

# State Employee Whistleblower Protection Law

2011–12 Wisconsin Statutes updated through 2013 Wis. Act 380  
and all Supreme Court Orders entered before May 3, 2014.

Wis. Admin. Code Chapter DWD 224, which implements the State Employee  
Whistleblower Protection Law, is also included.

## Chapter 230 State Employment Relations

### Subchapter III Employee Protection, ss. 230.80 – 230.89, Stats.

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## Subchapter III

### Employee Protection

**Cross Reference:** See also ch. DWD 224, Wis. adm. code.

**230.80 Definitions.** In this subchapter:

**(1)** “Abuse of authority” means an arbitrary or capricious exercise of power.

**(1m)** “Appointing authority” means the chief officer of any governmental unit unless another person is authorized to appoint subordinate staff by the constitution or any law.

**(2)** “Disciplinary action” means any action taken with respect to an employee which has the effect, in whole or in part, of a penalty, including but not limited to any of the following:

(a) Dismissal, demotion, transfer, removal of any duty assigned to the employee’s position, refusal to restore, suspension, reprimand, verbal or physical harassment or reduction in base pay.

(b) Denial of education or training, if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation or other personnel action.

(c) Reassignment.

(d) Failure to increase base pay, except with respect to the determination of a discretionary performance award.

**(3)** “Employee” means any person employed by any governmental unit except:

(a) A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

(b) A person who is, or whose immediate supervisor is, assigned to an executive salary group or university senior executive salary group under s. 20.923.

**(4)** “Governmental unit” means any association, authority, board, commission, department, independent

agency, institution, office, society, or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor, and the courts. “Governmental unit” does not mean any political subdivision of the state or body within one or more political subdivisions that is created by law or by action of one or more political subdivisions.

**NOTE:** Sub. (4) is shown as amended eff. 1-1-15 by 2013 Wis. Act 20. Prior to 1-1-15 it reads:

**(4)** “Governmental unit” means any association, authority, board, commission, department, independent agency, institution, office, society, or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor, and the courts, but excluding the Health Insurance Risk-Sharing Plan Authority. “Governmental unit” does not mean any political subdivision of the state or body within one or more political subdivisions that is created by law or by action of one or more political subdivisions.

**(5)** “Information” means information gained by the employee which the employee reasonably believes demonstrates:

(a) A violation of any state or federal law, rule or regulation.

(b) Mismanagement or abuse of authority in state or local government, a substantial waste of public funds or a danger to public health and safety.

**(6)** “Merit further investigation” means reasonably indicates the existence of a situation justifying inquiry.

**(7)** “Mismanagement” means a pattern of incompetent management actions which are wrongful, negligent or arbitrary and capricious and which adversely affect the efficient accomplishment of an agency function. “Mismanagement” does not mean the mere failure to act in accordance with a

particular opinion regarding management techniques.

**(8)** “Retaliatory action” means a disciplinary action taken because of any of the following:

(a) The employee lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85 (1).

(b) The employee testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employee.

(c) The appointing authority, agent of an appointing authority or supervisor believes the employee engaged in any activity described in par. (a) or (b).

**(9)** “Substantial waste of public funds” means an unnecessary expenditure of a substantial amount of money or a series of unnecessary expenditures of smaller amounts of money.

**History:** 1983 a. 409; 1995 a. 27, 326; 1997 a. 237; 2005 a. 74; 2013 a. 20.

A “pattern of incompetent management actions” under sub. (7) requires more than a claim of a single act of incompetent management. A continuing course of conduct requires multiple actions to constitute a pattern. *Hutson v. Wisconsin Personnel Commission*, 2003 WI 97, 263 Wis. 2d 612, 665 N.W.2d 212, 01–2959.

**230.81 Employee disclosure. (1)** An employee with knowledge of information the disclosure of which is not expressly prohibited by state or federal law, rule or regulation may disclose that information to any other person. However, to obtain protection under s. 230.83, before disclosing that information to any person other than his or her attorney, collective bargaining representative or legislator, the employee shall do either of the following:

(a) Disclose the information in writing to the employee’s supervisor.

(b) After asking the division of equal rights which governmental unit is appropriate to receive the information, disclose the information in writing only to the governmental unit that the division of equal rights determines is appropriate. The division of equal rights may not designate the department of justice, the courts, the legislature or a service agency under subch. IV of ch. 13 as an appropriate governmental unit to receive information. Each appropriate governmental unit shall designate an employee to receive information under this section.

**(2)** Nothing in this section prohibits an employee from disclosing information to an appropriate law enforcement agency, a state or federal district attorney in whose jurisdiction the crime is alleged to have occurred, a state or federal grand jury or a judge in a proceeding commenced under s. 968.26, or disclosing information pursuant to any subpoena issued by any person authorized to issue subpoenas under s. 885.01. Any such disclosure of information is a lawful disclosure under this section and is protected under s. 230.83.

**(3)** Any disclosure of information by an employee to his or her attorney, collective bargaining representative or legislator or to a legislative committee or legislative service agency is a lawful disclosure under this section and is protected under s. 230.83.

**History:** 1983 a. 409; 2003 a. 33.

**Cross Reference:** See also ch. DWD 224, Wis. adm. code.

**230.82 Processing of information. (1)** A governmental unit to which an employee discloses information under s. 230.81 (1) shall process it as provided in this section. Within 30 days of receiving the information, the governmental unit shall either initially determine if it merits further investigation or refer the

information to a governmental unit better able to initially determine if it merits further investigation. A governmental unit which initially determines information to merit further investigation shall, within 30 days of that determination, either commence a full investigation into the truth of the information or refer the information to a governmental unit better able to conduct such an investigation, which shall commence it within 30 days of referral. A governmental unit may disclose or refer information to an appropriate law enforcement agency or district or federal attorney as part of an investigation or in lieu of referral to another governmental unit, if the law enforcement agency or district or federal attorney is best able to conduct the investigation. Any full investigation commenced shall be completed within a reasonable time.

