# 2005 *WISCONSIN ACT 86*

**Amendments to**

**Wisconsin Statutes**

**Chapter 108,**

***UNEMPLOYMENT***

***INSURANCE***

***LAW***

Prepared by Bureau of Legal Affairs, Office of Policy Research
staff Barbara J. Unger. Legal assistance provided by
Bureau of Legal Affairs Research Attorney Thomas E. Smith.

Cover design and layout by Lora Waddell.
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# ***Highlights of Act 86***

On December 28, 2005 Governor Doyle signed 2005 Wisconsin Act 86, amending Chapter 108, Wisconsin's Unemployment Insurance law. The Act includes provisions to:

- Provide a specific disqualification for any employee who repeatedly fails to notify his or her employer of absenteeism or tardiness.

- Charge benefits to employers that fail to provide timely, complete and correct information.

- Assess reimbursable non-profit employers to recover bad debt.

- Create a half time assistant attorney general position in the Department of Justice to prosecute employer and employee fraud.

- Increase the maximum weekly benefit rate for 2006 from $329 to $341 and to $355 in 2007.

- Increase requirements for electronic filing of reports.

- Study the long term fiscal stability of the unemployment reserve fund.

# Overview

This booklet describes the changes the Unemployment Insurance Advisory Council recommended to unemployment law for Act 86 of 2005. After a brief description of the Council, changes to the law are described in the following order: changes in benefit policies, tax policies, program administration, and technical changes. Two appendices are included for reference. Appendix A lists the changes by topic. Appendix B lists the changes in order of their statute number.

# Unemployment Insurance Advisory Council

The Unemployment Insurance Advisory Council consists of five representatives of employees, five representatives of employers, and a nonvoting chairperson who is a permanent, classified employee of the Department of Workforce Development. Since 1939 the Council has advised the Department in administering the unemployment law, reported its views on pending Unemployment Insurance legislation to appropriate committees of the Wisconsin Legislature, and submitted its recommendations for changes to unemployment law to each session of the Legislature.

By law, the Secretary of the Department of Workforce Development is responsible for appointing Council members. In doing so, the Secretary must give consideration to keeping the representation balanced between the industrial, commercial, construction, nonprofit and public sectors of the state's economy and must include a small business representative.

During each even numbered year the Department conducts four or five hearings around the state. It gives public notice of the hearings and invites all employers covered by the unemployment program to participate along with labor organizations and other entities that have expressed an interest in the Unemployment Insurance program.

In addition to ideas expressed in the public hearings, written suggestions may be submitted at any time to the Council Chairperson. All communications are sent a reply and shared with the Council. Over the two year cycle suggestions come from many sources including legislators, employers, employees, departmental staff and the general public.

After studying numerous suggestions for change, management and labor members of the Council negotiate about the ideas they will recommend to the Legislature for inclusion in a bill. The representatives need to give and take on the issues before them to achieve mutual satisfaction of both interests. The negotiating process is intended to promote smoothly functioning labor markets and balance the cost of taxes to employers with the need for benefits paid to employees.

# ***Changes in Benefit Policies***

- **Increase the maximum weekly benefit rate $12 in 2006 and $14 in 2007.**

The new maximum weekly benefit rate will increase from $329 to $341 in 2006 and to $355 in 2007. The minimum weekly benefit rate also increases from $49 to $51 in 2006 and to $53 in 2007.

- **Provide a specific disqualification for any employee who repeatedly fails to notify his or her employer of absenteeism or tardiness.**

New law has a specific disqualification for repeatedly failing to notify an employer of absenteeism or tardiness. When the disqualification applies, an employee who has been discharged for excessive failure to notify will be ineligible to receive unemployment benefits until six weeks have passed after the week of discharge and the employee has earned six times his or her weekly benefit rate in wages from new work. The disqualification does not apply unless the employer has a written policy on notification and the employee is absent without notice on five or more occasions or tardy without notice on six or more occasions in a 12 month period.

Employers are required to have a written policy on notification of absence or tardiness. This policy must apply uniformly to all employees and include:
1) A description of what constitutes a single occurrence of absence or tardiness;
2) The procedure for giving proper notice of absence or tardiness; and
3) Information that failure to notify may result in a discharge.

