STATE OF WISCONSIN

DWD

Department of Workforce Development

Unemployment Insurance Advisory Council

Meeting Agenda

May 19, 2022, 10:00 a.m.

The public may attend by teleconference:

Phone: 415-655-0003 or 855-282-6330 (toll free) or WebEx
Meeting number (access code): 2598 428 5006 Password: DWD1

Materials: https://dwd.wisconsin.gov/uibola/uiac/meetings.htm

1. Call to order and introductions
2. Approval of minutes of the February 17, 2022 UIAC meeting
3. Governor's Proclamation – Secretary-designee Amy Pechacek
4. Department update
5. Trust Fund update
6. Financial Outlook
7. Fraud Report to the Unemployment Insurance Advisory Council
8. Legislation update
   - UIAC "Policy" Bill (2021 WI Act 231) with plain language summary
9. Rulemaking update
   - Proposed Permanent Rule, DWD ch. 100-150 (CR 22-010)
     - Converting references from Standard Industrial Classification codes to the North American Industry Classification System codes; and other minor technical changes to the unemployment insurance program
10. Judicial update
    - *Wisconsin Dep't of Workforce Dev. v. Labor and Industry Review Comm'n*
11. Research requests
12. Future meeting dates: June 16, 2022; July 21, 2022; August 18, 2022
13. Adjourn

Notice

- The Council may take up action items at a time other than that listed.
- The Council may not address all agenda items or follow the agenda order. The Council may discuss other items, including those on any attached lists.
- The Council members may attend the meeting by teleconference.
- The employee or employer representative members of the Council may convene in closed session at any time during the meeting to deliberate any matter for potential action or items listed in this agenda, under Wis. Stat. § 19.85(1)(ee). The Council may then reconvene again in open session after the closed session.
- This location is accessible to people with disabilities. If you need an accommodation, including an interpreter or information in an alternate format, please contact the UI Division Bureau of Legal Affairs at 608-266-0399 or dial 7-1-1 for Wisconsin Relay Service.

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

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

February 17, 2022
Held Via Teleconference Due to Public Health Emergency

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

Members: Janell Knutson (Chair), David Bohl, Dennis Delie, Di Ann Fechter, Sally Feistel, Mike Gotzler, Shane Griesbach, Terry Hayden, Scott Manley, Susan Quam and Kathy Thornton-Bias.

Department Staff: Jim Chiolino, Jim Moe, Ryan Farrell, Jason Schunk, Linda Hendrickson, Shashank Partha, Jeff Laesch, Janet Sausen, Robert Usarek, Mary Jan Rosenak, Mike Myszewski, Jennifer Wakerhauser (Chief Legal Counsel), Caitlin Madden (Deputy Legal Counsel), Samantha Ahrendt (Staff Counsel), Jenifer Cole (Legislative Liaison), and Joe Brockman

Members of the Public: Keri Routhieaux (Legislative Audit Bureau), Brenda Lewison (Attorney, Legal Action) and Victor Forberger (Attorney, Wisconsin UI Clinic)

1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council to order at 10:05 am under the Wisconsin Open Meetings Law. Attendance was taken by roll call, and Ms. Knutson acknowledged the department staff in attendance.

2. Approval of Minutes

Motion by Mr. Manley, second by Ms. Quam to approve the minutes of the October 21, 2021, meeting. The vote was taken by roll call and passed unanimously

Motion by Mr. Hayden, second by Mr. Delie, to approve the minutes of the January 20, 2022, meeting. The vote was taken by roll call and passed unanimously.

3. Department Update

Mr. Chiolino stated that, since the last Council meeting, two new Bureau Directors have been selected. Shashank Partha is the new Director of the Bureau of Tax and Accounting. Jeffrey Laesch is the new Director of the Bureau of Management Information Services.

Mr. Chiolino stated that adjudication timeliness has been improving week by week. Non-separation determinations met federal timeliness standards last week. Separation determination timeliness has also improved.

4. Trust Fund Update

Ms. Knutson stated that the Trust Fund financial report is in members' packets. Ms. Knutson stated that, as of February 16, 2022, the Trust Fund balance was $1.1 billion. Ms. Knutson stated that $503 million in regular UI benefits were paid last year. Further information on the 2021 report will be provided at the next meeting.

5. Judicial Update

Friendly Village. Nursing & Rehab, LLC v. Dep't of Workforce Dev., 2022 WI 4.

