made public in websites and handbooks does not change its essential nature. Nor does that kind of public dissemination make an unpromulgated rule legally enforceable.

Given that DWD has decided to deny benefits to applicants who fail to register for work within the 14-day deadline rather than waive the disqualification for such claimants, Legal Action of Wisconsin is concerned that DWD’s denials are violating the law. Particularly during these extraordinary circumstances, Legal Action has concluded that the law seems to require DWD to either waive the work registration requirement or cease the forfeiture of benefits for individuals who fail to timely complete the work registration.

Thank you for your attention to this matter. Please do not hesitate to reach out to discuss this issue further or if you have any questions.