2 COVERED AND EXCLUDED EMPLOYMENT

A. Employee vs. Independent Contractor

Wisconsin's Unemployment Insurance Law defines the term "employee" differently for individuals who provide services in the trucking or logging industry and individuals working for government units and nonprofit organizations from individuals working in other industries.

1. ***Trucking, Logging, Government Unit or Nonprofit Organization.*** An individual working as a logger or trucker or providing services to a government unit or nonprofit organization will be considered an employee unless:

   a. The individual is free from the employing unit's direction and control, not only under the terms of any written contract, but also in the day-to-day performance of such services. The individual must be free from your direction and control in regard to the details of when, where, and how their services are performed. In addition, although an employer can determine what the desired end results are, you cannot control the details of how the worker accomplishes those results. If you have the right to direct and control the logger or trucker, even if you never exercise that right, the individual is an employee and not an independent contractor.

   b. The services have been performed in an independently established trade, business or profession in which the individual is customarily engaged. Generally this means that the logger or trucker has an investment from which he/she may realize either a profit or a loss. In addition, the individual alone must have the right to sell or give away that business investment.

   c. See DWD 105 (Relationship Of Carriers And Contract Operators) and DWD 107 (Employment Relationships In The Logging Industry) for additional details.

   Unless both of the above conditions are met, the logger, trucker or individual providing services to a government unit or nonprofit organization is an employee and not an independent contractor.

2. ***Others.*** As of January 1, 2000, there are no mandatory criteria. An individual must satisfy at least 7 of the following 10 criteria to be considered an independent contractor.

   a. The individual must either have or have applied for a Federal Employer Identification Number (FEIN).

   b. The individual must have filed federal self-employment or business tax returns in the previous year based on the type of service they're providing to the employing unit or, in the case of a new business, in the year in which such services were first performed.

   c. The individual must maintain a separate business with his/her own office, equipment, materials and other facilities. Does the worker have what is needed or essential to do their job or are essentials provided by the employing unit? Consider the type of business when determining what business assets are reasonable to expect the individual to have. For instance, it would be reasonable to expect that a machinist would have tools and equipment and a facility other than his/her home from which to work. It would not be as likely that a computer consultant would have a facility other than an office in his/her home but a computer, modem, and fax would be essential.

   d. The individual must operate under contracts to perform specific services for specific amounts of money and under which the individual controls the means and method of performing the

services. An agreement between the worker and the employing unit is a contract, whether that agreement is oral, written, or limited to the practices followed. An employing unit may direct what should be done by an independent contractor, but the individual should determine how to accomplish the job.

e. The individual should incur the main expenses related to the services being performed. If expenses are reimbursed by the employing unit, it is unlikely that the individual will meet this criterion.

f. The individual is responsible for the satisfactory completion of the services and is liable for failure to satisfactorily complete the services. If rework is necessary, will the worker be required to perform the work at no additional cost to the employing unit? If the work is not completed according to contract, can the employing unit sue for breach of contract? An independent contractor is most likely responsible for completing the job to the satisfaction of the employing unit.

g. The individual receives compensation for services performed on a commission or per job or competitive bid basis and not on any other basis. An individual paid strictly by the hour would not meet this requirement unless the hourly rate is part of a bid or per job agreement.

h. The individual must be able to realize a profit or suffer a loss under contracts to perform services. If the worker has expenses that may exceed income, this criterion would be met. This would be true, for example, if an individual underbid and material costs exceeded money received for the job.

i. The individual has recurring business liabilities or obligations. If the worker has liabilities that continue whether or not he/she has customers, this item would be met. Some examples of liabilities are lease payments, insurance, advertising, professional fees, rent, and interest.

j. The success or failure of the individual's business depends on the relationship of business receipts to expenditures. If success or failure of the worker's business depends on something else, such as a single source supplier or a single employing unit's sales license, this requirement is not met.

Under current law, it is incumbent on the employing unit to satisfy the Department that at least 7 of the 10 items are met in order to consider the worker an independent contractor. The Department will work with both the employing units and the individual to gather the necessary information. However, it is ultimately the employing unit's responsibility to respond to the Department.

If you have questions regarding the independent contractor provisions of the law, contact us at:

E-mail: taxnet@dwd.state.wi.us

Internet:
http://www.dwd.state.wi.us/uitax/default.htm

or

Bureau of Tax & Accounting
Division of Unemployment Insurance
P.O. Box 7942
Madison, WI 53707

or

Telephone: (608) 261-6700
FAX: (608) 267-1400

Deaf, and hearing or speech-impaired callers may reach us through WI TRS.

