

UNEMPLOYMENT INSURANCE

ADVISORY COUNCIL ACTIVITIES REPORT

2015-2016



STATE OF WISCONSIN



Department of Workforce Development

May 15, 2017

To: The Honorable Scott Walker and Members of the Wisconsin State Legislature:

This report describes the activities of Wisconsin's Unemployment Insurance Advisory Council for the 2015-2016 period.

Wisconsin's thriving economy and the common-sense reforms made to Wisconsin's Unemployment Insurance program have improved the stability and integrity of the Unemployment Insurance Trust Fund. When Governor Walker took office in January 2011, the Trust Fund had a negative balance of \$1.4 billion. At the end of 2016, the Trust Fund was nearly \$1.2 billion in the black, a \$2.6 billion improvement. And, the Trust Fund balance is expected to be greater than \$1.2 billion on June 30, 2017, which would result in an additional Unemployment Insurance tax reduction for Wisconsin employers for 2018. That would be the third straight tax year that Wisconsin employers would experience such a reduction.

This report describes the reforms to the Unemployment Insurance program during the 2015-2016 biennium. Examples include:

- ▶ Provisions to reduce Unemployment Insurance benefit fraud;
- ▶ Administrative and criminal penalties for intentional worker misclassification;
- ▶ Credit for benefit charges related to identity theft for employers with reimbursable financing;
- ▶ Modernization of unemployment appeals;
- ▶ Implementing the administrative rules for the pre-employment drug testing program as required by the 2015-2016 Wisconsin state budget.

The Department of Workforce Development and the Unemployment Insurance Advisory Council look forward to working with the Governor and the Legislature to continue to strengthen Wisconsin's Unemployment Insurance program. The department and the Council seek to ensure that this vital program remains available to workers who lose their job through no fault of their own and accountable to the Wisconsin employers who fund benefit payments.

Sincerely,



Ray Allen, Secretary
Department of Workforce Development

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INTRODUCTION

The following report summarizes the deliberations of the Unemployment Insurance Advisory Council (Council) and provides the position of the Council concerning each proposed change to Unemployment Insurance (UI) law during 2015-2016. The report is prepared by the Secretary of the Department of Workforce Development and provided to the Governor and Legislative leaders as required by Wis. Stat. § 16.48(1)(b).

ABOUT THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Created in 1932, the Council celebrates its 85th anniversary in 2017. Since its inception, the Council has recommended changes to Wisconsin's UI Law to the Wisconsin State Legislature.

The Council's primary responsibilities are to:¹

- (1) Advise the Department of Workforce Development in its administration of the UI law;
- (2) Report its views on pending legislation affecting the UI program to legislative committees;
- (3) Submit its recommended changes to Wisconsin's UI law to the Wisconsin State Legislature.

The Council studies potential law changes on an ongoing basis, providing a balanced forum where the interests of both employees and employers are considered. The Council's negotiated recommendations to change the UI law are presented to the Legislature as an "Agreed Bill" for the Legislature's consideration.

The Legislature has traditionally recognized the value of the Council process in bringing together the two groups most affected by the UI program, employees and employers. The Legislature's support of the Council process has helped to ensure that Wisconsin's UI law continues to conform to federal requirements, which is required for Wisconsin to receive the federal funding necessary to administer the UI program.

The Council communicates with the Legislature regarding specific issues that affect the UI program. Members of the Legislature are encouraged to attend Council meetings and address the Council on their proposed changes to the UI law prior to introduction.



▲ Management members of the UI Advisory Council, from left to right: Jon Mielke, Mike Gotzler, Ed Lump and Scott Manley

¹ The Council responsibilities are specified in Wis. Stat. § 108.14(5)(a).

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL MEMBERSHIP

The Secretary of the Department of Workforce Development appoints Council members to six-year terms. The Council is composed of five management members representing the interests of employers and five labor members representing the interests of employees. One management representative is required by state law to be an owner of a small business or represent an association that is primarily composed of small businesses. The non-voting Council chairperson is a permanent, classified department employee.

