



# UNEMPLOYMENT INSURANCE

## ADVISORY COUNCIL ACTIVITIES REPORT

### 2017-2018

STATE OF WISCONSIN



Department of Workforce Development



May 15, 2019

To: The Honorable Tony Evers and Members of the Wisconsin State Legislature:

The Department of Workforce Development is pleased to present the following report on the activities of Wisconsin's Unemployment Insurance Advisory Council for the 2017-2018 period.

The Legislature created the Unemployment Insurance Advisory Council to advise the Legislature and the Department of Workforce Development on matters concerning Wisconsin's Unemployment Insurance (UI) program, and to recommend changes to improve the state's UI laws. Recommendations of the Council reflect interests of employers who pay contributions and workers who depend on unemployment benefits in times of economic hardship. Most of the reforms described in this report are the result of the Council's negotiations, agreement, and recommendations on ways to improve Wisconsin's UI system. Examples include:

- ◆ Implementing provisions to reduce UI fraud and prevent UI benefit overpayments;
- ◆ Revising statutes to enhance the department's ability to collect UI debts;
- ◆ Allowing electronic delivery of certain UI documents;
- ◆ Implementing a program integrity assessment to fund UI program integrity efforts without increasing employer taxes.

The Council's diverse opinions, perspectives, and knowledge of the program are key to ensuring a balanced representation of the interests of both workers and employers is maintained in Wisconsin's UI program.

The Council and the Department of Workforce Development look forward to continuing to work with the Governor and the Legislature to further enhance Wisconsin's UI program and continue providing effective and efficient services to both UI claimants and employers.

Sincerely,



Caleb Frostman, Secretary  
Department of Workforce Development





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## INTRODUCTION

The following report summarizes the deliberations of the Unemployment Insurance Advisory Council and provides the position of the Council concerning each proposed change to Unemployment Insurance law during 2017-2018. The report is prepared by the Secretary of the Department of Workforce Development and provided to the Governor and Legislative Leadership as required by Wis. Stat. § 16.48(1)(b).

**The Council studies potential law changes on an ongoing basis, providing a balanced forum where the interests of both employees and employers are considered.**

## ABOUT THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

The Legislature created the Council in 1932 to advise the Department of Workforce Development and the Legislature on policy matters concerning the development and administration of UI law. For over 87 years, the Council has acted as a catalyst for labor and management representatives to work together to ensure stability in the UI system and collaborate on positive changes to enhance the program.

The Council's primary responsibilities are to:<sup>1</sup>

- (1) Advise the department in its administration of 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 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 and for employers to receive federal tax credits.

The Council regularly 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 UI law before introduction.

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

## 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. In addition to these voting members, a permanent classified employee of the department serves as the nonvoting chairperson for the Council.<sup>2</sup>

### Employer Representatives (Management Members)

**Michael Gotzler** – Special Counsel, Littler Mendelson; Board Member, Wisconsin Association of Staffing Services: term expires June 30, 2023

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

**Susan Quam (Small Business Representative)** – Executive Vice President, Wisconsin Restaurant Association: term expires June 30, 2023

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

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

### Employee Representatives (Labor Members)

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

**Dennis Delie** – Secretary-Treasurer, Wisconsin State AFL-CIO: term through August 31, 2021

**Shane Griesbach** – Business Representative, International Union of Operating Engineers Local 139: term expires June 30, 2023

**Terry Hayden** – President, Wisconsin Pipe Trades Association: term expires August 31, 2021

**Di Ann Fechter** – Business Representative, International Association of Machinists & Aerospace Workers: term expires November 13, 2024

### Chairperson (non-voting)

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

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<sup>2</sup> Wis. Stat. § 15.227(3)

## COUNCIL PROCEDURES

### Business Meetings

Council members negotiate proposed changes to Wisconsin's UI law in biennial cycles, as well as review and approve administrative rules drafted by the department and unemployment-related legislation proposed by lawmakers throughout the biennium. Council meetings typically occur monthly and provide labor and management the opportunity to exchange ideas and opinions so the interests of both employers and employees are represented and considered. 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.<sup>3</sup>

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.<sup>4</sup>

**The proposals brought forward for inclusion in the UIAC Agreed Bill are developed based on input from several sources including: employer representatives, labor representatives, the Legislature, and the department.**

### Public Hearing

The proposals brought forward for inclusion in the UIAC Agreed Bill are developed based on input from several sources including: employer representatives, labor representatives, the Legislature, and the department. The Council also holds a statewide public hearing each biennium for members of the public to provide their recommendations on possible changes to the UI program.