B. Employment Excluded by Statute

Individuals who meet the statutory definition of employee but who perform certain types of services are specifically listed or designated as not performing covered employment. The result is that their wages are not reportable/taxable (unless they are taxable under FUTA) nor will they be entitled to receive UI benefits based on those wages. The following excluded employment is grouped by types of employers that are entitled to the exclusion for UI tax purposes:

1. For All Employers:

   a. Service performed by an individual who is enrolled at a nonprofit or public educational institution, which combines work experience with academic instruction in a full-time program for credit at the institution (work/study student);

   b. Service performed as a student nurse, medical intern or patient in the employ of a hospital; or

   c. Service performed in any calendar quarter in the employ of an organization exempt from federal income tax under section 501(a) of the Internal Revenue Code, other than an organization described in Section 401(a) or 501(c)(3) or Section 521, if the payment for such service is less than $50.00 in a calendar quarter (e.g., officer of fraternal organization or labor union with wages of less than $50.00 in a calendar quarter).

   d. Service by a nonresident alien for the period he or she is temporarily present in the United States as a nonimmigrant if the nonresident alien has F, J ,M or Q visas. The spouse and children of the nonresident aliens are also excluded.

   e. Services provided to recipients of medical assistance by an individual who is not an employee of a home health agency if the service is:

      1. Private duty nursing service or part time intermittent care for which medical assistance is available as a covered service provided by an individual certified by the Department of Health and Family Services as a nurse in independent practice or as an independent nurse practitioner; or

      2. Respiratory care service for ventilator dependent individual for which medical assistance is available as a covered service, provided by an individual who is certified by the Department of Health and Family Services as a provider of respiratory service in independent practice.

2. For All Employers Except Government Units and Nonprofit Organizations:

   a. Service performed by an individual in agricultural labor if the employer is not subject to the general agricultural coverage conditions (see Part 1: "ESTABLISHING COVERAGE");

   b. Service as a domestic in the employ of an individual in that individual's private home if the employer is not subject to the general domestic coverage conditions (see Part 1: "ESTABLISHING COVERAGE");

   c. Service as a caddy on a golf course;

   d. Service as an individual selling or distributing newspapers or magazines on the street or from house to house, unless covered under the Federal Unemployment Tax Act;

   e. Service covered under the Federal Railroad Unemployment Insurance Act;

   f. Service as an insurance agent or real estate salesperson working solely on a commission basis;

   g. Service as an unpaid corporate or association officer;

   h. Service by an individual employed entirely outside Wisconsin;

   i. Service by a sole proprietor's father, mother, spouse or by a son or daughter, or by a child or stepchild if legally adopted, under the age of 18 for his or her parents. This does not apply to a corporation and only applies to a partnership if the relationship of the exempt employee is excludable for all partners;

   j. Service as a court reporter paid on a per diem basis;

   k. Service performed by an individual paid solely by commissions, overrides, bonuses or differentials directly derived from in-person sales of consumer products primarily in the home;

l. Maritime service excluded from coverage under the Federal Unemployment Tax Act; or

m. Service by an individual leasing a taxicab if:

(1) The individual retains the income earned through use of the taxicab under the lease;

(2) The individual receives no direct compensation from the lessor under the lease; and

(3) The amount of the lease payment is not contingent on the income generated by the use of the taxicab.

3. For Government Units and Nonprofit Organizations:

a. Service by an individual under a work relief or work training project financed by state or federal funds, unless coverage is required as a condition in the state or federal program;

b. Service by an individual receiving rehabilitation through a rehabilitation program; or

c. Service by an inmate of a custodial or penal institution.

4. For Nonprofit Organizations Only:

a. Service in the employ of a church or convention or association of churches;

b. Service in the employ of an organization operated primarily for religious purposes and operated, supervised, controlled or principally supported by a church or convention or association of churches; or

b. Service by a duly ordained, commissioned or licensed minister of a church in the exercise of such ministry or by a member of a religious order in the exercise of duties required by the order.

5. For Government Employers Only:

a. Service of an official elected by vote of the public;

b. Service as an official appointed to fill part or all of the unexpired term of a vacant position normally filled by election;

c. Service as a member of a legislative body or judiciary of a state or political subdivision;

d. Service as a member of the Wisconsin National Guard in a military capacity;

e. Service solely on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency; or

f. Service in a position designated as a major nontenured policy or advisory job, or in a position designated as a policy or advisory position not normally requiring service of more than 8 hours per week.

6. For Educational Institutions Only:

a. Service for an educational institution by a student enrolled and regularly attending classes at the institution; or

b. Service by the spouse of a student working under a program to provide financial assistance to the student if written notice is given at the start of employment that it is not covered for unemployment insurance.