Mr. Farrell stated that this case was decided by the Wisconsin Supreme Court on January 26, 2022. A summary of the case can be found on page 19 of the members' packets. Mr. Farrell provided a brief summary of the case to Council members. The Court found in a four to three decision that the late application by Eden Senior Care to succeed the Unemployment Insurance account of the former owner was not due to reasons of excusable neglect.

6. Legislation Update

Various changes to the unemployment insurance law (UIAC "Policy" Bill) (AB 910 / SB 897)

Ms. Knutson thanked Mr. Manley for testifying in favor of the agreed bills, Mr. Hayden for providing written testimony on behalf of the bills and Ms. Quam for registering in favor of the bills.

The fiscal estimate is included in members' packets.

On January 26, 2022, the Assembly Committee on Labor and Integrated Employment held a hearing on the bill. On February 10, 2022, the Committee voted unanimously to recommend passage of the bill. The bill was placed on the Assembly calendar for February 17, 2022. The Senate Committee on Labor and Regulatory Reform Committee held a hearing on the bill on February 8, 2022.

Various changes to the unemployment insurance law and making an appropriation (UIAC "Appropriations" Bill) (SB 899)

Ms. Knutson stated that the Senate Committee on Labor and Regulatory Reform held a hearing on the bill on February 8, 2022. It has not been voted out of committee. The bill has not been introduced in the Assembly.

Classification of motor vehicle operators as independent contractors or employees) AB 691 / SB 703)

Mr. Farrell stated that this bill provided, for the purposes of various state tax and employment laws, that the use by an operator of a motor vehicle of motor carrier safety equipment is not evidence that the operator is an employee rather than an independent contractor. This bill would apply to all motor vehicle drivers, not just truckers.

This bill has passed both Senate and Assembly committees. An amendment was introduced in the Assembly to insert "motor carrier, as defined in 49 CFR § 390.5". The bill passed the Senate with the amendment, and it is with the Assembly.

Various changes to the unemployment insurance law, a grant program for hiring qualified long-term unemployment recipients, allocation of federal American Rescue Plan Act of 2021 funding for certain purposes, the state plan under the federal Workforce Innovation and Opportunity Act of 2014, federal Reemployment Services and Eligibility Assessment grants, employment outcome data reporting, extending the time limit for emergency rule procedures, providing an exemption from emergency rule procedures, and granting rule-making authority. (AB 883 / SB 914)

Mr. Farrell stated this bill contains various changes to the Unemployment Insurance law including: the bill changes the name of the Unemployment Insurance Division to the Division of Reemployment Assistance; requires the promulgation of rules for drug testing for certain claimants; provides reemployment assistance to all claimants; changes the partial benefit formula; and establishes several grant programs using ARPA funds.

This bill passed both Assembly and Senate committees and is in the Assembly today.

Ms. Thornton-Bias requested clarification on the drug testing portion of the bill.

Mr. Farrell stated that the bill will require the Department to promulgate administrative rules for drug testing claimants in certain occupations. While current statutes authorize occupational drug testing that conforms to federal regulations, the testing cannot take place until the Department promulgates administrative rules. This bill requires the Department to promulgate those rules so that the drug testing can take place. Ms. Knutson reiterated that the drug testing would be based on the claimant's occupation.

The amount of benefits received under the unemployment insurance law (AB 937 / SB 906)

This bill changes the number of weeks of regular unemployment insurance benefits payable. A claimant would be eligible for benefits dependent upon the seasonally-adjusted statewide average unemployment rates in the first or third calendar quarter immediately preceding the beginning of the claimant's benefit year. A table containing the unemployment rate corresponding to the number of eligible weeks is contained on page 148 of members' packets. This bill has passed both the Senate and Assembly committees and is with the Assembly today.

Various changes to the unemployment insurance law, requiring an audit to be conducted by the Legislative Audit Bureau, requiring approval by the Joint Committee on Finance of certain federally authorized unemployment benefits, and authorizing the secretary of administration to transfer employees from any executive branch agency to the Department of Workforce Development for certain purposes. (AB 938 / SB 932)

Mr. Farrell stated that this bill makes various changes to the Unemployment Insurance law including: changes to the misconduct statutes, requires the Department to audit 50% of all

reported work search actions, requires DWD to increase call center hours if claims significantly increase, requires an audit to be conducted by the Legislative Audit Bureau of UI's anti-fraud efforts, and requires approval by the Joint Committee on Finance of certain federally authorized unemployment benefits

This bill passed the Senate and Assembly committees and is with the Assembly today.