(2) A governmental unit which initially determines that information merits further investigation, or which after a full investigation finds information to be true, shall so inform the employee and his or her appointing authority in writing. A governmental unit which initially determines information not to merit further investigation, refers the information to another governmental unit or after a full investigation finds information to be untrue shall so inform the employee in writing.

(3) A governmental unit which investigates or otherwise processes information disclosed under s. 230.81 may require that an interview with any employee described in s. 230.80 (3), except a management or supervisory employee immediately involved in the subject matter of the information disclosed, be conducted outside the presence of the appointing authority or any representative or agent thereof unless the employee voluntarily requests that presence. An appointing authority

shall permit an employee to be interviewed without loss of pay and to have an employee representative present at the interview. An appointing authority of an employee to be interviewed may require the governmental unit to give the appointing authority reasonable notice prior to the interview.

(4) A governmental unit shall keep the identity of the employee confidential until the governmental unit determines the information merits further investigation. If a governmental unit conducts a full investigation, it shall keep the identity of the employee confidential if it is reasonably possible to do so.

**History:** 1983 a. 409.

### **230.83 Retaliatory action prohibited.**

(1) No appointing authority, agent of an appointing authority or supervisor may initiate or administer, or threaten to initiate or administer, any retaliatory action against an employee.

(2) This section does not apply to an employee who discloses information if the employee knows or anticipates that the disclosure is likely to result in the receipt of anything of value for the employee or for the employee's immediate family, unless the employee discloses information in pursuit of any award offered by any governmental unit for information to improve government administration or operation.

(3) Nothing in this section restricts the right of an employer to take appropriate disciplinary action against an employee who knowingly makes an untrue statement or discloses information the disclosure of which is expressly prohibited by state or federal law, rule or regulation.

**History:** 1983 a. 409.

**Cross Reference:** See also ch. DWD 224, Wis. adm. code.

**230.85 Enforcement. (1)** An employee who believes that a supervisor or appointing authority has initiated or administered, or threatened to initiate or administer, a retaliatory action against that employee in violation of s. 230.83 may file a written complaint with the division of equal rights, specifying the nature of the retaliatory action or threat thereof and requesting relief, within 60 days after the retaliatory action allegedly occurred or was threatened or after the employee learned of the retaliatory action or threat thereof, whichever occurs last.

**(2)** The division of equal rights shall receive and, except as provided in s. 230.45 (1m), investigate any complaint under sub. (1). In the course of investigating or otherwise processing such a complaint, the division of equal rights may require that an interview with any employee described in s. 230.80 (3), except a management or supervisory employee who is a party to or is immediately involved in the subject matter of the complaint, be conducted outside the presence of the appointing authority or any representative or agent thereof unless the employee voluntarily requests that presence. An appointing authority shall permit an employee to be interviewed without loss of pay and to have an employee representative present at the interview. An appointing authority of an employee to be interviewed may require the division of equal rights to give the appointing authority reasonable notice prior to the interview. If the division of equal rights finds probable cause to believe that a retaliatory action has occurred or was threatened, it may endeavor to remedy the problem through conference, conciliation or persuasion. If that endeavor is not successful, the division of equal rights shall issue and serve a written notice of hearing, specifying the nature of the retaliatory action which has occurred or was

threatened, and requiring the person named, in this section called the “respondent”, to answer the complaint at a hearing. The notice shall specify the place of hearing and a time of hearing not less than 30 days after service of the complaint upon the respondent nor less than 10 days after service of the notice of hearing. If, however, the division of equal rights determines that an emergency exists with respect to a complaint, the notice of hearing may specify a time of hearing within 30 days after service of the complaint upon the respondent, but not less than 10 days after service of the notice of hearing. The testimony at the hearing shall be recorded or taken down by a reporter appointed by the division of equal rights.

**(3) (a)** After hearing, the division of equal rights shall make written findings and orders. If the division of equal rights finds that the respondent engaged in or threatened a retaliatory action, it shall order the employee’s appointing authority to insert a copy of the findings and orders into the employee’s personnel file and, if the respondent is a natural person, order the respondent’s appointing authority to insert such a copy into the respondent’s personnel file. In addition, the division of equal rights may take any other appropriate action, including but not limited to the following:

1. Order reinstatement or restoration of the employee to his or her previous position with or without back pay.

2. Order transfer of the employee to an available position for which the employee is qualified within the same governmental unit.

3. Order expungement of adverse material relating to the retaliatory action or threat from the employee’s personnel file.

4. Order payment of the employee’s reasonable attorney fees by a

governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to participate in proceedings before the division of equal rights.

5. Recommend to the appointing authority of a respondent who is a natural person that disciplinary or other action be taken regarding the respondent, including but not limited to any of the following:

a. Placement of information describing the respondent's violation of s. 230.83 in the respondent's personnel file.

b. Issuance of a letter reprimanding the respondent.

c. Suspension.

d. Termination.