Before the public hearing, the Council invites the public to submit written comments on suggested UI law changes to the department via letter or a dedicated email box. The department compiles all the written and verbal comments submitted during the comment period and at the public hearing and presents them to the Council. The Council considers the public comments as they develop potential reform ideas for the upcoming biennium. The Council held a public hearing in November 2016 and factored the input received from the public into many of the UI law changes included in the most recent UIAC Agreed Bill.

<sup>3</sup>Closed caucus sessions are permissible under Wis. Stat. § 19.85(1)(ee).

<sup>4</sup>Wis. Stat. § 108.14(5)(ag)

## **LAW CHANGES ENACTED DURING THE REPORTING PERIOD**

Four bills that relate to the UI program were enacted into law during the 2017-2018 biennium: 2017 Wis. Act 59, the 2015-2017 Budget Act; 2017 Wis. Act 147, related to increased criminal penalties for unemployment insurance fraud; 2017 Wis. Act 157, the UIAC Agreed Bill with various UI law changes; and 2017 Wis. Act 370, related to waivers from work search and work registration requirements for certain unemployment insurance claimants. The permanent administrative rules regarding pre-employment drug testing and drug treatment became effective in 2017.

### **Law Changes Related to UI Benefits Contained in the UIAC Agreed Bill**

#### **Ineligibility for Concealment of Holiday, Vacation, Termination, or Sick Pay**

A claimant who conceals work on an UI benefit claim is totally ineligible for benefits for that week. But, under prior law, a claimant who conceals holiday, vacation, termination, or sick pay on a weekly claim could still be eligible for partial UI benefits for that week.

2017 Wis. Act 157 (UIAC Agreed Bill) amended the statute to provide that concealment of holiday pay, vacation pay, sick pay or termination/dismissal pay on a weekly benefit claim results in total ineligibility for the week for which the claimant concealed the pay. This is consistent with the treatment for concealment of work and wages.

#### **Ineligibility for Failure to Provide Information**

Under prior law, a claimant became ineligible for UI benefits for the week in which the claimant failed to answer the department's eligibility questions, and any subsequent weeks, until the claimant responded to the department's request. A claimant who later answered the department's eligibility questions became retroactively eligible for benefits beginning with the week in which they failed to answer the questions (if otherwise eligible).

The UIAC Agreed Bill provided that claimants who fail to answer eligibility questions raised by the department are ineligible beginning with the week involving the eligibility issue rather than the week in which the claimant fails to answer the department's question.

#### **Amendments to Drug Testing Statutes**

2015 Wis. Act 55 (2015-2017 Budget Act) created Wis. Stat. §§ 108.04(8)(b) and 108.133, which requires the department, by administrative rule, to create programs related to the drug screening, testing and treatment for certain individuals applying for or claiming UI benefits.

As required by 2015 Wis. Act 55, the department created a voluntary program for employers to report the results of a failed or refused pre-employment drug test to the department. If a reported individual is receiving UI benefits, the individual is presumed to have failed, without good cause, to accept suitable work and is ineligible for UI benefits. The individual may maintain eligibility for UI benefits if the individual enrolls in and complies with a state-sponsored substance abuse treatment program, completes a job skills assessment, and meets all other program requirements.

The other drug testing provision created by the 2015-2017 Budget Act directs the department to promulgate rules identifying occupations for which drug testing is regularly conducted in the state in order to implement screening and drug testing of UI applicants whose only suitable work is in an occupation that regularly drug tests. If the individual's only suitable work is in an occupation

that regularly drug tests and the drug screen indicates there is a reasonable suspicion of unlawful drug use, the individual must pass a drug test in order to be eligible for UI benefits. Like the pre-employment drug testing program, an individual who fails a drug test may maintain eligibility for UI benefits if they enroll in and comply with a substance abuse treatment program and meet all other program requirements.

The 2017 UIAC Agreed Bill revised certain aspects of the drug testing statutes, including:

- ◆ Expanding the confidentiality protections to all aspects of the drug testing program, rather than only to records relating to enrollment in a substance abuse treatment program;
- ◆ Limiting employers' civil liability under state law for submission of pre-employment drug testing information to the department;
- ◆ Amending terminology in Wisconsin's occupational drug testing statute to refer to "applicants" instead of "claimants" to clearly conform state law to the federal definition;
- ◆ Confirming that the department shall pay the reasonable costs of drug testing under the occupational drug testing program; and,
- ◆ Amending the appropriation statute so that unused drug screening and testing funds be transferred to the UI Program Integrity Fund at the end of each biennium.