Employer Representatives (Management)

Michael Gotzler – Board Member, Wisconsin Association of Staffing Services, Shorewood, WI: term expires June 30, 2017 (reappointed through June 30, 2023)

Earl Gustafson – Vice President, Energy Forestry & Human Resource, Wisconsin Paper Council, Appleton, WI: term expires June 30, 2019

Edward J. Lump (Small Business Representative) – President and CEO, Wisconsin Restaurant Association: term expires June 30, 2017 (reappointed through June 30, 2023)

Scott M. Manley – Senior Vice President of Government Relations, Wisconsin Manufacturers and Commerce, Madison, WI: term expires August 31, 2021

John Mielke – President, Associated Builders & Contractors of Wisconsin, Inc., Madison, WI: term expires August 31, 2021

Employee Representatives (Labor)

Michael Crivello – President, Milwaukee Police Association, Milwaukee, WI: term expires August 31, 2021

Sally Feistel – Sub-District Director, United Steel Workers, District 2, Menasha, WI: term expires May 31, 2020

Shane Griesbach – Business Representative, International Union of Operating Engineers Local 139, Appleton, WI: term expires June 30, 2017 (reappointed through June 30, 2023)

Terry Hayden – Business Manager, UA Local 434 Plumbers & Steamfitters, Mosinee, WI: term expires August 31, 2021

Mark Reihl – Executive Director, Wisconsin State Council of Carpenters, Madison, WI: term expires November 14, 2018

Chairperson

Janell Knutson – Director, Bureau of Legal Affairs, UI Division, Department of Workforce Development

COUNCIL PROCEDURES

Business Meetings

Council members negotiate proposed changes to Wisconsin's UI law in biennial cycles, and review and approve administrative rules drafted by the department and unemployment-related legislation proposed by lawmakers throughout the biennium. The Council typically meets monthly and communicates with department staff, legislators and the public regarding potential law changes on a continuing basis. Council meetings are open to the public and are noticed in accordance with Wisconsin's open meetings law. Management and Labor members are permitted under state law to hold separate, closed caucus sessions to discuss potential law changes.²

The Council Chairperson leads the Council meetings and presents department proposals to change UI law to the Council for review. The department provides an analysis of each proposal that typically includes a description of the suggested law change, the rationale, the history and background of current law, potential federal conformity issues relevant to the proposal, the policy and fiscal effects, and the administrative feasibility and effect of the proposal. Council members deliberate proposals presented by the department, their own proposals, and any unemployment-related bills pending in the Legislature. A vote of seven of the ten Council members is required for the Council to act on any matter.

Public Hearing

Each biennium, the Council holds a statewide hearing for the public to suggest law changes to the UI program. Most recently, the Council held a public hearing on November 17, 2016 via videoconference with hearing locations in Eau Claire, Green Bay, La Crosse, Madison, Milwaukee, Superior and Wausau. The Council also accepted written comments from the public. Nineteen people spoke at the public hearing and 281 written comments were submitted on a wide range of topics.



▲ UI Advisory Council discussion during council meeting in May 2017

² Closed caucus sessions are permissible under Wis. Stat. § 19.85(1) (ee).

LAW CHANGES ENACTED DURING THE REPORTING PERIOD

Governor Walker signed five bills into law during the 2015-2017 biennium that relate to the UI program: 2015 Wis. Act 55, the 2015-2017 budget; 2015 Wis. Act 86, an agreed-upon bill regarding certain federal requirements; 2015 Wis. Act 203, regarding franchisor liability for UI contributions; 2015 Wis. Act 258, amending the real estate agent exclusion; and 2015 Wis. Act 334, an agreed-upon bill with eighteen law changes.

Law Changes Related to UI Benefits

Pre-employment Drug Testing and Drug Treatment

The 2015-2017 Budget Act (Act 55) requires the department, by administrative rule, to create a voluntary program for employers to report the results of a failed or refused pre-employment drug test to the department. A claimant's failed or refused pre-employment drug test is presumed to be a failure to accept suitable work. By rule, a failure to accept suitable work due to a failed or refused pre-employment drug test will make the claimant ineligible for UI benefits until he or she earns six times their weekly benefit rate in wages. A claimant may overcome the presumption that the failed or refused test is a failure to accept suitable work by proving certain facts to the department. A claimant who fails a pre-employment drug test may remain eligible for UI benefits if the claimant enrolls in and complies with a drug treatment program and completes a job skills assessment.