The employer must provide a copy of the policy to each employee and keep a dated, signed statement that the employee read and understood the policy. If there is failure to notify, the employer must give the employee at least one warning that future violation of the policy may result in a discharge.

Total benefit entitlement is not reduced under the new law. However, benefits based on the discharging employer's wage credits and paid after requalification under this provision of the law will be charged to the reserve fund's balancing account rather than the former employer's account.

The new provision does not preclude the Department from finding misconduct in attendance cases when such a finding is appropriate. When there is misconduct, the employee's wage credits from the discharging employer are not used to calculate any future benefit entitlement. And, the employee must wait seven weeks after the week of discharge and earn fourteen times the weekly benefit rate before being considered for benefits in the future.

The new policy has a four year trial period. After that it can be modified, renewed, made permanent, or eliminated.

- **Count all wages of food processing workers when determining eligibility or benefits.**

Under prior law, wages earned from a food processing employer could not be used to determine eligibility or benefits unless the claimant met one of three additional criteria. The three conditions were:

1) The claimant earned sufficient wages to qualify for unemployment benefits based solely on work for the food processing employer;
2) The claimant earned a minimum of $200 working for another employer subject to the Unemployment Insurance law during the four completed quarters immediately preceding the first week of work for the processing employer in that year.
3) The claimant worked for the processing employer outside that employer's active processing season as specified in administrative rule DWD 145, which listed specific processing weeks for each of 24 fresh fruits and vegetables.

Over 10,000 employees work for canning factories each year. Currently about 800 cases each year require additional analysis. About 600 of the 800 cases meet one of the criteria above and are found eligible for benefits.

The former wage exclusion has been one of the more time consuming issues for the Department to resolve. The Department receives federal administrative funds only for the time spent to analyze the 200 cases found to be ineligible. The time spent on the remaining 600 eligible cases received no federal administrative funds.

In addition, the exclusion was unfair to claimants. Food processing work is essentially factory work. But other factory workers do not have to meet any extra criteria.

- **Include wages earned by all firefighters, emergency medical technicians, and "first responders" when determining whether benefits are due for a week of partial unemployment.**

***Note: This provision was in effect from January 1, 2006 through April 1, 2006. It was repealed by Wisconsin Act 142, which eliminates the requirement for claimants to report wages earned in their capacity as a voluntary firefighter, emergency medical technician and "first responder" while claiming unemployment benefits. The paragraphs below refer to the law as it was in effect from January 1, 2006 through April 1, 2006.***

When an unemployed claimant has earnings from work performed in a week, the earnings reduce the claimant's benefit amount. Act 373 of 1993 provided that the weekly wages earned from the services performed by volunteer firefighters, emergency medical technicians and "first responders" no longer had to reduce weekly payments. It was felt this income was a small token amount for rural volunteers that assisted with putting out fires and doing other emergency work on an ad hoc basis. However, these wages were still treated as base period wages, creating employer liability for benefits based on the wages.

The Department has since learned that almost all individuals who assist their communities with these services receive some compensation. The amount of compensation may be substantial and the method used to compute the amount varies around the state. The result is that very few volunteers receive only token amounts anymore and it is difficult for the Department to define clearly the types of services that are considered volunteer.

With Act 86 all weekly wages earned for services performed by volunteer fire fighters, emergency medical technicians and "first responders" must be reported to determine whether a partial benefit is due. Requiring the reporting of all wages will simplify administration. The partial formula continues to disregard the first $30 of weekly earnings and one third of the remainder. If wages really are token amounts, they will not reduce the weekly benefit rate.

- **Provide a consistent method for determining unemployment benefits payable when claimants are unable or unavailable to work for only part of a week.**

Following a layoff, it is not uncommon for claimants to take other work at less than their usual wages or hours until reemployed in their usual occupation. As an incentive to encourage them to work in the interim, claimants are allowed to keep about one third of their earnings while the remainder is subtracted from the weekly benefit rate. Sometimes claimants who receive benefits that are reduced by earnings are unable or unavailable to work for part of a week and receive no pay for the hours missed.