## Law Changes Related to UI Benefits Not Contained in the UIAC Agreed Bill

### Increased Criminal Penalties for Unemployment Insurance Fraud

Increased criminal penalties for individuals who intentionally commit acts of unemployment benefit fraud became effective in April 2018. Previously, the criminal penalty for knowingly making a false statement or representation to obtain UI benefits was an unclassified misdemeanor with a fine of \$100 to \$500, up to 90 days in jail, or both, for each false statement. 2017 Wis. Act 147 revised the criminal penalties for UI fraud to a structured scale that increases with the dollar amount of benefits fraudulently obtained and made the penalties for UI fraud consistent with those of other types of theft. The revised penalties are as follows:

If the value of UI benefits fraudulently obtained is:	Claimant is guilty of:	Maximum criminal penalty:
\$2,500 or less	Class A Misdemeanor	Up to \$10,000 fine or imprisonment up to 9 months, or both
More than \$2,500, up to \$5,000	Class I Felony	Up to \$10,000 fine or imprisonment up to 3.5 years, or both
More than \$5,000, up to \$10,000	Class H Felony	Up to \$10,000 fine or imprisonment up to 6 years, or both
More than \$10,000	Class G Felony	Up to \$25,000 fine or imprisonment up to 10 years, or both

2017 Wis. Act 147 also specified that a UI benefit fraud case involving more than one violation may be prosecuted as a single crime.

## **Work Search and Work Registration Waivers<sup>5</sup>**

Unemployment insurance claimants are required to register for work and complete at least four work search actions each week, unless the requirements are waived. The provisions relating to work search and work registration waivers were approved by the Council and Wis. Admin. Code DWD §§ 126.03 and 127.02 became effective in June 2015. 2017 Wis. Act 370, passed during the December 2018 extraordinary session, codified in statute the work search and work registration waivers contained in the administrative rules and specified that the department may modify, eliminate or establish additional waivers from the work registration and work search requirements only if necessary to comply with federal law or as specifically allowed under federal law.

2017 Wis. Act 370 also codified the requirement that claimants must verify their compliance with the work registration and work search requirements, unless waived.

## **Law Changes Related to UI Tax / Collections Contained in the UIAC Agreed Bill**

### **Fiscal Agent Joint and Several Liability**

2017 Wis. Act 157 aligned state law with federal law so a private agency serving as a fiscal agent, or contracting with a fiscal intermediary to serve as a fiscal agent, may be found jointly and severally liable with respect to the unemployment tax liability of a domestic employer. The potential liability will provide an incentive for fiscal agents to correctly report wages for employers and to properly pay UI taxes.

### **Personal Liability for Tax: Repeal of the Ownership Requirement**

2017 Wis. Act 157 amended the tax personal liability statute to repeal the requirement that an officer, employee, member, manager, partner, or other responsible person must have at least a 20 percent ownership interest to hold the person personally liable for willfully failing to file reports or payments.

### **State Tax Refund Intercept for Tax Recovery**

2017 Wis. Act 157 permits the department to intercept state income tax refunds, lottery payments, state vendor payments, and unclaimed property of taxpayers (employers and personally liable individuals) who owe debts to the department. The department previously only intercepted such amounts for claimants who owe overpayments and penalties.

### **Levy Non-compliance Penalty**

2017 Wis. Act 157 modified an existing penalty for third parties who refuse to comply with a department levy, increasing the penalty from 25 percent to 50 percent of the amount of the debt owed. Under Act 157, the penalties will be deposited into the UI Program Integrity Fund.

### **Secured Liens for Benefit Overpayments & Bankruptcy**

2017 Wis. Act 157 created an unrecorded lien against any person who owes the department a debt (under prior law, this provision only applied to employers).

### **Warrant Notice Changes**

2017 Wis. Act 157 codified existing department practice by requiring the department to give 15 days' notice to a debtor before issuing a warrant.

### **Sale of Seized Property by Online Auction and Sale**

2017 Wis. Act 157 provided that the department may sell property seized to satisfy debts in any manner that will bring the highest net bid or price, including through online auction or sales.

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<sup>5</sup>As of this publication, the validity of Act 370 is the subject of litigation.

## Program Administration

### Work-Share Provisions

In lieu of layoffs, employers may reduce employees' work hours under a work-share program that results in a pro rata payment of unemployment benefits. The 2017 UIAC Agreed Bill made various changes to the work-share statutes to confirm the department's interpretation of current law. The changes include:

- ♦ Specifying that vacation, holiday, termination, and sick pay in a work-share program will be treated as hours worked for the purposes of calculating an employee's work-share benefit amount. This is similar to the current law for regular benefits;
- ♦ Providing that the department shall disregard discrepancies of less than 15 minutes of work reported. This is similar to the disregard of \$2 of wages earned in a week for regular benefits; and,
- ♦ Specifying that missed work available for work-share employees will be treated as hours worked; this is similar for claimants applying for regular benefits. This will ensure that work-share employees are not paid greater benefits when missing work with a work-share employer.