The Council approved an emergency rule under the requirements of Act 55 for the pre-employment drug testing program which became effective on May 6, 2016. The permanent rule for the pre-employment drug testing program was later approved by the Council and became effective on May 1, 2017.

Concealment Definition

Act 334 clarified the definition of concealment and codified a duty of care for claimants to provide an accurate and complete response to each inquiry made by the department in connection with the claimant's receipt of benefits. The statute was amended to provide a list of factors for the department to consider when making a concealment determination.

Suitable Work

Act 334 created a statutory definition of suitable work. For the first six weeks of a claimant's unemployment, work is suitable if the work does not involve a lower grade of skill than one of the claimant's most recent jobs and the hourly wage for the work is 75% or more of what the claimant earned on their highest paying, most recent job. After the first six weeks of unemployment, suitable work includes any work the claimant is capable of performing, regardless of whether the claimant has any relevant experience or training, and that pays wages that are above the lowest quartile of wages for similar work in the labor market area in which the work is located.

Claimants have "good cause" for refusing to accept suitable work if the refusal is related to the claimant's personal safety, sincerely held religious beliefs, an unreasonable commuting distance, or another compelling reason that would have made accepting the offer unreasonable.

Social Security Disability Insurance (SSDI) Disqualification

Act 334 clarified that an individual is ineligible for UI benefits for each week in the entire month in which a SSDI payment is issued to an individual.

Worker's Compensation Disqualification

Act 334 provided that an individual who receives a worker's compensation payment for temporary total disability or permanent total disability for a full week is ineligible for UI benefits for that same week. A worker's compensation payment for part of the week for temporary total disability, temporary partial disability or permanent total disability, is treated as wages for purposes of eligibility for UI benefits for partial unemployment.

Work Share Benefit Formula

Under a work-share program, employers reduce employees' work hours in lieu of layoffs. The law originally provided employees would receive the greater of the work-share benefit amount (a proportionate reduction based on their reduction in work hours) or the UI partial wage benefit amount. Act 86 provided employees in a work-share program would only receive the work-share benefit amount.

Law Changes Related to UI Taxes

Administrative and Criminal Penalties for Misclassifying an Employee

Act 334 created a new administrative penalty for construction employers who knowingly and intentionally misclassify workers as independent contractors. The penalty is \$500 per employee intentionally misclassified with a maximum of \$7,500 per employer, per incident. Construction employers, after having previously been assessed an administrative penalty for knowingly and intentionally misclassifying workers as independent contractors, may be criminally fined by a court \$1,000 for each employee who is misclassified with a maximum fine of \$25,000 per employer, per violation.

Administrative Penalty for Coercion

Act 334 created a new administrative penalty for construction employers who coerce individuals to adopt independent contractor status. The penalty is \$1,000 per employee coerced with a maximum penalty of \$10,000 per employer, per year.

Recovery of Tax Debts Under the Treasury Offset Program

In conformity with federal requirements, the department now has the statutory authority to intercept federal income tax refunds to recover tax debts from employers and personally liable individuals. The department has had statutory authority to intercept federal income tax refunds to satisfy claimant overpayment debts since 2010.

Personal Liability Assessment for Limited Liability Partners (LLP)

Before Act 334, officers, employees, members, or managers with at least 20 percent ownership interest in a corporation or LLC could be held personally liable for unpaid UI contributions. Act 334 allows the department to hold individuals personally liable for the UI contributions of "other forms of business association," which includes LLPs.

Reimbursable Employer ID Theft Charging

Before Act 334, reimbursable employer accounts (public employers, nonprofits and Indian tribes) were charged for benefits erroneously paid due to identity theft fraud unless the department recovered the overpayments from the identity thief. For contribution employers, identity theft charges were credited to the employer's account and transferred to the Trust Fund balancing account. Act 334 set aside \$2 million in the balancing account for accounting purposes and credits reimbursable employers for charges due to identity theft. Each year, the department will determine the amount of interest accrued on the funds set aside and the total charges for identity theft against reimbursable employer accounts. If the set aside is reduced to \$100,000 or less, all reimbursable employers will be assessed proportionately for identity theft charges. The department will report to the Council annually on the set aside amount remaining.