Wisconsin unemployment law has several sections that determine whether unemployment benefits are paid to claimants who miss some days of work in a week. Under prior law, the sections worked in different ways. In some cases it permitted claimants to receive a partial payment for the week and in other situations it denied benefits for the whole week.

Under former law, when a claimant became unable or unavailable to work for a portion of a week (often due to an illness or a non work injury) and the claimant suspended employment or the employer suspended or terminated the claimant, the claimant was denied unemployment benefits for the whole week. However, claimants that in advance asked for and were granted an unpaid leave of absence for a portion of a week were not necessarily denied benefits for the whole week. Instead, the Department reduced the weekly unemployment benefit by applying a formula to the amount of wages earned for the week and the wages that could have been earned if the leave had not been granted. This resulted in some individuals receiving a partial benefit for the week.

With Act 86, the unable or unavailable claimant who suspends work or is suspended or terminated by an employer will also have the wages earned and the wages that could have been earned in the week included in the partial benefit formula to see whether a reduced benefit is payable for that week. The same method applies to a week in which the worker returns to work for part of a week. The change simplifies the law by treating similar situations in the same way when work is missed for only a portion of a week.

- **Exclude the services of participants in AmeriCorps from the definition of employment.**

Federal funds support AmeriCorps programs through grants to public and private non-profit entities that provide services ranging from tutoring or mentoring youth to building affordable housing and cleaning parks and streams. The grants provide a small monthly living allowance for participants but may not be used to pay Unemployment Insurance benefits.

In 1995 the U.S. Department of Labor determined that most AmeriCorps State and National program participants were not employees under Federal law. Since then, several states have excluded AmeriCorps participants from employment covered by the Unemployment Insurance program.

Act 86 amends Wisconsin Unemployment Law by excluding from the definition of employment the services performed by certain AmeriCorps participants. These are the services funded under certain special Federal Grants to governmental, nonprofit, or educational entities. As a result, employers that pay a stipend to AmeriCorps participants for their services will no longer pay taxes on the stipends or reimburse the Department for benefits based on those stipends. Participants in AmeriCorps except as noted below are no longer eligible to claim benefits based upon service for AmeriCorps.

Exceptions to the exclusion are established for services performed as a part of a Professional Corps program. The Professional program recruits and places qualified participants in positions such as teachers, nurses, police officers, engineers or other professionals to provide services in communities with an inadequate number of such professionals. The local public or private nonprofit employer that applies for and receives the AmeriCorp grant pays full professional salaries to these participants, who may also receive health insurance and child care expenses.

- **Change an administrative rule to allow unemployment benefits to claimants available for second and third shift work if they have a history of working other than first shift hours.**

Currently, unemployment claimants must be available for at least 50% of all the suitable full time work that they can perform in their labor market. Because the majority of jobs in most labor markets are offered between 6:00 a.m. and 6:00 p.m., individuals who work full time during other hours could be found unavailable for 50% of full time job opportunities and denied unemployment benefits.

Today's world offers opportunities to work that fall outside of the day time hours, especially in larger cities. Hospital emergency rooms, for example, are open 24 hours a day, 7 days a week, to say nothing of convenience, grocery, or drug stores. Discount stores and mall stores can be open until 10 p.m.

Unlike other changes in this booklet, this provision is not included in the statutes but requires a change to Department Administrative Code. When changed, there will be more flexibility in the work opportunities for which a claimant may be available. The rule will require that workers have a history of working full time night or weekend shifts. Also, it will require that the claimant's labor market has full time jobs suitable to the claimant's prior training and experience. Students will be ineligible unless their previous work pattern demonstrates that they will continue to be available for thirty-two or more hours of work each week while a student.

## ***Changes in Tax Policies***

- **Expand the definition of employer fault.**

Act 86 redefines employer fault to include instances when the employer or employer's agent fails to provide timely, complete, and correct information when requested during the Department's initial fact finding investigation for benefit eligibility. Following is a description of how this is going to work.