### Various Minor and Technical Changes

The 2017 UIAC Agreed Bill contained several minor and technical changes to unemployment statutes including:

- ♦ Updating outdated terminology or phrasing, correcting cross-references, and updating references to federal law;
- ♦ Clarifying the steps that appeal tribunals (ALJs) should take when parties fail to appear at administrative hearings;
- ♦ Allowing for optional electronic delivery of certain department determinations and notices; and,
- ♦ Updating statutes to replace references to checks with "issuance of payment" (less than 1 percent of unemployment benefits were being paid by paper check).

### Pre-Employment Drug Testing Permanent Rules

To comply with the requirements of 2015 Wis. Act 55, the department promulgated rules with the approval of the Council to create a voluntary program for employers to report the results of a failed or refused pre-employment drug test to the department. The rules established the parameters for which a reported individual would be denied UI benefits or could maintain benefit eligibility by complying with a state-sponsored substance abuse treatment program. The permanent administrative rule in Wis. Admin. Code DWD ch. 131 became effective May 1, 2017.

## Other Deliberations of the Council

2015 Wis. 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 to be used by the department for program integrity activities.

In September 2017, the Council approved the Secretary's request to implement the 0.01 percent program integrity assessment for 2018; and again, in September 2018 for 2019. The proceeds allow the department to continue anti-fraud and other program integrity efforts without raising taxes. The Council recognizes the value of the assessment as it relates to the department's program integrity efforts and has unanimously approved this request every year since the assessment was created.

# ISSUES PENDING WITH THE COUNCIL

## Various Administrative Rule Changes

In 2017, the department began the process to promulgate a rule to amend Wisconsin Administrative Code DWD chapters 100 through 150. The changes are minor and technical in nature and designed to align administrative rules with current federal laws and state statutes; update or delete obsolete or incorrect cross-references; and clarify language.

The department held a public hearing related to the minor and technical changes to Wis. Admin. Code DWD chapters 100 to 150 in July 2018. The Council approved the final draft rule in September 2018 and it was submitted to the Legislature. Germane modifications were submitted to the Legislature for committee review in February 2019. The proposed rule was then referred to the Joint Committee for Review of Administrative Rules.

It is anticipated the rule will be effective June 1, 2019.

## UIAC Agreed Bill for 2019-2020 Session

The Council began the agreed-bill process for the upcoming biennium by holding a public hearing on November 15, 2018, via video conference with hearing locations at Eau Claire, Green Bay, La Crosse, Madison, Milwaukee, Superior and Wausau. The Council also accepted written comments from the public submitted to the department by mail or through a dedicated email box. Five people spoke at the public hearing and 21 written comments were received on a wide range of topics.

The input provided by the public during the comment period was presented to the Council at the first UIAC meeting following the public hearing. The Council will take these comments into account as they begin work on law change proposals for inclusion in the next UIAC Agreed Bill.

## Occupational Drug Testing Rules

Under 2015 Wis. Act 55, the department must, by administrative rule, create a program for drug testing certain UI applicants. The department will determine whether an applicant's only suitable work is in an occupation that regularly conducts drug testing. If 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 the applicant engaged in the unlawful use of controlled substances. An applicant with a positive screening result must submit to a drug test to remain eligible for UI benefits. An applicant who fails a drug test under Wis. Stat. § 108.133 without evidence of a valid prescription may remain eligible for UI benefits if the applicant enrolls in and complies with a drug treatment program, completes a job skills assessment, and otherwise meets all program requirements.

There are two parts to the state Occupational Drug Testing Program:

1. Drug testing UI applicants whose only suitable work is in an "occupation that regularly conducts drug testing," as identified in the regulations issued by USDOL.
2. Drug testing UI applicants whose only suitable work is in an occupation for which drug testing is regularly conducted in this state as identified in administrative rules promulgated by the department.

The U.S. Department of Labor promulgated regulations that established the list of occupations that regularly conduct drug testing; however, U.S. House Joint Resolution 42, signed by President Trump in March 2017, nullified the regulations.

USDOL issued a Notice of Proposed Rule Making relating to occupational drug testing for UI applicants on November 5, 2018. USDOL has not yet promulgated final regulations.

## CONCLUSION

Since its inception, the Council process has fostered collaboration among those most invested in the UI program and developed reforms that ensure the integrity of the program and the solvency of the UI Trust Fund. This collaboration has ensured that UI benefits remain available to workers who lose their job through no fault of their own.

The Council anticipates completing deliberations on the next UIAC Agreed Bill later this year and looks forward to continuing its positive working relationship with the Legislature and the Governor.





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