Ms. Feistel requested clarification of the changes to the misconduct statute. Mr. Farrell stated that page 156 of the packet contains the summary of what misconduct is currently and what the changes would be if the bill becomes law.

Various changes to the unemployment insurance law. (AB 939 / SB 911)

The provisions in this bill include requiring DWD to consider employer reports regarding employees' attachment to the labor market and requiring employers to promptly respond to Department questions regarding an eligibility issue on a claim. The bill also requires the Department to recover overpayments in certain cases.

This bill passed both Senate and Assembly committees and is in the Assembly today.

7. Rulemaking Update

Ms. Knutson reported there are two emergency rules currently in effect:

Emergency Rule 2125. DWD Ch. 102, 113 & 123 (Eff. 10/03/21 – 3/2/22):

This emergency rule will expire on March 1, 2022. A couple of provisions will expire in April.

Proposed Permanent Rule, DWD Ch 100-150 (CR 22-010)

Ms. Knutson stated that this proposed rule will convert references from Standard Industrial Classification codes to the North American Industry Classification System codes. Ms. Knutson stated that this proposed rule also contains other minor technical changes. A public hearing will be held on this rule on February 24, 2022, at 10:00 am by WebEx. A final draft of the rule will be provided to the Council after the public hearing.

8. Research Requests

Mr. Delie requested information on the status of the Department's use of contractors and if the Department has plans to return to a normal hiring process.

Mr. Chiolino stated that the Department has been reducing the number of contractors.

Ms. Knutson stated that the Department will provide information at the next Council meeting as to the number of contractors utilized by the Department before, during, and after the Pandemic.

Ms. Thornton-Bias stated that, since no other state does occupational drug testing, she is interested to know which occupations will be subject to drug testing.

Ms. Knutson stated that a summary of the federal drug testing law and regulations will be provided at the next meeting.

9. Future Meeting Dates

Ms. Knutson stated that the dates of the next three meetings are: March 17, 2022; April 21, 2022; and May 19, 2022. Ms. Knutson stated that she anticipates fairly short meetings.

Ms. Thornton asked if the meeting would be virtual or in-person.

Ms. Knutson stated that she anticipates that the next meeting will probably be virtual.

Ms. Knutson stated that in the future she anticipates future meetings may be held using a hybrid model, where some members attend in-person and some attend virtually.

Several Council members expressed interest in resuming either in-person or hybrid meetings.

Ms. Knutson stated that, after checking the facilities in GEF-1, the matter of resumption of in-person meetings will be reviewed.

10. Adjourn

Motion by Ms. Fechter, second by Mr. Manley, to adjourn the meeting. The vote was taken by voice vote and passed unanimously. The meeting was adjourned at 10:49 am.

The State of Wisconsin

OFFICE OF THE GOVERNOR

CERTIFICATE OF COMMENDATION

HONORING THE

Unemployment Insurance Advisory Council

90TH ANNIVERSARY

WHEREAS; Wisconsin's unemployment insurance law, the first law of its kind enacted in the United States, was passed in January 1932, and the Advisory Committee on Unemployment Compensation, now known as the Unemployment Insurance Advisory Council, was established in 1932 to ensure the continued participation of labor and management in the development of the law; and

WHEREAS; the Unemployment Insurance Advisory Council advises the Wisconsin Department of Workforce Development (DWD) in carrying out the administration of Wisconsin's unemployment insurance law to this day; and

WHEREAS; the burdens of unemployment not only affect the economic vitality of our entire state, but result in significant stress on individuals and families across Wisconsin, as being unemployed through no fault of their own may cause individuals to struggle to make ends meet and support their families, which is why the work of the Unemployment Insurance Advisory Council is critical to providing stability in our unemployment insurance system, enacting positive changes, and helping working families; and

WHEREAS; for 90 years, DWD has—with the advice and aid of the Unemployment Insurance Advisory Council—worked tirelessly in conjunction with other state agencies to reduce and prevent unemployment by eliminating barriers to employment, which has included providing job and skills training, expanding access to affordable childcare, healthcare, and housing, investing in reliable public transportation, and serving as a resource to those seeking to enter the workforce; and

WHEREAS; on this occasion, as we celebrate a record-low unemployment rate of 2.8 percent in our state and the l[illegible]t number of people unemployed in state history, the state of Wisconsin wishes the Unemployment Insurance Advis[illegible] Council many more years of success;

NOW, THEREFORE, I, Tony Evers, Governor of the State of Wisconsin, do hereby congratulate Unemployment Insurance Advisory Council upon its 90th anniversary, and thank everyone involved for their dedicated service to our state.

