



Department of Workforce Development

Unemployment Insurance Advisory Council

Council Members: Please bring your calendars to schedule future meetings.
<https://dwd.wisconsin.gov/uibola/uiac/>

MEETING

Date: November 7, 2019
Time: 11:30 a.m. – 4:00 p.m.
Place: Department of Workforce Development
201 E. Washington Avenue
Madison, Wisconsin
GEF-1, Room H306

AGENDA ITEMS AND TENTATIVE SCHEDULE:

1. Call to Order and Introductions
2. Approval of Minutes of the October 22, 2019 Council Meeting
3. Department Update
4. Department Proposals for Agreed Bill
5. Labor and Management Proposals for Agreed Bill
6. Research Request
7. Agreed Bill Timeline
8. Future Meeting Dates
9. Adjourn

Notice:

- ❖ The Council may not address all agenda items or follow the agenda order.
- ❖ The Council may take up action items at a time other than that listed.

- ❖ The Council may discuss other items, including those on any attached lists.
- ❖ The Council members may attend the meeting by telephone.
- ❖ The employee or employer members of the Council may convene in closed session at any time during the meeting to deliberate any matter for potential action or items posted in this agenda, under sec. 19.85(1)(ee), Stats. The employee or employer members of the Council may thereafter reconvene again in open session after completion of the closed session.
- ❖ This location is accessible to persons with disabilities. If you have a disability and need assistance (such as an interpreter or information in an alternate format), please contact Robin Gallagher, Unemployment Insurance Division, at 608-267-1405 or dial 7-1-1 for Wisconsin Relay Service.
- ❖ Today's meeting materials will be available online at 10:00 a.m. at <https://dwd.wisconsin.gov/uibola/uiac/meetings.htm>

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

Offices of the State of Wisconsin Department of Workforce Development
201 E. Washington Avenue, GEF 1, Room F305
Madison, WI

October 22, 2019

The meeting was preceded by public notice as required under Wis. Stat. § 19.84.

Members Present: Janell Knutson (Chair), Scott Manley, Mike Gotzler, Susan Quam, John Mielke, Sally Feistel, Dennis Delie, Shane Griesbach, and Terry Hayden.

Department Staff Present: Mark Reihl, Andrew Rubsam, Jim Moe, JoAnna Richard (Deputy Secretary), Danielle Williams (Assistant Deputy Secretary), John Keckhaver (Legislative Liaison), Pamela McGillivray (Chief Legal Counsel), Jennifer Wakerhauser (Deputy Legal Counsel) Tyler Tichenor, Patrick Lonergan, Tom McHugh, Jason Schunk, Pam James, Janet Sausen, Robert Usarek, Emily Savard, Maureen McShane and Robin Gallagher.

Members of the Public Present: Mike Duchek (Legislative Reference Bureau), Ryan Horton (Legislative Fiscal Bureau), BJ Dernbach (office of Representative Warren Petryk), Joe Handrick (office of Speaker Robin Vos), Anita Krasno (General Counsel, Labor & Industry Review Commission), Chris Reader (Wisconsin Manufacturers & Commerce), Victor Forberger (Attorney, Wisconsin UI Clinic), Brian Dake (Wisconsin Independent Businesses, Inc.).

1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council meeting to order at 10:02 a.m. under Wisconsin's Open Meetings law. Council members introduced themselves and Ms. Knutson recognized DWD Deputy Secretary, JoAnna Richard; DWD Assistant Deputy Secretary, Danielle Williams; DWD Chief Legal Counsel, Pamela McGillivray; DWD Deputy Legal Counsel, Jennifer Wakerhauser; and DWD Legislative Liaison, John Keckhaver. Ms. Knutson also recognized BJ Dernbach of Rep. Warren Petryk's Office, Joe Handrick of Speaker Robin Vos' Office, Mike Duchek of the Legislative Reference Bureau, Ryan Horton of the Legislative Fiscal Bureau, and Anita Krasno, General Counsel with the Labor & Industry Review Commission (LIRC).

2. Approval of Minutes of the September 19, 2019 Meeting

Motion by Mr. Hayden, second by Mr. Manley, to approve the minutes of the September 19, 2019 meeting without correction. The motion carried unanimously.

3. Department Update

Mr. Reihl informed the Council that the annual UI tax rate notice and employer newsletter was sent out to employers this October. For the third year in a row, the UI Trust Fund balance exceeded the \$1.2 billion threshold needed to trigger the lowest tax rate schedule for 2020.

