WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 East Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455)
Fax 414-727-6385
www.will-law.org

May 13, 2021

Senator Steve Nass
P.O. Box 7882
Madison, WI 53707-7882

RE: Emergency Rule EmR2106 – DWD Work Search Requirement

Dear Senator Nass:

We were pleased to see your recent press release noting that you intended to seek suspension of the Department of Workforce Development's ("DWD") Emergency Rule, EmR2106. We write to provide some additional support to your efforts, and in particular, to make clear that EmR2106 is an unlawfully promulgated rule that, regardless of public policy reasons, should be repealed or the state risks litigation.

EmR2106 is little more than an extension of a previously issued, and now expired Emergency Rule, EmR2006. Indeed, both EmR2106 and the expired EmR2006 were promulgated from the *same* Statement of Scope, SS 013-20, Approved by the Governor on March 19, 2020.

As you know, an Emergency Rule is only valid for 150 days, unless extended by JCRAR. *See* Wis. Stat. § 227.24(1)(c). The original EmR2006 was original set to expire on October 5, 2020. It was ultimately extended by JCRAR for the maximum amount of time (an additional 120 days, per Wis. Stat. § 227.24(2)(a)) and expired on February 2, 2021.

As the Department noted in the rulemaking analysis attached to the current EmR2106, the intent of both rules is the same:

> "…EmR2006 effectively waives work search due to the existence of the public health emergency by providing that a declared public health emergency constitutes the required four work search actions each week. *This rule accomplishes the same result* by temporarily waiving the requirement to complete four work search actions for each weekly claim." (Emphasis added)

Because an emergency rule may not be extended beyond the statutorily allowed period, an agency may not simply ignore this by promulgated successive emergency rules. Wisconsin state agencies, like DWD, are creations of state law and have only those powers explicitly given to them by state law. They may not exceed these powers.

A formal Attorney General opinion is directly on point. The Attorney General stated that the temporal limitation on emergency rules is a "clear expression of intent that the effectiveness of an

emergency rule may not be extended beyond" the initial effectiveness period by simply re-filing it. 62 Atty. Gen. 305, 308. The Attorney General further stated that this initial time period "was intended to afford an agency the requisite time to adopt rules pursuant to the normal procedures of ch. 227, if the agency perceives that what begins as an emergency presents the need for rules of lasting effect." *Id.*

Here, DWD did just what the law does not allow: they extended an emergency rule beyond the statutorily allowed time frame by simply re-filing it as a new emergency rule. Where an agency's rule exceeds the statutory authority of the agency, Courts in Wisconsin are required to declare the rule invalid. *See* Wis. Stat. § 227.40(4)(a).

Had DWD wished to extend the rule beyond the temporal limitations of the Emergency Rule procedure, the proper avenue would have been to promulgate a permanent rule. That, of course, would have subjected it to the additional oversight requirements that they avoided here. DWD itself seems to acknowledge that it avoided the proper route when it offers excuses for not doing so, claiming they "never contemplated promulgating these rule changes into permanent rules." They further claim such a permanent rule would not be appropriate or allowed under federal law as this rule only relates to the COVID-19 pandemic. Instead, they chose to openly violate state law and unlawfully promulgated EmR2106.

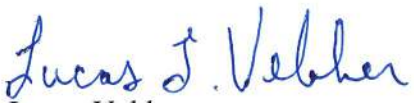
It is bizarre that a state agency, created by the people of Wisconsin and given only those powers provided it by the laws of this state, would choose to so brazenly ignore state law.

For these reasons, we support your efforts to repeal this unlawful agency action. We hope your colleagues on the Joint Committee for Review of Administrative Rules will join you in this effort. This is the most cost effective and efficient way to hold DWD accountable to state law. Should this rule remain effective, however, we are prepared to litigate this matter and have this rule declared unlawful.

Thank you for your time and your continued service to the people of Wisconsin.

Sincerely,

Kyle Koenen
Policy Director
Wisconsin Institute for Law & Liberty



Lucas Vebber
Deputy Counsel
Wisconsin Institute for Law & Liberty

cc: JCRAR Membership