C. Employment Excluded by Employer Election

The employment exclusions that follow are optional. You must make an election to exclude this employment and must meet the specified criteria before the election will be approved.

1. Corporate Officer Exclusion

   Section 108.02(15)(L) allows small employers to elect to exclude the wages of all principal corporate officers provided that they have a direct or indirect ownership interest in the corporation.

   The result is that you are not required to report the wages or pay state UI taxes on the wages of corporate officers who own or control 25% or more of the business. These excluded officers will not be entitled to draw UI benefits.

   Criteria which must be met:

   - The corporation must file an Election to Exclude All Principal Officers, Form UCT-7937 (see Example 2). This must be filed by March 31 of the year you're requesting to elect out of coverage. In the case of new employers, it's due when the first quarterly report is due.

   - The corporation must be a small employer. Annual taxable payroll must be $500,000 or less for the calendar year proceeding the year of election.

   - The principal officer(s) must have a direct or indirect substantial ownership interest in the corporation. An officer has direct or indirect substantial ownership if one-fourth (25%) of the ownership interest is owned or controlled by the officer.

   - The department will issue an Initial Determination, approving or rejecting the election, based upon the criteria above. The election remains in effect as long as the conditions are met or until you reelect coverage of wages for the corporation's officers. Once you reelect coverage, you cannot again elect the Corporate Officer Exclusion.

   - **It is not always beneficial to elect the Corporate Officer Exclusion. The Federal Unemployment Tax Act (FUTA) does not recognize this exclusion and therefore, since no state UI tax has been paid on the officers' wages, you pay the full 6.2% FUTA tax on the excluded officers' wages.**

     However, if other employees are on your payroll in addition to excluded corporate officers and their wages exceed $7,000, "credits" are generated which may offset the additional FUTA tax on the excluded officers.

     See Example 3, UCT-8055, to help you determine if a savings will be realized.

For further information, please contact us at:

E-mail: taxnet@dwd.state.wi.us

Internet:
http://www.dwd.state.wi.us/uitax/default.htm

or

Bureau of Tax & Accounting
Division of Unemployment Insurance
P.O. Box 7942
Madison, WI 53707

or

Telephone: (608) 261-6700
FAX: (608) 267-1400

Deaf, hearing or speech-impaired callers may reach us through WI TRS.

2. Seasonal Employer Designation

   Certain employers may elect to be designated as Seasonal Employers. Ultimately, this could result in a lower tax rate. Seasonal employees may not be eligible to collect UI benefits, but wages would still be reported and taxes would continue to be paid on these wages. As a seasonal employer, you would also pay an additional 2% solvency tax on all of your taxable payroll for the calendar year, to a limit of the maximum rate in effect for the calendar year.

Criteria which must be met:

- You must file an Election for Seasonal Employer Designation, Form UCT-9315, by May 31 of the year prior to the year you're requesting your designation as a seasonal employer to begin. (see Example 4)

- You must be in a tourism, recreational or tourist service, agricultural production, agricultural services, forestry, commercial fishing, hunting or trapping industry (DWD 147, Wis. Administrative Code).

- You must customarily operate during two calendar quarters within a year. These two quarters are regarded as the season.
- At least 75% of the wages you pay must be for work performed during the two seasonal quarters.

- You are not delinquent in making any UI reports/payments. We will examine the application and issue a determination by June 30 as to your seasonal status. We also examine each seasonal employer every year to determine if the above conditions continue to be met.

When designated as a Seasonal Employer:

The employment **IS** excluded (for benefit purposes) and no benefits are allowed **IF**:

1. The worker received written notice before performing any services that their work may be considered excluded employment for UI purposes;

2. You've employed the worker for less than 90 days during any season which includes a portion of the worker's base period; and

3. The worker has not earned $500 or more during his/her base period from another employer, which is covered by the UI law of any state or federal UI law.

Charging of UI Benefits:

1. Your account is charged if the worker worked for you 90 days or more (regardless of outside earnings).

2. Your account is not charged if the worker worked for you less than 90 days and had outside earnings of $500 or more.

To obtain an election forms or for further information, please contact us at:

E-mail: taxnet@dwd.state.wi.us

Internet:
http://www.dwd.state.wi.us/uitax/default.htm

or

Bureau of Tax & Accounting
Division of Unemployment Insurance
P.O. Box 7942
Madison, WI 53707

or

Telephone: (608) 261-6700
FAX: (608) 267-1400

Deaf, hearing or speech-impaired callers may reach us through WI TRS.