Mr. Reihl also mentioned that the Governor's Joint Enforcement Task Force on Payroll Fraud and Worker Misclassification had its second meeting on September 25, 2019 in Wisconsin Rapids. The Task Force received detailed presentations from the Wisconsin Department of Revenue as well as DWD's Unemployment Insurance, Worker's Compensation and Equal Rights Divisions regarding the tests and standards used to determine if a worker is an independent contractor or an employee. The next meeting of the Task Force is scheduled for Wednesday, October 23, 2019 and will take place in Madison.

Ms. Knutson notified the Council that the Madison UI Hearing Office is relocating from its current building to DWD's offices in GEF-1 (201 E. Washington Ave., Madison, WI). The leases on the hearing office facilities are expensive, and due to the decrease in UI's federal funding in recent years, the UI division is finding new ways to reduce costs. As a result of declining appeals, on-going appeals centralization and improving workflow efficiency the UI division is able to consolidate the hearing office operations to the space currently available in GEF-1. The move is expected to occur the second week of November 2019 and employers or claimants with in-person hearings will report to the hearing rooms on the first floor of GEF-1.

4. Report on the UI Reserve Fund

Ms. Knutson reported the September 30, 2019 Trust Fund ending balance was \$1,944,765,893, an increase of \$238,637,045 when compared to the same time last year. A Trust Fund balance of \$2 billion is required for Wisconsin to achieve a 1.0 Average High Cost Multiple (AHCM). The September 2019 Trust Fund ending balance of \$1.9 billion is equal to an AHCM of about .97.

5. Update on Court Cases

Varsity Tutors LLC vs. LIRC, DWD & Holland Galante

Mr. Rubsam provided a report on an unpublished Court of Appeals decision on the *Varsity Tutors LLC vs. LIRC, DWD & Holland Galante* case relating to whether an individual provided services for an employer as its employee and not an independent contractor for UI benefit purposes.

In the case, LIRC determined Holland Galante was an employee of Varsity Tutors for UI benefit purposes. Varsity Tutors appealed the decision to the Circuit Court which reversed LIRC's determination. LIRC appealed to the Court of Appeals which affirmed the Circuit Court's decision and found that Holland Galante performed tutoring services as an independent contractor. This is a recent decision that is not final yet so it may still be appealed to the Wisconsin Supreme Court. Because the decision is not final and the department is a party to this

case and other litigation is still pending, the department cannot comment further on the case at this time. A copy of the decision is included in the meeting materials for the Council to review.

6. Update on Federal Rulemaking – Occupational Drug Testing

2015 Wisconsin Act 55 (2015-2017 Budget Bill) requires DWD to create, by administrative rule, a program to test unemployment insurance applicants for controlled substances. But, federal law limits the scope of unemployment insurance drug testing to applicants “for whom suitable work (as defined under the state law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor).” US-DOL issued regulations listing occupations that regularly conduct drug testing in 2016, but those regulations were nullified under the Congressional Review Act in March 2017. US-DOL published its new final rule identifying occupations that regularly conduct drug testing on October 4, 2019. The new final rule is effective November 4, 2019.

The most material change between the nullified 2016 rule and this final rule is the addition of § 620.3(j), which provides that a state may identify additional occupations in that state where employers require pre-hire or post-hire drug testing as a standard eligibility requirement and consider those occupations as regularly conducting drug testing.

The department is reviewing US-DOL’s recently issued regulation to determine how to proceed with promulgating rules to implement occupational drug testing while conforming to the federal regulation.

Mr. Mielke noted that one of the categories of occupations that regularly conduct drug testing identified in US-DOL’s new final rule is “an occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances,” and asked how does this apply to contractors or construction workers working on prevailing wage projects that, through either legislation or executive order, are required to be drug tested or be subject to drug testing. Mr. Rubsam responded that those instances likely would not fit the definition of “occupations” since they identify workers working on a specific type of project as opposed to identifying the specific occupations.

Mr. Gotzler asked how the laws in the two other states (Texas and Mississippi) with conforming enabling legislation are structured. Mr. Rubsam said that, after reviewing the statutes in those other states, it appears that the current legislation enacted by Texas and Mississippi would not allow those states to identify additional occupations under § 620.3(j). Ms. Knutson added that Texas has confirmed that its statute as it exists would not allow them to identify any additional occupations under that provision. Mr. Rubsam clarified that the statutes in Texas and Mississippi only allow for drug testing of individuals in an occupation identified under regulations issued by the U.S. Secretary of Labor that requires drug testing. The provisions in the new final rule that allow for drug testing of additional occupations do not identify specific occupations so Texas and Mississippi will not be testing additional occupations.