(b) If, after hearing, the division of equal rights finds that the respondent did not engage in or threaten a retaliatory action it shall order the complaint dismissed. The division of equal rights shall order the employee's appointing authority to insert a copy of the findings and orders into the employee's personnel file and, if the respondent is a natural person, order the respondent's appointing authority to insert such a copy into the respondent's personnel file. If the division of equal rights finds by unanimous vote that the employee filed a frivolous complaint it may order payment of the respondent's reasonable actual attorney fees and actual costs. Payment may be assessed against either the employee or the employee's attorney, or assessed so that the employee and the employee's attorney each pay a portion. To find a complaint frivolous the division of equal rights must find that s. 802.05 (2) or 895.044 has been violated.

(c) Pending final determination by the division of equal rights of any complaint under this section, the division of equal rights may make interlocutory orders.

(d) Interim earnings or amounts earnable with reasonable diligence by the person subjected to the retaliatory action or threat shall reduce back pay otherwise allowable. Amounts received by the person subjected to the retaliatory action or threat as unemployment benefits or welfare payments do not reduce the back pay otherwise allowable, but shall be withheld from the person subjected to the retaliatory action or threat and immediately paid to the unemployment reserve fund or to the welfare agency making the payment.

**(4)** The division of equal rights shall serve a certified copy of the findings and order on the respondent and, if the respondent is a natural person, upon the respondent's appointing authority.

**(5)** (a) If a respondent does not comply with any lawful order by the division of equal rights, for each such failure the respondent shall forfeit a sum of not less than \$10 nor more than \$100. Every day during which a respondent fails to comply with any order of the division of equal rights constitutes a separate violation of that order.

(b) As an alternative to par. (a), the division of equal rights may enforce an order by a suit in equity.

**(6)** (a) If a disciplinary action occurs or is threatened within the time prescribed under par. (b), that disciplinary action or threat is presumed to be a retaliatory action or threat thereof. The respondent may rebut that presumption by a preponderance of the evidence that the disciplinary action or threat was not a retaliatory action or threat thereof.

(b) Paragraph (a) applies to a disciplinary action under s. 230.80 (2) (a) which occurs or is threatened within 2 years, or to a disciplinary action under s. 230.80 (2) (b), (c) or (d) which occurs or is threatened within one year, after an employee discloses information under s.

230.81 which merits further investigation or after the employee's appointing authority, agent of an appointing authority or supervisor learns of that disclosure, whichever is later.

**History:** 1983 a. 409; 1991 a. 39; 2003 a. 33; Sup. Ct. Order No. 03-06A, 2005 WI 86, 280 Wis. 2d xiii; 2011 a. 2.

**Cross Reference:** See also ch. DWD 224, Wis. adm. code.

The commission may not use a "multiplier" in computing reasonable attorney fees under sub. (3) (a) 4.; only SCR 20:1.5 factors are permissible. Board of Regents v. Personnel Commission 147 Wis. 2d 406, 433 N.W.2d 273 (Ct. App. 1988).

**230.86 Discipline based on surveillance. (1)** No appointing authority may take any disciplinary action based in whole or in part on wiretapping, electronic surveillance or one-way mirrors unless that surveillance produces evidence that the employee against whom disciplinary action is taken has committed a crime or unless that surveillance is authorized by the appointing authority and is conducted in accordance with the rules promulgated under s. 16.004 (12).

**(2)** Subsection (1) does not apply to wiretapping, electronic surveillance or one-way mirrors used to monitor security or used for public safety purposes at a state institution.

**History:** 1989 a. 245; 1993 a. 496.

**Cross Reference:** See also ch. DWD 224, Wis. adm. code.

**230.87 Judicial review. (1)** Findings and orders of the division of equal rights under this subchapter are subject to judicial review under ch. 227. Upon that review, or in any enforcement action, the department of justice shall represent the division of equal rights unless a conflict of interest results from that representation. A court may order payment of a prevailing appellant employee's

reasonable attorney fees by a governmental unit respondent, or by a governmental unit employing a respondent who is a natural person if that governmental unit received notice and an opportunity to appear before the court.

**(2)** If the court finds that the appeal is frivolous, it shall award to the respondent reasonable attorney fees and costs. Payment may be assessed fully against the appellant, including a governmental unit, or the appellant's attorney or assessed so that the appellant and the appellant's attorney each pay a portion. To find an appeal frivolous, the court must find one or more of the following:

(a) The appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The appellant or appellant's attorney knew, or should have known, that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

**History:** 1983 a. 409; 1985 a. 135; 2003 a. 33.

**Cross Reference:** See also ch. DWD 224, Wis. adm. code.

**230.88 Payment of award, judgment or settlement; effect of order, arbitration award or commencement of court action. (1) PAYMENT.** Any award, judgment or settlement obtained by an employee under this subchapter shall be paid from the funds appropriated under s. 20.865 (1) (a), (g) and (q).

**(2) EFFECT.** (a) A final order issued under s. 230.85 or 230.87 which has not been appealed and for which the time of appeal has passed binds all parties who were subjected to the jurisdiction of the division of equal rights or the court and who received an opportunity to be heard.

With respect to these parties, the decree is conclusive as to all issues of law and fact decided.

(b) No collective bargaining agreement supersedes the rights of an employee under this subchapter. However, nothing in this subchapter affects any right of an employee to pursue a grievance procedure under a collective bargaining agreement under subch. V of ch. 111, and if the division of equal rights determines that a grievance arising under such a collective bargaining agreement involves the same parties and matters as a complaint under s. 230.85, it shall order the arbitrator's final award on the merits conclusive as to the rights of the parties to the complaint, on those matters determined in the arbitration which were at issue and upon which the determination necessarily depended.