D. Tax vs. Benefit Exclusion

Work for an employer may be covered for UI tax purposes even though it is excluded for benefit purposes (e.g., work for designated seasonal employers). However, work excluded for tax purposes is generally excluded for benefit purposes. (Refer to the chart, Employment that is Excluded for Benefit Purposes, in Section 1, Part 7, F. for a summary comparison.)

EXAMPLE 2

ELECTION TO EXCLUDE PRINCIPAL OFFICERS

FROM COVERAGE UNDER WISCONSIN'S UNEMPLOYMENT INSURANCE ACT
Chapter 108, Wis. Stats.

State of Wisconsin
Department of Workforce Development
Mailing Address:
Division of Unemployment Insurance
P.O. Box 7942
Madison, WI 53707-7942
Fax: (608) 267-1400

Personal information you provide may be used for secondary purposes [Privacy Law, s. 15.04 (1)(m)]

Pursuant to Section 108.025, Stats. the following named corporation:

Business Name	WI UI Account Number

elects, effective as of January 1, _____, to exclude from coverage under Wisconsin's Unemployment Insurance Law all of their principal officers, i.e., president, vice-president(s), secretary, and treasurer, who have a direct or indirect substantial ownership interest in the corporation.

The undersigned certifies that the corporation's payroll for the calendar year proceeding the effective date of this election was $500,000 or less. It is further certified that the principal officers of the corporation, covered by however designated or evidenced, in the corporation that is owned or controlled, directly or indirectly, by each of said officers. It is further certified that the corporate officer signing this election has the authority to act on behalf of the corporation.

It is expressly understood that this election, when approved by the Department of Workforce Development, will remain in effect for subsequent calendar years if the electing corporation's payroll remains at $500,000 or less for successive calendar years and the principal officers covered by this election retain a one-fourth or more ownership interest in the corporation as outlined above.

The corporation will receive an Initial Determination advising the status of this election.

Submitted for the Corporation on this Date	Signed By
Telephone Number ( )	Title

Section 108.025

"Employment" includes an individual's service for an employer organized as a corporation in which the individual is a principal officer, as defined in Section 108.025, and has a direct or indirect ownership interest, except that if an employer having an annual payroll of $500,000 or less for the calendar year preceding an election files a notice of election, in that manner prescribed by the department, to exclude the service of all of its principal officers who have a direct or indirect substantial ownership in the corporation, "employment" does not include the service of these officers. An employer which files an election under this paragraph may reelect coverage of its principal officers under this subsection by filing a notice of reelection with the department. An employer which reelects coverage of its principal officers is not eligible to file a notice of election of noncoverage under this paragraph. To be effective for a calendar year, an employer shall file a notice of election or reelection not later than March 31 of that year. Newly subject and successor employers have until the due date of their first quarterly report to elect the corporate officer exclusion. An election is effective for each calendar year until the employer files a timely notice of reelection. A principal officer has a direct or indirect substantial ownership interest in a corporation under this paragraph if one-fourth or more of the ownership interest, however designated or evidence, in the corporation is owned or controlled, directly or indirectly, by the officer.

UCT-7937 (R. 05/2001)

EXAMPLE 3

NOTICE FOR CORPORATIONS

State of Wisconsin
Department of Workforce Development
Mailing Address:
Division of Unemployment Insurance
P.O. Box 7942
Madison, WI 53707-7942
Fax: (608) 267-1400

Personal information you provide may be used for secondary purposes [Privacy Law, s. 15.04 (1)(m)]

Certain corporations may elect to exclude qualified corporate officers from "employment" under Wisconsin's Unemployment Insurance (UI) Law. Their wages would neither be subject to state UI contributions (taxes) nor usable for any UI benefit purpose.

A corporation may exclude principal corporation officers effective as of January 1, 2002, if all the following conditions exist.

1. The corporation had a total UI taxable payroll for 2001 of $500,000 or less.
2. An election to exclude eligible corporation officers is filed by **March 31, 2002**. (Special Note: New and successor employers have until the due date of their first quarterly report to file the application for exclusion.)
3. The election covers all principal officers (president, vice president(s), secretary and treasurer) who have one-fourth or more ownership interest in the corporation.

Please read the statutory provisions on the bottom half of this sheet.

Since paid corporation officers' wages are subject to tax under the Federal Unemployment Tax Act (FUTA), it may not be financially advantageous for some corporations to exclude their wages from taxation under Wisconsin's UI Law. The FUTA tax is initially a 6.2% tax on the first $7,000 paid each employee within a calendar year. Employers receive a 90% offset credit against this 6.2% tax for contributions paid timely under a state UI law. Where sufficient offset credit is available, the resulting net FUTA tax is 0.8%. If the exclusion is elected, employers pay the full 6.2% FUTA tax on the corporate officer wages. **You will receive an Initial Determination advising you of the status of your election**.