Employer ABC discharges employee MM and MM files a claim for unemployment benefits. Unemployment staffers investigate the separation from employment by questioning MM and contacting the employer ABC or the employer's agent XYZ. Messages are left with the employer or the employer's agent to reply within a certain time frame with details about the discharge. If ABC or XYZ never responds, or provides incorrect or incomplete information, the Department uses the best information available and may allow benefits. When ABC or XYZ receives the Department's decision allowing benefits or a notice of benefits being paid on ABC's account, ABC or XYZ may then file an appeal and a hearing is scheduled. If an initial decision allowing benefits is reversed at the hearing because the employer/agent information was incorrect or incomplete, employer ABC will be charged for benefits paid prior to the reversal instead of a claimant who in good faith cooperated in the initial investigation. Employers may receive higher tax rates when benefits "stand as paid".

Employer fault would not be found if the employer or agent has good cause for failure to provide information. The determination of good cause may be made only by an administrative law judge on an appeal from the Department's initial decision.

Under the new law the Department may suspend the privilege of any agent to act as an employer's representative if the agent fails to supply requested information completely and timely during fact-finding investigations when there is no good cause for the failure. Unemployment hearing offices will count the number of times in a twelve month period the same agent fails to provide initially requested information and then later appeals the decision. When this happens with the same agent in 5% of the hearings that are held (withdrawals and dismissals not included), the agent may be suspended from representing employers at Unemployment Insurance hearings in Wisconsin for the next twelve months.

- **Assess non-profit reimbursing employers to recover bad debt.**

Non-profit employers that elect reimbursement financing for unemployment benefits do not pay taxes into the Unemployment Reserve Fund. Instead they are billed for the full amount of benefits paid to employees they lay off. Since 2004 several medium and large reimbursing employers went out of business and did not completely reimburse the Reserve Fund.

To recover the bad debt, assessments of reimbursing employers in a total amount no greater than $200,000 annually will be made whenever the June 30th bad debt balance is at least $5,000. Individual employer assessment amounts will be in proportion to the employer's gross payroll in the prior year except that assessments less than $10 will be prorated among all other assessed employers. When there is an assessment, it will be added to the September reimbursement bill to employers. Interest will be charged to delinquent employers and the Department may terminate the employer's election of reimbursement financing at the close of any calendar year the assessments are not paid.

Based on 2004 data about 320 employers (40% of the 810 reimbursing employers) were so small their assessment would be less than $10. These small employers would be removed from the pool of reimbursing employers assessed. Another 266 employers (33%) would have an assessment of $100 dollars or less. The chart below shows the estimated number of non-profit employers that would have assessment amounts between selected dollar amounts.

| **Assessment Range ($)** | **Number of Accounts** | **Total Amount Assessed** | **Percent of Accounts** |
|---|---|---|---|
| | | | |
| Less than $10 | 320 | 0 | 40% |
| $10 to $50 | 204 | $5,427 | 25% |
| $51 to $100 | 62 | $4,528 | 8% |
| $101 to $500 | 148 | $33,040 | 18% |
| $501 to $1,000 | 35 | $24,224 | 4% |
| $1,001 to $5,000 | 32 | $69,191 | 4% |
| Over $5,000 | 9 | $63,590 | 1% |
| | | | |
| Grand Total: | 810 | $200,000 | 100% |

It will take five years of assessments to pay off existing debt at the $200,000 a year maximum level. After that, another assessment will not be made unless new unpaid debt amounts to at least $5,000.

- **Comply with the federal SUTA Dumping Prevention Act of 2004.**

"SUTA dumping" occurs when employers buy or transfer businesses primarily to obtain a reduced tax rate. Act 86 adds the following statutory provisions to Unemployment Law to prevent SUTA dumping in Wisconsin:

- Prior law specified that all business transfers between related parties or between buyers and sellers owned or controlled by substantially the same interests require the transferee to assume the unemployment tax rating factors of the transferor. New law extends the mandatory transfer of the tax rating factors to businesses that are owned, controlled, or ***managed*** by the same interests.
- Under prior law, when at least twenty-five per cent of a business was transferred from one unrelated employer to another, the transferee had an option, under certain circumstances, to assume the factors used in determining the Unemployment Insurance tax rates. New law prohibits this transfer of employer experience when a new employer acquires an existing business with a tax rate lower than the state's new employer tax rate if the purpose of the transfer is solely or primarily for the purpose of avoiding the new employer tax rate.
- Whenever factors used for determining a tax rate are transferred, a new tax rate shall be determined or re-determined for the transferee as of the beginning of the first quarter following the date of the transfer. Under former law, tax rates did not change until January 1 following the date of transfer.
- New law permits the Department to nullify a successorship and the mandatory transfer of account experience if the Department later finds that a substantial purpose of the business transfer was to obtain a reduced contribution rate for the buyer.
- The penalty for employers that knowingly attempt to circumvent the mandatory or prohibited transfer provisions will be a tax rate increase to the maximum rate. This rate will apply to taxable wages the year during which the violation occurred and the three years following the violation. If the employer's tax rate is already at the maximum rate, or if the amount of increase in the employer's tax rate is less than 2%, an additional penalty rate of 2% will be imposed on taxable wages for the year. Under prior law there were no penalty taxes.
- Individuals who knowingly make or attempt to make a false statement or representation to departmental staff in connection with an investigation to determine whether an employer qualifies to be considered a successor to the transferor of a business will be given a civil penalty fine of not more than $5,000. Individuals were not subject to such a penalty under prior law.
- In addition to the penalties listed above, any violation of the "SUTA dumping" provisions may now be prosecuted as a Class A misdemeanor under s.939.51 of the criminal code.
- The Department will establish procedures to identify the transfer or acquisition of businesses that attempt to engage in SUTA dumping.

# ***Administrative Changes***

- **Create a half time Assistant Attorney General position in the Department of Justice (DOJ) to prosecute fraud by employers and employees.**

Under prior law, the Department had to refer cases to local District Attorneys (DA's) who have many other high profile cases that demand their attention. Act 86 authorizes half a position for the DOJ with specific responsibilities for prosecuting Unemployment Insurance fraud. It funds the position from penalties for failing to comply with the Unemployment Insurance program rules and from interest charged when payments are late.

- **Increase requirements for electronic filing of reports.**

The following changes are made to requirements for filing quarterly tax and wage reports.

**QUARTERLY TAX REPORTS:**

1) Under prior law all employers were permitted to file tax reports on paper, by using the internet, or by submitting them electronically using a medium and format approved by the Department. New law requires employers to use the Department's internet application to file tax reports if they have 50 or more employees and prepare and file their own quarterly tax reports. Failure to file properly may result in a penalty of $25 per quarterly report.

2) Under prior law an agent that prepared and filed tax reports for 25 or more employers was required to use the internet or another electronic medium and format approved by the Department. This requirement continues. For all tax reports prepared by employer agents that represent 1 - 24 employers regardless of number of employees each employer has, new law requires use of the internet. Failure to file properly may result in a penalty of $25 per employer.

**QUARTERLY WAGE REPORTS:**

1) New law requires that employers with 50 or more employees file quarterly wage reports using the internet or any electronic medium approved by the Department. Prior law required employers of 100 or more employees to use an electronic medium to file reports. Employers with 49 or less employees may continue to use any media for filing reports (i.e. paper, internet or departmentally approved electronic medium and format). Failure to file properly may result in a penalty of $10 per employee.

2) New law also requires that employer agents file all quarterly wage reports using the internet or an electronic medium and format approved by the Department regardless of the number of employees reported. When agents prepare the quarterly wage reports in an incorrect format, the $10 penalty per employee may be charged to either the employer or the agent that prepared the report. Prior law did not specify the manner in which employer agents were required to report.

The new requirements are being phased in. The first phase is quarter 3 of 2006 (reports due July 1, 2006 – September 30, 2006) for employers of 75 to 99 employees. The second phase is quarter 3 of 2007 for employers of 50 to 74 employees.