(c) No later than 10 days before the specified time of hearing under s. 230.85 (2), an employee shall notify the division of equal rights orally or in writing if he or she has commenced or will commence an action in a court of record alleging matters prohibited under s. 230.83 (1). If the employee does not substantially comply with this requirement, the division of equal rights may assess against the employee any costs attributable to the failure to notify. Failure to notify the division of equal rights does not affect a court's jurisdiction to proceed with the action. Upon commencement of such an action in a court of record, the division of equal rights has no jurisdiction to process a complaint filed under s. 230.85 except to dismiss the complaint and, if appropriate, to assess costs under this paragraph.

**History:** 1983 a. 409; 2003 a. 33; 2009 a. 28; 2011 a. 10.

The commission lost its subject matter jurisdiction over the appellant's whistleblower complaint once an action was filed in the federal district court that included allegations of state whistleblower violations.

The state did not waive the jurisdictional issue by informing the commission that it had no objection to holding the commission proceeding in abeyance while the claims were pursued in federal court. The legislature expressly withdrew the power of the commission to adjudicate whistleblower claims once an action alleging those claims is filed in a court of record. *Albrechtsen v. Department of Workforce Development*, 2005 WI App 241, 288 Wis. 2d 144, 708 N.W.2d 1, 04-2130.

**230.89 Rule making and reporting. (1)** The division of equal rights shall promulgate rules to carry out its responsibilities under this subchapter.

**(2)** Every 2 years, the division of equal rights shall submit a report to the chief clerk of each house of the legislature, for distribution to the appropriate standing committees under s. 13.172 (3), regarding complaints filed, hearings held and actions taken under this subchapter, including the dollar amount of any monetary settlement or final monetary award which has become binding on the parties.

**History:** 1983 a. 409; 1987 a. 186; 2003 a. 33.

**Cross Reference:** See also PC, Wis. adm. code.

## Chapter DWD 224

### Whistleblower Protection

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**Note: Chapter DWD 224 was created by emergency rule effective August 5, 2003.**

**DWD 224.01 Purpose.** The purpose of this chapter is to implement the law relating to complaints filed against the state as an employer under subch. III of ch. 230, Stats., commonly referred to as the “whistleblower” law.

**History:** CR 03–092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.02 Definitions.** When used in this chapter:

(1) “Administrative law judge” means the examiner appointed to conduct hearings under subch. III of ch. 230, Stats.

(2) “Appointing authority” has the meaning given in s. 230.80 (1m), Stats.

**Note:** Section 230.80 (1m), Stats., provides that “appointing authority” means “the chief officer of any governmental unit unless another person is authorized to appoint subordinate staff by the constitution or any law.”

(3) “Complainant” means the employee who files a complaint alleging that an action prohibited by subch. III of ch. 230, Stats., has been committed.

(4) “Day” means a calendar day, except that if the last day of the time period is a Saturday, Sunday, or legal holiday, the last day shall be the next business day.

(5) “Division” means the equal rights division of the department of workforce development.

(6) “Employee” has the meaning given in s. 230.80 (3), Stats.

**Note:** Section 230.80 (3), Stats., provides that “employee” means “any person employed by any governmental unit except:

(a) A person employed by the office of the governor, the courts, the legislature or a service agency under subch. IV of ch. 13.

(b) A person who is, or whose immediate supervisor is, assigned to an executive salary group or university senior executive salary group s. 20.923.”

(7) “Filing” means the physical receipt of a document.

(8) “Governmental unit” has the meaning given in s. 230.80 (4), Stats.

**Note:** Section 230.80 (4), Stats., provides that “governmental unit” means “any association, authority, board, commission, department, independent agency, institution, office, society or other body in state government created or authorized to be created by the constitution or any law, including the legislature, the office of the governor and the courts. ‘Governmental unit’ does not mean any political subdivision of the state or body within one or more political subdivisions which is created by law or by action of one or more political subdivisions.”

(9) “Probable cause” means a reasonable ground for belief, supported by facts and circumstances strong enough in themselves to warrant a prudent person to believe, that a violation of subch. III of ch. 230, Stats., probably has been or is being committed.

(10) “Respondent” means the appointing authority, agent of an appointing authority, supervisor, or governmental unit alleged to have committed an action prohibited by subch. III of ch. 230, Stats.

(11) “Retaliatory action” has the meaning given in s. 230.80 (8), Stats.

**Note:** Section 230.80 (8), Stats., provides that “retaliatory action” means “a disciplinary action take because of any of the following:

(a) The employee lawfully disclosed information under s. 230.81 or filed a complaint under s. 230.85 (1).

(b) The employee testified or assisted or will testify or assist in any action or proceeding relating to the lawful disclosure of information under s. 230.81 by another employee.

(c) The appointing authority, agent of an appointing authority or supervisor believes the employee engaged in any activity described in par. (a) or (b).”

(12) “Service of the complaint upon the respondent” under s. 230.85 (2), Stats., means mailing of the complaint to the respondent.

(13) “Unanimous vote” as it is used in s. 230.85 (3) (b), Stats., means the decision of the administrative law judge.

**History:** CR 03–092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.03 Complaints. (1) WHO MAY FILE COMPLAINTS.** A complaint may

be filed by any employee or by the employee's duly authorized representative. A complaint filed by a representative shall state that the representative is authorized to file the complaint.

**(2) WHERE TO FILE COMPLAINTS.**

(a) A complaint may be filed in person with any division office or it may be mailed or sent by facsimile transmission to one of the following division offices:

1. Equal Rights Division, 201 East Washington Avenue, Madison, Wisconsin 53702. Facsimile number: 608-267-4592.

2. Equal Rights Division, 819 North Sixth Street, Milwaukee, Wisconsin 53203. Facsimile number: 414-227-4084.

(b) A complaint filed by facsimile transmission shall conform with the requirements of s. DWD 224.24 (1).