Mr. Manley asked about the language in § 620.3(j) that permits a state to test an occupation where the state has a “factual basis for finding that employers hiring employees in that occupation conduct pre- or post-hire drug testing as a standard eligibility requirement.” If the state makes a “finding” that employers in Wisconsin hiring construction workers require pre- or post-hire drug testing, would

that be sufficient to require drug testing of construction workers for UI benefits? Ms. Knutson responded that whether US-DOL would allow for that broad of a classification of occupation is unclear and US-DOL needs to provide additional guidance. Mr. Manley added that, based on the preamble and the responses to comments on § 620.3(j) in the final rule, it appears US-DOL has a desire to grant states latitude to make their own determination about what types of occupations can be drug tested for UI benefit purposes. Mr. Manley reiterated that the policy decision has already been made in Wisconsin and is reflected in state statute. Ms. Knutson responded that the department is still reviewing the new final rule, and we expect US-DOL to issue additional guidance.

7. Proposals for Agreed Bill and Research Requests

There were no pending research requests and no questions from Council members on the pending proposals.

8. Agreed Bill Timeline

Ms. Knutson presented an updated agreed bill timeline to the Council to include an additional meeting date in November to make up for the meeting that was cancelled in August due to lack of a quorum and to potentially avoid the need for a December meeting.

9. Future Meeting Dates

The next regularly scheduled Council meeting is November 21, 2019. A poll of Council members for additional November meeting dates shows there would be a quorum on Thursday, November 7, 2019.

Caucus

Motion by Mr. Manley, second by Ms. Feistel to convene in closed caucus under Wis. Stat. § 19.85(1)(ee) to deliberate items on the agenda. The motion carried unanimously and the Council convened in closed caucus at 10:25 a.m.

The Council reconvened the public meeting at 2:36 p.m. Mr. Manley reported the Council has reached an agreement for department proposals D19-08 – Appropriation Revisions and Technical Corrections, and D19-09 – Creation of Administrative Fund. The Council has agreed to these proposals with the caveat that the appropriation provisions be contained in a separate bill. Mr. Manley also stated that the Council reached an agreement on department proposal D19-20 – Effect of Criminal Convictions with minor amendments. Mr. Rubsam reported the amendments to department proposal D19-20 were as follows:

- Amending the wording in the first line of the proposed language to insert “final” before “order or judgment,” and
- Adding the phrase “that relates to the criminal conviction” at the end of the first sentence of the proposed language.

Mr. Manley stated the Council will continue its work on the remaining department proposals as well as continue negotiations based on the Labor and Management proposals. The Council hopes

to conclude its work on the agreed bill at the November 7 meeting. Mr. Manley expressed the Council's desire to have the November 7 meeting time be moved to 11:30 a.m.

Motion by Mr. Manley, second by Mr. Hayden to approve department proposals D19-08, D19-09, and D19-20 as amended. The motion carried unanimously.

10. Adjourn

Motion by Mr. Hayden, second by Mr. Manley to adjourn. The motion carried unanimously, and the Council adjourned at 2:41 p.m.

UIAC Proposal Tracking – 2019

No.	Department Proposal Title	Proposal Subject	Presented to UIAC	Action
D19-01	Reimbursable Employer Debt Assessment Charging	REDA access to imposter funds	3-21-19	Approved on 6-20-19
D19-02	Assessment for Failure to Produce Records	Subpoena Penalty	3-21-19	
D19-03	Fiscal Agent Election of Employer Status	Fiscal Agents	3-21-19	Approved on 6-20-19
D19-04	Clarification of Employee Status Statute	Employee Status	3-21-19	
D19-05	Clarification of Exemptions Laws	Levy Exemptions	3-21-19	
D19-06	SUTA Dumping Penalty	SUTA Dumping	3-21-19	
D19-07	Departmental Error	Department Error	3-21-19	Approved on 6-20-19
D19-08	Appropriation Revisions and Technical Corrections	Cross Reference & Technical Clean-Up and Appr. Revisions	3-21-19	Approved on 10-22-19
D19-09	Creation of Administrative Fund	IP Lapse and Admin Fund	3-21-19	Approved on 10-22-19
D19-10	Update Administrative Rules to Convert SIC to NAICS	Amend SIC to NAICS Codes	3-21-19	Scope Approved on 3-21-19
D19-11	Repeal of UI Drug Testing	Drug Testing	3-21-19	
D19-12	Repeal of Substantial Fault	Substantial Fault	3-21-19	
D19-13	Define Suitable Work by Administrative Rule	Suitable Work	3-21-19	
D19-14	Quit Exception for Relocating Spouse	Quit Exception	3-21-19	
D19-15	Increase and Index Maximum Wage Cap for the Partial Benefits Formula	Wage Threshold	3-21-19	
D19-16	Repeal Waiting Week	Waiting Week	3-21-19	
D19-17	Repeal Work Search and Work Registration Requirements	Work Search & Work Registration	Tabled	
D19-18	Increase Maximum Weekly Benefit Rate to \$406	Increase WBR to \$406	3-21-19	
D19-19	Department Reports to Legislature	Department Reports	6-20-19	Approved on 9-19-19
D19-20	Effect of a Criminal Conviction	Department Determinations	6-20-19	Approved on 10-22-19
D19-21	Eligibility for Certain Employees	Benefit Eligibility	6-20-19	Approved 9-19-19