Qualifying corporations can complete the worksheet on the reverse side and estimate their total state and federal UI taxes with the exclusion and without the exclusion. **Corporations that elected to take this exclusion in the past do not have to make another election. You should review your account each year to be sure the election is still saving you money. If you wish to rescind the election, please send us a letter to that effect by March 31.**

A corporation wishing to elect this exclusion can obtain the election form and/or further information by writing the Employer Service Team, P.O. Box 7942, Madison, WI 53707-7942, or telephoning the unit at (608) 261-6700 or FAX (608) 267-1400. Completed election forms should be submitted to the P.O. Box address. Division of Unemployment Insurance internet address is: http//:www.dwd.state.wi.us/ui/

Section 108.025 provide the following:

"Employment" includes an individual's service for an employer organized as a corporation in which the individual is a principal officer, as defined in Section 108.025, and has a direct or indirect ownership interest, except that if an employer having an annual taxable payroll of $500,000 or less for the calendar year preceding an election files a notice of election, in that manner prescribed by the department, to exclude the service of all of its principal officers who have a direct or indirect substantial ownership in the corporation, "employment" does not include the service of these officers. An employer which files an election under this paragraph may reelect coverage of its principal officers under this subsection by filing a notice of reelection with the department. An employer which reelects coverage of its principal officers is not eligible to file a notice of election of noncoverage under this paragraph. To be effective for a calendar year, an employer shall file a notice of election or reelection not later than March 31 of that year. Newly subject and successor employers have until the due date of their first quarterly report to elect the corporate officer exclusion. An election is effective for each calendar year until the employer files a timely notice of reelection. A principal officer has a direct or indirect substantial ownership interest in a corporation under this paragraph if one-fourth or more of the ownership, however designated or evidenced, in the corporation is owned or controlled, directly or indirectly, by the officer.

UCT-8055 (R. 12/2001)

EXAMPLE 3 - CONTINUED

WORKSHEET - CORPORATE OFFICER EXCLUSION

INSTRUCTIONS: Complete the chart below using estimated 2002 payroll figures to illustrate the effect of excluding corporate officer wages on your total state and federal unemployment costs. **This is only one year's payroll and results could vary in subsequent years**. You may have other tax concerns to consider when making your decision.

**NOTE:* The figures you show in lines 1, 2 and 3 will be the same for both Column A and B since the exclusion of paid officers' wages is not allowed under the Federal Unemployment Tax Act (FUTA).

USE PAYROLL FIGURES (estimated 2002)	COLUMN A (without exclusion)	COLUMN B (with exclusion)
1. Payroll subject to FUTA (include only first $7,000 of any employee's wages)		*
2. FUTA Tax (6.2% time line 1)		*
3. Maximum FUTA Credit Potentially Available (5.4% times line 1)		*
4. Payroll subject to WI UI Tax (include only first $10,500 of any employee's wages)		
5. Your 2002 WI UI Tax Rate		
6. WI UI Tax (line 4 times line 5)		
7. FUTA Credit for "implied" Payment of State UI Taxes (5.4% times line 4)		
8. Total FUTA Credit (higher of line 6 or 7, but not more than line 3)		
9. Net FUTA Tax (line 2 minus line 8)		
10. Total State UI and FUTA Taxes (line 6 plus line 9)		

UCT-8055 (R. 12/2001)

EXAMPLE 4

ELECTION FOR SEASONAL EMPLOYER DESIGNATION

UNDER WISCONSIN'S UNEMPLOYMENT COMPENSATION ACT

CHAPTER 108, WIS. STATS.

Pursuant to Section 108.066 stats., the following named employer:

_____ _____
Business Name UC Account Number

elects, effective as of January 1, 19_____ to be designated a seasonal employer under Wisconsin's Unemployment Compensation Law.

The undersigned certifies that at least 75% of the wages paid during the previous calendar year were paid for work performed during no more than two (2) quarters

It is further certified that the person signing this election has the authority to act on behalf of the employer.

It is expressly understood that this election, when approved by the Department of Industry, Labor and Human Relations, will remain in effect for subsequent calendar years if the employer continues to qualify as a seasonal employer. The employer may also withdraw the election for a subsequent calendar year with written notice to the department by May 31 of the current year.

The Employer will receive an Initial Determination advising the status of this election or if any change in the election status is made.

Date submitted for the Employer_____

Signed by _____, _____
(Title)

Telephone Number (_____) _____.

UCT-9315 (R 05/94)