**(3) FORM AND CONTENT OF COMPLAINT.** A complaint shall be written on a form that is available at any division office or on any form acceptable to the division. Each complaint shall be signed by the employee filing the complaint or by the employee's duly authorized representative. The signature constitutes an acknowledgment that the employee or the representative has read the complaint; that to the best of that employee's knowledge, information, and belief the complaint is true and correct; and that the complaint is not being used for any improper purpose, such as to harass the party against whom the complaint is filed. Each complaint shall contain all of the following information:

(a) The name and address of the complainant.

(b) The name and address of the respondent.

(c) A concise statement of the facts, including pertinent dates, constituting the alleged retaliatory action.

**Note:** A complaint form is also available on the Department of Workforce Development's website at

<http://www.dwd.state.wi.us/> by following the link to Equal Rights.

**(4) ASSISTANCE BY THE DIVISION.** The division shall, upon request, provide appropriate assistance in completing and filing complaints.

**(5) AMENDMENT OF COMPLAINT.** A complaint may be amended, subject to the approval of the division, except that a complaint may not be amended less than 20 days before hearing unless good cause is shown for the failure to amend the complaint prior to that time. If the complaint is amended prior to the issuance of an initial determination, the division shall investigate the allegations of the amended complaint. If the complaint is amended after the case has been certified to hearing, the chief of the hearing section or the administrative law judge may remand the complaint to the investigation section to conduct an investigation and issue an initial determination as to whether probable cause exists to believe that the respondent took retaliatory action as alleged in the amended complaint. An amended complaint shall be dismissed if it does not meet the requirements of s. DWD 224.06 (1).

**(6) WITHDRAWAL OF COMPLAINT.** A complaint may be withdrawn at any time. A request for withdrawal shall be in writing and shall be signed by the complainant or by the complainant's duly authorized representative. Upon the filing of a request for withdrawal, the division shall dismiss the complaint by written order. Such dismissal shall be with prejudice unless otherwise expressly stated in the order.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04; CR 06-062: am. (2) Register November 2006 No. 610, eff. 12-1-06.

**DWD 224.04 Notification of respondent. (1) WHEN NOTICE IS TO BE SENT.** The division shall serve a copy of a

complaint that meets the requirements of s. DWD 224.03 upon each respondent prior to the commencement of any investigation.

**(2) CONTENT OF NOTICE.** The notice shall include a copy of the complaint, which shall indicate on its face the date the complaint was filed. The notice shall direct the respondent to respond in writing to the allegations of the complaint within a time period specified by the division. The notice shall further state that, if the respondent fails to answer the complaint in writing, the division may make an initial determination as to whether retaliatory action has occurred based only on the division's investigation and the information supplied by the complainant.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.05 Complainant's duty to respond to correspondence from the division.** The division may dismiss the complaint if the complainant fails to respond to the division within 20 days from the date of mailing of any correspondence from the division concerning the complaint, provided that correspondence was sent by certified mail, return receipt requested, to the last known address of the complainant.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.06 Preliminary review of complaints. (1) REVIEW OF COMPLAINT.** The division shall review every complaint filed to determine all of the following:

(a) Whether the complainant is protected by subch. III of ch. 230, Stats.

(b) Whether the respondent is subject to subch. III of ch. 230, Stats.

(c) Whether the complaint states a claim for relief under subch. III of ch. 230, Stats.

(d) Whether the complaint was filed within the time period set forth in s. 230.85 (1), Stats., if that issue is raised in writing by the respondent.

**(2) PRELIMINARY DETERMINATION DISMISSING COMPLAINT.** The division shall issue a preliminary determination dismissing any complaint or any portion of a complaint that fails to meet the requirements of sub. (1). The division shall send the order of dismissal by first class mail to the last known address of each party and to their attorneys of record.

**(3) APPEAL OF PRELIMINARY DETERMINATION.** A complainant may appeal from an order dismissing a complaint under sub. (2) by filing a written appeal with the division. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the division shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision which shall either affirm, reverse, modify, or set aside the preliminary determination. The division shall serve the decision of the administrative law judge upon the parties. If the decision reverses or sets aside the preliminary determination, the complaint shall be remanded for investigation. If the decision affirms the preliminary determination, the complainant may seek judicial review if it is a final decision and order as defined in s. DWD 224.22 (1).

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.07 Investigations. (1) CONDUCT OF INVESTIGATION.** Except as provided in sub. (3), the division shall investigate all complaints that satisfy the review under s. DWD 224.06. In

conducting investigations under this chapter, the division may seek the cooperation of all persons to provide requested materials to the division; to obtain access to premises, records, documents, individuals, and other possible sources of information; to examine, record, and copy necessary materials; and to take statements of persons reasonably necessary for the furtherance of the investigation. In scheduling interviews with state employees, the division may consider the programmatic needs of the appointing authority. The division may subpoena persons or documents for the purpose of the investigation. Subpoenas may be enforced pursuant to s. 885.11, Stats.

**(2) ADVISING COMPLAINANT TO AMEND COMPLAINT.** If, during an investigation, it appears that the respondent has engaged in retaliatory action against the complainant that is not alleged in the complaint, the division may advise the complainant that the complaint should be amended.

**(3) DISMISSAL OF COMPLAINT PRIOR TO COMPLETION OF INVESTIGATION.** (a) The division may dismiss a complaint prior to completion of an investigation under the following circumstances:

1. The complainant has failed to respond to correspondence from the division concerning the complaint within 20 days after the correspondence was sent by certified mail to the last-known address of the person filing the complaint.