Program Integrity Assessment

Act 334 created a new program integrity assessment of 0.01 percent and reduced employer taxes by a corresponding amount, resulting in no tax increase for Wisconsin employers. The proceeds of this assessment are deposited into the UI Program Integrity Fund for program integrity activities, such as combatting UI fraud.

In September 2016, the Council approved the Secretary's request to implement the 0.01 percent program integrity assessment for 2017. The proceeds allow the department to continue its aggressive anti-fraud and other program integrity efforts without raising employer taxes.

Program Administration

Appeals Modernization

Act 334 provided the statutory authority for changes in the appeals process to streamline and improve efficiency within the UI appeals process. The changes include:

- Allowing electronic delivery of notices and decisions;
- Streamlining the handling of the review of failure to appear at hearings;
- Allowing appeals to be filed directly with the appeal tribunal;
- Allowing the Administrative Law Judge to sign appeal tribunal decisions electronically;
- Incorporating enabling language to allow the department to hold video hearings.

Judicial Review

Before Act 334, the statutory provisions for procedures to appeal decisions of the Labor Industry Review Commission (LIRC) in UI cases to circuit court were contained in Wis. Stat. ch. 102 (the worker's compensation law). Act 334 incorporated the judicial review process for UI cases into the UI law, Wis. Stat. ch. 108. In addition, Act 334 modified certain judicial review procedures such as:

- The department is not required to exhaust its administrative remedies before filing an action for judicial review;
- The department is a party to judicial review actions of benefits issues;
- LIRC must transmit the appeal record to circuit court within 60 days;
- The appeal is filed in the county where the plaintiff resides. In the event the department is the plaintiff, the action is filed in the county where a defendant that is not LIRC resides.



▲ UI Council member Terry Hayden works on Labor law change proposals at May 2017 Council Meeting

Able and Available

Before Act 334, the department issued one determination when a claimant filed for benefits that included a determination of separation and the claimant's availability for work and ability to work. Under Act 334, the department will issue two separate determinations: a determination identifying the reason for separation, and a determination regarding the claimant's availability for work and ability to work.

Fiscal Agents and Employer Definition

Act 55 created a provision to ensure that fiscal agents may act on behalf of children who receive long-term community support services. The unemployment definition of "employer" excludes fiscal agents for certain individuals who receive long-term support services. Act 334 amended the definition of "employer" to exclude fiscal agents acting on behalf of children receiving long-term support services.

Transfer of SAFI Funds

During the recession, the Wisconsin UI program had to borrow money from the federal government to pay for benefits. Interest due on the loans was paid by employers through a special assessment for interest (SAFI). Act 334 permitted the department to transfer SAFI funds that exist after the repayment of the interest on federal loans to the Trust Fund balancing account, the Program Integrity Fund, or both.

Unemployment Program Integrity Fund Sunset – Repeal

The Unemployment Program Integrity Fund was scheduled to sunset (expire) on January 1, 2034. Act 334 repealed the sunset due to the new assessments and penalties that will be deposited into the Program Integrity Fund.

Statutory Benefit Tables Elimination

Before Act 334, the statutes provided a formula for calculating the amount of weekly benefits to which a benefit claimant is entitled with charts showing the benefit rate based on an individual's earnings. Act 334 provided in statute the weekly benefit rate formula and removed the charts from the statute. The removal of the charts did not change a claimant's weekly benefit rate and the charts continue to be published on the department's website.

Combined Wage Claims

Act 86 addressed a mandate by the federal government that requires states to pay UI benefits in cases where an unemployed individual has wages and employment in more than one state, commonly referred to as a combined wage claim. The federal requirement also prohibits states from providing relief from charges to an employer's UI account when the employer's actions caused an improper UI benefits payment. Under Act 86, the department may issue a determination to an out-of-state employer if that employer is at fault for the erroneous payment of benefits under a combined wage claim.