Employers and agents can find information about the various electronic reporting methods on the Department's internet web site at: **http://dwd.wisconsin.gov/ui/**. On the left side links, chose either Wage Quarterly Reporting or Tax Quarterly Reporting for the report you wish to do. Assistance is available Monday through Friday from 8 am to 4 pm at (608) 261-6700.

The charts below summarize Act 86 requirements for electronic filing by employers and employer agents. They also show penalties for failure to file an electronic report or filing a report that can not be "read" by the Department.

## Requirements for Employers Preparing and Filing Their Own Reports

| Number Of Employees | TAX REPORT | WAGE REPORT |
|---|---|---|
| | | |
| 1 – 49 | Paper, internet or an electronic medium and format approved by the Department | Paper, internet or an electronic medium and format approved by the Department |
| 50 or more | Internet | Internet or an electronic medium and format approved by the Department |
| | | |
| Penalties for employers of 50 or more | $25 per report | $10 per employee |

## Requirements for Reports Prepared by Agents and Filed Either by the Agent or the Employer

| Number Of Employers Agent Represents | TAX REPORT | WAGE REPORT |
|---|---|---|
| | | |
| 24 or less employers | Internet | Internet or an electronic medium and format approved by the Department |
| More than 25 employers | Internet or an electronic medium and format approved by the Department | Internet or an electronic medium and format approved by the Department |
| | | |
| Penalties for improper filing by agent or employer | $25 per employer | $10 per employee |

- **Clarify statutory language on levies used to collect unpaid debt.**

Since 1989 the law has allowed the Department to use levies compelling a third party (bank, employer, etc.) to seize any property belonging to a business or person and remit it to the Department to pay any debt owed to the Department. Statutory language also provided for a fee to be paid to the third party to do this collection. Act 86 has two actions. First, it clarifies that the fee is in addition to the debt being collected. Second, it increases the fee from $5 to $15 for levies that require multiple payments over time. The fee for a one time collection by levy remains at $5.

- **Study the long term fiscal stability of the Unemployment Reserve Fund.**

Act 86 directs the Department to look at the long term fiscal stability of the Unemployment Reserve Fund and determine what measures, if any, are required to maintain future stability. The study results will be reported to the Advisory Council no later than July 1, 2007.

- **Use Reed Act funds for Unemployment Insurance administration.**

Funding for administration of the state Unemployment Insurance program continues to shrink even though the number of employees potentially eligible for the program continues to grow. Act 86 authorizes use of up to $1 million dollars for Unemployment Insurance Administration if needed in state fiscal year 2007. The source of the funds is a federal Reed Act distribution authorized by Public Law 107-147.

# ***Technical Changes***

- **Remove departmental authority to offset benefit payments in order to recover administrative assessments levied against imposters.**

Individuals who file an unemployment claim by telephone and falsely identify themselves to obtain the benefits of others are imposters. When imposters are discovered, they must repay any benefits already paid to them.

Act 197 of 2003 gave the Department authority to recover unemployment benefits paid to imposters by offsetting any future unemployment benefits they might receive. In addition, the Act allowed the Department to reduce future benefits by the amount of a monetary penalty.

According to the United States Department of Labor, the statute does not conform to federal law. Federal law permits overpaid benefits to be offset from unemployment benefits, but it does not permit the deduction of the penalty. Federal law requires that the Department use other collection methods at its disposal to obtain the penalty assessed. Act 86 of 2005 provides for the use of these methods.

- **Amend Act 197 of 2003 to change the effective date applicable for purposes of determining benefits for members of limited liability corporations.**

In order to prevent retroactive payment of benefits and retroactive adjustment of benefit eligibility when an application for limited liability status is filed with the Internal Revenue Service, Act 197 of 2003 specified different effective dates for tax and benefit purposes. The dates that were chosen did not achieve the desired effect. Act 86 specifies dates that correct this situation.

- **Repeal a provision that denies unemployment benefits to self-employed individuals who are exempt from searching for work for other reasons.**

To receive Unemployment Insurance benefits, a claimant must search for work unless exempt from this requirement. For example, a claimant with a definite date of recall to a regular job is exempt. No claimant is exempt because of self employment. If a claimant were exempt because of a definite date of recall to a regular job, it would make no sense to deny either the exemption or benefits only to those who are self-employed. Act 86 corrects this inequity.