2. The complainant signed a valid waiver and release of claims arising out of the complainant's employment with the respondent which would preclude the division from finding that the respondent has violated subch. III of ch. 230, Stats.

3. The allegations in the complaint have been previously dismissed by the division.

(b) A complainant may appeal from an order dismissing a complaint under

this subsection by filing a written appeal with the division. The appeal shall be filed within 20 days of the date of the order and shall state specifically the grounds upon which it is based. If a timely appeal is filed, the division shall serve a copy of the appeal upon all other parties. The matter shall be referred to the hearing section of the division for review by an administrative law judge. The administrative law judge shall issue a decision that shall either affirm, reverse, modify, or set aside the dismissal of the complaint. The decision of the administrative law judge shall be served upon the parties. If the decision reverses or sets aside the dismissal, the complaint shall be remanded for further investigation. If the decision affirms the dismissal of the complaint, it is subject to judicial review under ch. 227, Stats., if it is a final decision and order as defined in s. DWD 224.22 (1).

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.08 Initial determination.**

**(1) GENERAL.** At the conclusion of the investigation, the division shall issue a written initial determination that shall state whether or not there is probable cause to believe that retaliatory action occurred as alleged in the complaint. This initial determination shall set forth the facts upon which its conclusion is based and shall be served upon the parties.

**(2) INITIAL DETERMINATION OF PROBABLE CAUSE.** If the division initially determines that there is probable cause to believe that any retaliatory action occurred as alleged in the complaint, it shall certify the case to hearing. A hearing on the merits shall thereafter be noticed and conducted in accordance with the provisions of ss. DWD 224.12 to 224.21.

**(3) INITIAL DETERMINATION OF NO PROBABLE CAUSE.** If the division initially determines that there is no probable

cause to believe that retaliatory action occurred as alleged in the complaint, it may dismiss those allegations. The division shall, by a notice to be incorporated in the initial determination, notify the parties and their attorneys of record of the complainant's right to appeal as provided in s. DWD 224.09.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.09 Appeal of initial determination of no probable cause.**

**(1) WHEN FILED.** Within 30 days after the date of an initial determination finding that there is no probable cause, a complainant may file a written request for a hearing on the issue of probable cause. The request for hearing shall state specifically the grounds upon which the appeal is based. The division shall notify the respondent that an appeal has been filed within 10 days of receiving the appeal.

**(2) DISMISSAL FINAL IF NO APPEAL FILED.** If no timely written request for a hearing is filed, the initial determination's order of dismissal shall be the final determination of the division.

**(3) CERTIFICATION TO HEARING ON ISSUE OF PROBABLE CAUSE; RIGHT TO STIPULATE THAT CASE BE DECIDED ON MERITS.** If a timely appeal is filed, the division shall issue a notice certifying the matter to hearing. A hearing on the issue of probable cause shall be noticed and conducted in accordance with the provisions of ss. DWD 224.12 and 224.14 to 224.21, except that the parties may stipulate prior to the hearing that the administrative law judge may decide the case on the merits. If a hearing on the issue of probable cause is requested in a case in which the initial determination also found probable cause with respect to one or more issues the division may, with the consent of the parties, consolidate the

hearing on probable cause and the hearing on the merits.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04; CR 06-062: am. (3) Register November 2006 No. 610, eff. 12-1-06.

**DWD 224.10 Private settlement and conciliation.** The parties may enter into an agreement to settle the complaint at any time during the proceedings, with or without assistance by the division. The division may assist the parties to reach a settlement agreement. The parties shall notify the division immediately upon reaching a settlement.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.11 Dismissal of complaint for lack of jurisdiction or other procedural basis following certification to hearing.**

A complaint may be dismissed based upon the conditions set forth in s. DWD 224.06 (1) or for any other procedural basis after the case is certified to hearing under either s. DWD 224.08 (2) or 224.09 (3). In determining whether to dismiss the complaint, the administrative law judge may consider documents and affidavits presented by any party and may hold a hearing to allow the parties to establish facts that may have a bearing on whether the complaint should be dismissed. If the administrative law judge issues an order dismissing the complaint under this section, a certified copy of the order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.12 Notice of hearing. (1) CONTENT.** In any matter which has been certified to hearing following an initial determination of probable cause under s. DWD 224.08 (2) or an appeal of an initial

determination of no probable cause under s. DWD 224.09 (3), the division shall advise the parties and their representatives and attorneys of record in writing by first-class mail, of the specific time, date, and place established for the hearing. The notice of hearing shall fully identify the parties and the case number. It shall specify a time and date for hearing not less than 30 days after the date of mailing of the notice of hearing. The notice of hearing shall specify the nature of the retaliatory action that is alleged to have occurred and shall state the legal authority on which the hearing is based. A copy of the complaint shall be attached to the notice of hearing.

**(2) PLACE OF HEARING.** The hearing shall be held in the county where the alleged retaliatory action occurred or at another location with the consent of the parties. For the purpose of this subsection, the county where the alleged retaliatory action occurred is the county where the complainant was employed at the time.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.13 Answer. (1) WHEN REQUIRED.** Within 21 days after the date of a notice of hearing on the merits, each respondent shall file with the hearing section of the division an answer to the allegations of the complaint upon which there is a finding of probable cause, along with a certification that a copy of the answer has been mailed to all other parties.