▲ In 1932, Wisconsin became the first state in the nation to enact an unemployment insurance law

ISSUES PENDING WITH THE COUNCIL

Occupational Drug Testing and Drug Treatment

Act 55 requires the department, by administrative rule, to create a program for drug testing certain UI benefit applicants. If the department determines that an applicant's only suitable work is in an occupation that regularly conducts drug testing, the department will screen the applicant to determine whether there is a reasonable suspicion that the applicant is using controlled substances. If a screening indicates a reasonable suspicion that the applicant engaged in the unlawful use of controlled substances, the applicant must submit to a drug test. A failed or refused drug test will disqualify the claimant from receiving benefits. The department, by rule, must determine a period of ineligibility or requalification requirement, or both. A claimant who fails a drug test without evidence of a valid prescription for the drug may remain eligible for UI benefits if the claimant enrolls in and complies with a drug treatment program and completes a job skills assessment.

The Council approved a scope statement for a permanent and emergency rule relating to occupational drug testing. The scope statement was approved by the Governor and printed in the Wisconsin Administrative Register.

The U.S. Department of Labor promulgated regulations (effective September 30, 2016) that established the list of occupations that regularly conduct drug testing. U.S. House Joint Resolution 42, signed by the President, nullified the regulations.

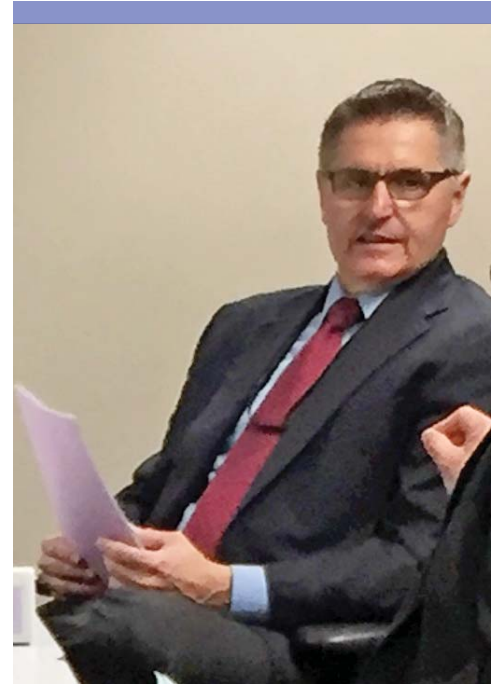
Work Search Waiver Exceptions for Seasonal Employees

From 2004 to June 14, 2015, the department, by administrative rule, waived a claimant's work search requirement if the claimant was laid off but there was a reasonable expectation of reemployment of the claimant by that employer. As of June 14, 2015, the administrative rule provides for a work search waiver if the claimant is currently laid off from employment with an employer but there is a reasonable expectation that the claimant will be returning to employment within a period of 8 weeks, which may be extended an additional 4 weeks, but may not exceed a total of 12 weeks. The rule also provides an equivalent waiver for work registration.

The department received comments during the statewide UI public hearing from employees and employers that expressed opposition to the change in the recall waiver. In addition, various State Legislators requested the Council review and address this issue to ensure employers are not losing skilled, long-term employees to other companies. The Council continues to review this issue.

Various Administrative Rule Changes

The Council agreed in January 2016 to amend the administrative rule to change the time that an ALJ would wait for a party to appear at a hearing from 15 minutes for appellants and 5 minutes for respondents to 10 minutes for all parties. The department expects to begin the rule promulgation process for this rule change as well as various other minor and technical changes to Wisconsin Administrative Code chapters DWD 100 through 150 in 2017.



▲ UI Council member Mark Reihl engages in discussion with fellow labor representatives during May 2017 meeting

CONCLUSION

The Council process ensures the participation of labor and management in the development of UI law. Celebrating its 85th year of service, the Council continues to recommend revisions to Wisconsin's UI law in order to improve Trust Fund solvency. The Council anticipates completing deliberation on its next agreed-bill later this year and looks forward to continuing its positive working relationship with the Legislature and the Governor.



▲ Chairperson Janell Knutson and Andy Rubsam, lead attorney for the UI Council, discuss federal legislation impacting the UI program



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