

RECOMMENDATIONS TO THE TASKFORCE ON PAYROLL FRAUD AND WORKER MISCLASSIFICATION FROM THE DFI REGISTRATION WORKGROUP

A. Background information relevant to all recommendations.

In Wisconsin, the breakdown of entity type is as follows:

90% of all entities are limited liability companies (LLCs);

6% are corporations; and

4% are all other entity types (*e.g.*, limited partnerships, limited liability partnerships, etc.).

In Wisconsin, formation, registration and annual reporting by business entities are overseen by the Department of Financial Institutions (DFI). However, DFI does not have general enforcement authority, and its authority over business entities is administrative only.

For example, while Wis. Stat. § 183.1002(5) provides for penalties if a foreign LLC fails to timely register with DFI, DFI has no ability to proactively assess penalties against a foreign LLC, even if it is reported to DFI that a foreign LLC is operating in Wisconsin without registration. Only if a foreign LLC voluntarily comes into compliance and voluntarily discloses that it has been operating in Wisconsin for a specified period of time will penalties be assessed. This happens very rarely and has minimal fiscal impact on DFI, meaning penalties are not separately tracked because penalties are so rarely assessed or collected.

B. Recommendations.

1. Amend Wis. Stat. ch. 183 to require the disclosure of all members and managers of domestic and foreign LLCs at organization/registration and in annual reports.

Over the last two years, agencies with enforcement authority over payroll fraud have presented to the Task Force and various workgroups. They have explained the challenges they face tracking LLCs for purposes of enforcement. Disclosure of the person organizing the LLC (who may or may not have any membership interest or management authority, *e.g.*, a lawyer) and a registered agent is all that is required under current law. This leaves agencies, municipalities, and the public with no information as to who owns or operates the LLC.

Twenty-five states require public disclosure of member(s)/manager(s), including Arizona, Arkansas, Illinois, Indiana, Montana, and Nebraska, despite the fact that such disclosure is not contained within the Model LLC Act. Disclosure of members and managers will give agencies a starting point for identifying the individuals truly responsible for the operation of an LLC and give municipalities and the public basic information on who is responsible for the LLC. The fiscal impact of the change is expected to be minimal, requiring simple modifications to existing paper and online forms.

2. Amend Wis. Stat. ch. 183 to include a false filings provision and penalty.

Pursuant to Wis. Stat. §§ 178.0120 (4) (partnerships), 180.0129 (corporations), 181.0129 (nonstock corporations), and 185.825 (cooperatives). A person may not sign a document with intent that it be delivered to DFI or deliver, or cause to be delivered, a document if the person knows that the document is false in any material respect at the time of its delivery. Violation of this provision is a Class I felony, and DFI may refer potential violations to the Attorney General for enforcement.

The false filings prohibition does not appear in the LLC statutes. Amending Wis. Stat. ch. 183 to include the false filings prohibition would put LLCs on the same footing as other business entity types.

3. Amend Wis. Stat. ch. 183 to provide for limited enforcement authority by DFI to investigate and refer violations to the Attorney General to enjoin LLC.

As indicated above, DFI has administrative authority only over LLCs, as well as other entity types. Evidence suggests that voluntary compliance by entities, particularly LLCs given that 90% of all business entities in Wisconsin are LLCs, is not happening. Such evidence includes:

- reports from agencies that LLCs are created and dissolved with regularity by the same actors with fairly clear intent to avoid liability for misclassification and payroll fraud;
- data from DFI indicating that very few penalties are ever assessed as a result of voluntary compliance; and
- a publicly available database that currently has over 2,200 entities that are either foreign entities not registered to do business in Wisconsin or domestic entities that are administratively dissolved but still operating in Wisconsin, *see* www.responsiblewisconsin.com.

Nearly a dozen states allow referral of violations to the Attorney General. The Model LLC Act also allows actions by the Attorney General to enjoin a business entity from doing business in the state when they are in violation of the statutory requirements. In order for DFI to refer matters to the Attorney General, it should be granted limited enforcement authority to take complaints/referrals, investigate compliance violations, proactively reach out to, and assess existing statutory penalties against, entities in violation, and refer violations to the Attorney General.

While such enforcement authority may require additional staff, the collection of penalties will offset at least some of the costs. For example, the Department of Workforce Development Unemployment Insurance division is cost positive in its enforcement efforts. It may also be possible for DFI to work cooperatively with other agencies such as the Department of Revenue to streamline enforcement efforts and maximize staff and agency resources to the greatest extent possible.

C. Members.

Work Group members are:

Cindy Buchko*

Tim DeMinter*

Nathan Houdek* by his designee David Haushalter

Senator Dale Kooyenga* by his staff designee Chris Rochester

Maria Lapacek*

Mike Myszewski

Marc Shovers

*Denotes Misclassification Taskforce Members