**(2) CONTENT OF ANSWER.** The answer shall contain the address of the respondent and the name and address of the respondent's legal counsel or other representative. It shall also contain a specific admission, denial, or explanation of each allegation of the complaint. If the respondent is without knowledge or information sufficient to form a belief as

to the truth of an allegation, the respondent shall so state and this shall have the effect of a denial. Admissions or denials may be to all or part of an allegation, but shall fairly meet the substance of the allegation. Any affirmative defense relied upon, including the statute of limitations, shall be raised in the answer unless it has previously been raised by a motion in writing. Failure to raise an affirmative defense in the answer may, in the absence of good cause, be held to constitute a waiver of such a defense.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.14 Pre-hearing conference.** In any case which has been certified to hearing, a pre-hearing conference may be held in accordance with the provisions of s. 227.44 (4), Stats.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.15 Pre-hearing discovery. (1) WHEN DISCOVERY MAY BEGIN.** Discovery may not be used prior to the time that a matter is certified to hearing, except that the taking and preservation of evidence shall be permitted prior to certification to hearing under the circumstances set forth in s. 227.45 (7), Stats.

**(2) DISCOVERY DIRECTED TO A PARTY NOT REPRESENTED BY LEGAL COUNSEL.** In the case of discovery directed to a party who is not represented by legal counsel, the party seeking that discovery shall, not less than 10 days prior to conducting such discovery, state in writing that it intends to seek discovery. The party seeking discovery shall send this notice to the party who is not represented by legal counsel and to either the chief of the hearing section or the administrative law judge, if one has been assigned to the case. All copies of demands for discovery and notices of

depositions shall be filed with the division at the time they are served upon the party from whom the discovery is sought. Copies of responses to discovery by an unrepresented party and the original transcript of any deposition of an unrepresented party shall be filed with the division by the party which instituted those discovery requests as soon as practicable after the discovery has been taken.

**(3) SCOPE, METHOD, AND USE OF DISCOVERY.** The scope of discovery, the methods of discovery, and the use of discovery at hearing shall be the same as set forth in ch. 804, Stats.

**(4) FAILURE TO COMPLY WITH DISCOVERY REQUESTS; DUTY TO CONSULT WITH OPPOSING PARTY.** The administrative law judge may in the manner provided under ch. 804, Stats. All motions to compel discovery or motions for protective orders shall be accompanied by a statement in writing by the party making the motion that, after consultation in person or by telephone with the opposing party and sincere attempts to resolve their differences, the parties are unable to reach agreement. The statement shall state the date and place of such consultation and the names of all parties participating in the consultation.

**(5) FILING WITH DIVISION.** Copies of discovery requests and responses to discovery requests need not be filed with the division, except as required under sub. (2).

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.16 Subpoenas and motions. (1) SUBPOENAS.** The division or a party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of documents. A subpoena issued by an attorney shall be in substantially the same form as provided in

s. 805.07 (4), Stats., and shall be served in the manner provided in s. 805.07 (5), Stats. Witnesses summoned by a subpoena who are not employees of the civil service as defined in s. 230.03 (6), Stats., shall be entitled to the witness and mileage fees set forth in s. 814.67 (1) (a) and (c), Stats. The cost of service, witness, and mileage fees shall be paid by the person issuing the subpoena. Subpoenas may be enforced pursuant to s. 885.11, Stats.

**(2) MOTIONS.** Motions made during a hearing may be stated orally and shall, with the ruling of the administrative law judge, be included in the record of the hearing. All other motions shall be in writing and shall state briefly the relief requested and the grounds upon which the moving party is entitled to relief. All written motions shall be filed with the administrative law judge assigned to the case. Any briefs or other papers in support of a motion, including affidavits and documentary evidence, shall be filed with the motion. Any party opposing the motion may file a written response. All written motions shall be decided without further argument unless requested by the administrative law judge.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.17 Disqualification of the administrative law judge.** Upon the administrative law judge's own motion, or upon a timely and sufficient affidavit filed by any party, the administrative law judge shall determine whether to disqualify himself or herself because of personal bias or other reason. The administrative law judge's determination shall be made a part of the record and decision in the case.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.18 Exchange of names of witnesses and copies of exhibits.** By no

later than the tenth day prior to the day of hearing, the parties shall file with the division and serve upon all other parties a written list of the names of witnesses and copies of exhibits which the parties intend to use at the hearing. For the purpose of this section, service is complete on mailing rather than on receipt. The administrative law judge may exclude witnesses and exhibits not identified in a timely fashion pursuant to this section. This section does not apply to witnesses and exhibits offered in rebuttal that the party could not have reasonably anticipated using prior to the hearing.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.19 Hearings. (1) PROCEDURE.** Hearings shall be conducted in conformity with subch. III of ch. 230, Stats., and the provisions of ch. 227, Stats.

**(2) POSTPONEMENTS AND CONTINUANCES.** All requests for postponements shall be filed with the administrative law judge within 10 days after the notice of hearing, except where emergency circumstances arise after the notice is issued but prior to the hearing. The party requesting a postponement shall mail a copy of the request to all other parties at the time the request is filed with the division. Postponements and continuances may be granted only for good cause shown and shall not be granted solely for the convenience of the parties or their attorneys.

**(3) APPEARANCE OF PARTIES.** Parties may appear at the hearing in person and by counsel or other representative.

**(4) FAILURE TO APPEAR AT HEARING.** If the complainant fails to appear at the hearing, either in person or by a representative authorized to proceed on behalf of the complainant, the administrative law judge shall dismiss the complaint. If the respondent fails to appear at the hearing, the hearing shall

proceed as scheduled. If, within 10 days after the date of hearing, any party who failed to appear shows good cause in writing for the failure to appear, the administrative law judge may reopen the hearing.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.20 Record of hearing. (1) METHOD OF RECORDING HEARING.** A stenographic, electronic, or other record of oral proceedings shall be made at all hearings conducted under subch. III of ch. 230, Stats. Any party wishing to have a court reporter present to transcribe the proceedings shall be permitted to do so at their own expense. If the hearing is recorded on tape or digitally, the original recording shall remain in the division for 5 years following the hearing, after which it may be discarded.