- **Delete statutory language for an infrequently used employee termination provision.**

The deleted statutory language required claimants to wait four weeks before benefits were paid after quitting an employer that transferred them to a job paying 1/3 less than their former rate of pay. Other statutory provisions allow the immediate payment of benefits when claimants quit because their pay is reduced substantially. The statute

requiring claimants to wait four weeks was rarely used because a 1/3 reduction in pay was rarely considered insubstantial. This change simplifies the law.

- **Remove incorrect statutory references in the approved training statute.**

Act 197 in 2003 authorized charges to the Reserve Fund's balancing account under certain circumstances affecting claimants in approved training. However, incorrect statutory references were included in Act 197. Act 86 corrects the statutory references.

- **Clarify the definition of employee.**

If a weekly wage in excess of $30 is earned by an individual who is paid for services provided while an employee, a substantial portion of the wage is deducted from the weekly benefit rate when the individual is unemployed. Prior law could have been interpreted to mean that the wage earned by an employee in employment not covered by the Unemployment Insurance program (e.g., a minister or elected official) could not be deducted from the weekly benefit rate when the individual was laid off from other covered employment. In practice, a weekly wage in excess of $30 from uncovered employment has never been disregarded in computing the amount of an unemployment benefit paid. To do so could have resulted in paying a benefit based on a lay off from part time covered work to an individual with a full time wage from uncovered work.

- **Clarify that sole proprietors or partners are not employees of their own businesses.**

While providing services to their own sole proprietorships or partnerships, sole proprietors and partners are not considered employees for purposes of Unemployment Insurance law. However, sole proprietors and partners may be employees of other business in which they are neither sole proprietors nor partners. Under prior law the status of sole proprietors and partners when working for others was not clearly differentiated from their status when working for themselves.

- **Clarify the definition of employees and independent contractors.**

Act 86 has two changes to correct and clarify the provisions of Act 15 of 2000. The first change reinserts the statutory reference to 108.02(12) (c) 1, accidentally omitted from Act 15 of 2000. The other change references correct subsections of the statutes. Act 15 referenced s. 108.02(12) (bm) subsections (1) and (2) when it should have referenced s. 108.02(12) (bm) subsections (3) and (4).

The changes to these statutory references prevent the Department from using documents granting operating authority or licenses to determine that an individual is an independent contractor. Permits and licenses are not a fair determinant of whether the employer actually has direction and control over an individual's work. For example, a driver's license or nursing license required for employment does not prove that an individual is an independent contractor.

- **Clarify the statute on personal liability for unpaid Unemployment Insurance taxes.**

When the statute creating personal liability for willful failure to pay taxes was enacted, specific authority was not included in the statute for the Department to issue warrants directing clerks of circuit courts to record judgments and liens after a final decision had been reached in such matters. Act 89 amends the statutes to provide this specific authority.

- **Clarify the professional employer organization statutes.**

Act 35 of 2001 officially recognized and defined professional employer organizations as entities that lease entire workforces to each of its clients. Act 35 specifically stated what the responsibilities of professional employer organizations are.

The first change explicitly states that a professional employer organization may share with its clients the responsibility for setting the employees' rate of pay. The second change clarifies the definition by specifying that it applies only to organizations that actually are in the business of providing employees to other businesses. An employer may not become a professional employer organization solely for its own employees.

- **Admit reports from a departmental database as evidence in Unemployment Insurance hearings without additional certification of the report by an "expert".**

A Conditions of Employment Database (COED) is prepared by labor market experts and automated so that other departmental employees can use it. The database contains information about jobs and wages in various labor markets throughout Wisconsin. By comparing information in the database with occupations a claimant has held and employment restrictions the claimant may have, a report can be generated about the percentage of jobs for which the claimant is available, whether a wage associated with a job offer is at least equal to the wage prevailing in the labor market, etc. These reports are used to determine whether the claimant is currently available for work, has unreasonably refused a job offer, etc.