D19-22	Prohibit DOR Collection of UI Debts	Collections	9-19-19	Approved 9-19-19
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No.	Labor Proposal Title	Proposal Subject	Presented to UIAC	Action
L19-01	Increased Penalties for Willful Worker Misclassification	Worker Misclassification	6-20-19	
L19-02	Amend UI Tax Schedule Triggers Based on AHCM	Tax Schedule Triggers	6-20-19	
L19-03	Increase Taxable Wage Base and Index in Future Years	Taxable Wage Base	6-20-19	
L19-04	Repeal Waiting Week	Waiting Week	6-20-19	
L19-05	Increase Maximum Weekly Benefit Rate to \$406	Increase WBR to \$406	6-20-19	
L19-06	Repeal of Substantial Fault and restore prior Wis. Stat. § 108.04(5g)	Substantial Fault	6-20-19	
L19-07	Quit Exception for Relocating Spouse	Quit Exception	6-20-19	
L19-08	Increase and Index Maximum Wage Cap for the Partial Benefits Formula	Wage Threshold	6-20-19	
L19-09	Define Suitable Work by Administrative Rule	Suitable Work	6-20-19	

No.	Management Proposal Title	Proposal Subject	Presented to UIAC	Action
M19-01	Summer Camp Counselor Exclusion	Excluded Employment	6-20-19	
M19-02	Union Referral Service Work Search Criteria	Work Search	6-20-19	
M19-03	Definition of Employee vs. Independent Contractor	Worker Misclassification	6-20-19	
M19-04	Repeal Quit Exception in Wis. Stat. § 108.04(7)(e)	Quit Exception	6-20-19	
M19-05	Link Benefit Eligibility Weeks to State Unemployment Rate	Duration of UI	6-20-19	
M19-06	Clarify Definitions of Misconduct and Substantial Fault	Misconduct & Substantial Fault	6-20-19	

Unemployment Insurance Advisory Council
Tentative Schedule
2019
(Updated 11/07/2019)

January 17, 2019	Scheduled Meeting of UIAC Discuss Public Hearing (Nov. 15, 2018) Comments
February 21, 2019	Scheduled Meeting of UIAC (Cancelled)
March 21, 2019	Scheduled Meeting of UIAC Introduce Department Law Change Proposals
April 18, 2019	Scheduled Meeting of UIAC Discuss Department Proposals
May 22, 2019	Re-Scheduled Meeting of UIAC Approve/Discuss Department Proposals Exchange of Labor & Management Law Change Proposals
June 20, 2019	Scheduled Meeting of UIAC Approve/Discuss Department Proposals Discuss Labor & Management Proposals
July 18, 2019	Scheduled Meeting of UIAC Approve/Discuss Department Proposals Discuss Labor & Management Proposals
August 15, 2019	Scheduled Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill (Cancelled)
September 19, 2019	Scheduled Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill
October 22, 2019	Re-scheduled Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill Review and Approval of LRB Draft of Agreed Items for Agreed Upon Bill
November 7, 2019	Meeting of UIAC Discussion and Agreement on Law Changes for Agreed Upon Bill Review and Approval of LRB Draft of Agreed Items for Agreed Upon Bill
November 21, 2019	Scheduled Meeting of UIAC Review and Approval of LRB Draft of Agreed Upon Bill
December 19, 2019	Tentative Meeting of UIAC – If Needed Final Review and Approval of LRB Draft of Agreed Upon Bill
January 2020	Agreed Upon Bill Sent to the Legislature for Introduction in the Spring 2020 Legislative Session