**(2) REQUIREMENTS FOR PREPARATION OF TRANSCRIPTS.** Any party may file a transcript of the hearing with the division. The transcript shall be prepared by an independent, reputable court reporter or transcriptionist. The transcript shall include a certification by the transcriptionist that it is an original, verbatim transcript of the proceedings.

**(3) COST FOR TRANSCRIPTION OF RECORD.** Transcription of the record for purposes other than judicial review shall be at the expense of any party who requests the transcription. For the purpose of judicial review, the division shall prepare at its own expense and provide to the court a transcript of the record, unless a transcript has already been prepared at the expense of the parties. If a transcript has been provided to the court for the purpose of judicial review, the division shall provide a copy of the transcript at no cost to any party that submits a sworn affidavit of indigency and the inability to obtain funds to pay for a transcript.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04; CR 06-062: am. (1) Register November 2006 No. 610, eff. 12-1-06.

**DWD 224.21 Decision and order. (1) GENERAL.** After the close of the hearing, including any briefs that may be allowed by the administrative law judge, the administrative law judge shall prepare a formal written decision that shall include findings of fact, conclusions of law and an order, and which may be accompanied by an opinion.

**(2) DECISION AND ORDER AFTER HEARING ON THE ISSUE OF PROBABLE CAUSE.** After a hearing on the issue of probable cause, the administrative law judge shall issue a decision and order which dismisses the allegations of the complaint or which orders that the case be certified for a hearing on the merits of the complaint, depending upon the administrative law judge's findings and conclusions on the issue of probable cause. If the decision of the administrative law judge determines that no probable cause exists, a certified copy of the decision and order and a notice of appeal rights shall be sent by first class mail to the last known address of each party and to their attorneys of record. A decision and order finding no probable cause may be appealed to court if it is a final decision and order as defined in s. DWD 224.22 (1).

**(3) DECISION AND ORDER AFTER HEARING ON THE MERITS.** After a hearing on the merits, the administrative law judge shall issue a decision and an order that shall either dismiss the allegations of the complaint or shall order an appropriate action, including actions listed in s. 230.85 (3) (a), Stats., depending upon the administrative law judge's findings and conclusions on the merits of the complaint. The division shall serve a certified copy of the findings and order on the respondent and, if the respondent is a

natural person, upon the respondent's appointing authority. The decision of the administrative law judge shall be the final decision of the division and the division for purposes of judicial review under s. 227.52, Stats.

**(4) COMPUTATION OF INTEREST.** Interest on any award made pursuant to this chapter shall be added to that award and computed at an annual rate of 12% simple interest. Interest shall be computed by calendar quarter.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.22 Appeals. (1) APPEALS LIMITED TO FINAL DECISIONS AND ORDERS.** Any party may seek judicial review of a final decision and order of the administrative law judge as provided in s. 230.87, Stats. Only final decisions and orders of the administrative law judge may be appealed. A final decision is one that disposes of the entire complaint and leaves no further proceedings on that complaint pending before the division.

**(2) NOTICE OF APPEAL RIGHTS.** Every decision and order of an administrative law judge under s. DWD 224.21 shall be accompanied by a separate notice advising the parties of their rights to seek judicial review of the decision pursuant to s. 230.87, Stats.

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04.

**DWD 224.23 Pay status and witness fees for state employee parties and state employee witnesses. (1) PAY STATUS OF STATE EMPLOYEE PARTIES.** State civil service employees who, as parties, are interviewed as part of investigations or who appear at pre-hearing conferences, conciliation sessions, or hearings, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in

accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

**(2) PAY STATUS OF STATE EMPLOYEE WITNESSES.** State civil service employees who are interviewed as part of investigations or who attend hearings as witnesses, whether held in person or via telephone, shall do so without loss of state salary and with reimbursement by the employing agency for travel expenses in accordance with the uniform travel schedule amounts established under s. 20.916 (8), Stats.

**(3) WITNESS FEES FOR STATE CIVIL SERVICE EMPLOYEES.** State civil service employees who attend hearings as witnesses shall be entitled only to that compensation specified in sub. (2).

**History:** CR 03-092: cr. Register March 2004 No. 579, eff. 4-1-04; CR 06-062: am. (2) Register November 2006 No. 610, eff. 12-1-06.

**DWD 224.24 Filing of documents by facsimile transmission or electronic mail.** **(1) FILING OF DOCUMENTS BY FACSIMILE TRANSMISSION.** (a) Except where otherwise directed by the division, documents may be filed by facsimile transmission. Documents filed by

facsimile transmission shall include a cover sheet setting forth all of the following information:

1. The name of the sender.
2. The individual to whom the transmission is directed, if that individual is known.
3. The number of pages being transmitted, including the cover sheet.

(b) The date of transmission recorded by the division's facsimile machine shall constitute the date of filing of a document under this section, except that documents filed by facsimile after the regular business hours of the division as established by s. 230.35 (4) (f), Stats., or on a day when the offices of the division are closed pursuant to s. 230.35 (4) (a), Stats., shall be considered filed on the next business day of the division.

**(2) FILING OF DOCUMENTS BY ELECTRONIC MAIL.** Documents may be filed by electronic mail only if expressly authorized by the equal rights officer or the administrative law judge assigned to the case.

**History:** CR 06-062: Register November 2006 No. 610, eff. 12-1-06