Former law specified that a COED report could be used in unemployment hearings only if certified by an "expert". Act 86 removes the requirement for expert certification in each case. However, Act 86 does require the Department to:

1) Provide the hearing parties with an explanation of the COED system and COED reports;
2) Provide the parties with an opportunity to review and object to the COED report, including the accuracy of the information used in creating the report; and,
3) Identify the information that was used in preparing the report.

# *Appendix A*

## Wisconsin Chapter 108 Statutory Changes by Topic

# *Appendix B*

**Wisconsin Chapter 108 Statutory Changes by Statute Section**

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| 108.151 (4) (b), (7), (8); 108.152 (7); 108.16 (6w), (6x) | Assess reimbursable employers to recover bad debt | 9 |
| 108.16 (8) (e), (em), (h); 108.16 (8) (im), (m) | Incorporate Federal "SUTA dumping" act into law | 10 |
| 108.17 (2b), (2g); 108.205 (1m), (2); 108.22 (1) (ac), (ad), (b) | Expand employer electronic reporting | 11 |
| 108.22 (2); 108.22 (8) (b) (1), (2) | Include individuals in warrants for bad debt recovery of LLC's | 16 |
| 108.22 (8) (b) 1; 108.05 (10) (b) | Clarify that imposter penalties will not come from benefits | 14 |
| 108.225 (20) | Increase levy fee retained by third party | 13 |
| 20.445 (1) (gi); 165.066; 165.60 | Fund Assistant Attorney General to pursue Department fraud | 11 |
| 20.445 (1) (nb); (nc) | Fund UI administration in 2007 if necessary | 13 |
| Section 72 (1) | Study long term solvency of unemployment trust fund | 13 |
| DWD 128 | Change rule to allow availability for additional shifts | 7 |

# ***Advisory Council on Unemployment Insurance***

**E-mail: legalnet@dwd.state.wi.us**

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|---|
| ***Chairperson*** |
| Daniel LaRocque, Bureau of Legal Affairs; 201 East Washington Avenue, PO Box 8942, Madison, WI 53708 (608) 267-1406; FAX NO. (608) 266-8221 |
| ***Employee Representatives*** |
| Michael Bolton, United Paperworkers International, 2510 Mecca Drive, PO Box 488, Plover, WI 54467 (715) 345-0538; FAX NO. (715) 345-2879 |
| Robert Lyons, American Federation of State, County & Municipal Employees, 8033 Excelsior Drive, Suite B, Madison, WI 53717-1903 (608) 836-4040; FAX NO. (608) 836-4444 |
| Phillip Neuenfeldt, Wisconsin State AFL-CIO, 6333 West Bluemound Road, Milwaukee, WI 53213 (414) 771-0700; FAX NO. (414) 771-1715 |
| Dennis Penkalski, Milwaukee & Southern WI District Council of Carpenters, PO Box 790, Pewaukee, WI 53072-0790 (262) 363-4345 |
| Red Platz, UAW Sub Regional Office, 2125-A South Memorial Place, Sheboygan, WI 53081 3714 (920) 458-1351; FAX NO. (920) 458-6246 |
| ***Employer Representatives*** |
| James Buchen, WI Manufacturers & Commerce, 501 East Washington Avenue, PO Box 352, Madison, WI 53701-0352 (608) 258-3400; FAX NO. (608) 258-3413 |
| Earl Gustafson, WI Paper Council, 250 N. Green Bay Rd., PO Box 718, Neenah, WI 54957-0718 (920) 722-1500; FAX NO. (920) 722-7541 |
| Edward J. Lump, 2801 Fish Hatchery Rd., Madison, WI 53713-3197 (608) 270-9950; FAX NO. (608) 270-9960 |
| Robert Oyler, Capital City Harley-Davidson, Inc, 6200 Millpond Rd., Madison, WI 53718 (608) 221-2761, ext. 113; FAX NO. (608) 258-4802 |
| Daniel Petersen, J.H. Findorff & Son Inc., 300 S. Bedford St., PO Box 1647, Madison, WI 53703 (608) 257-5321; FAX NO. (608) 257-5306 |