DONE ON THIS 31ST DAY OF JANUARY 2022.

Tony Evers

TONY EVERS
GOVERNOR

AFSCME171

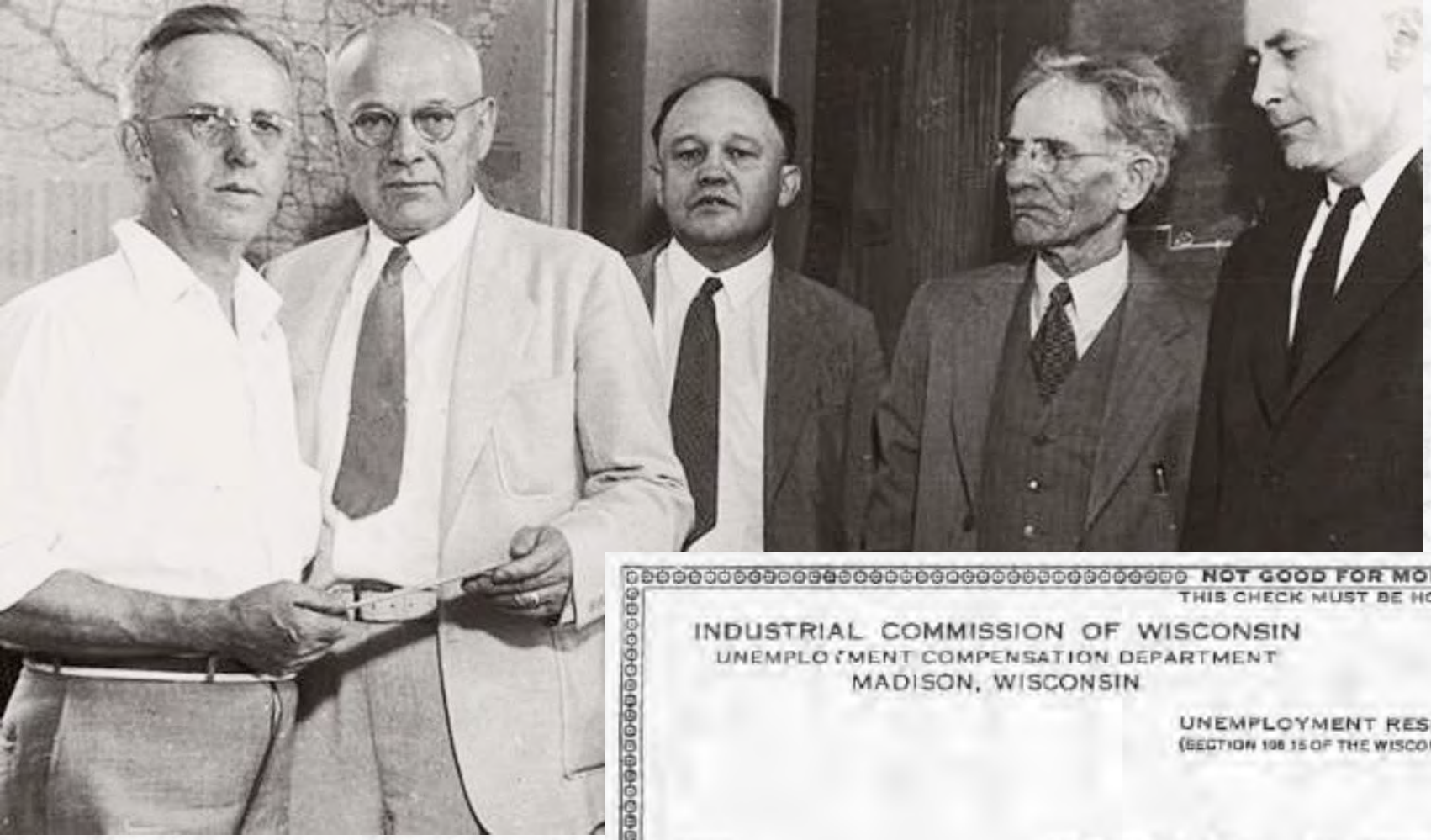

STATE OF WISCONSIN
DWD
Department of Workforce Development
90th Anniversary Celebration
Unemployment Insurance

Happy 90th Anniversary!

Wisconsin Firsts

- Enact an unemployment law (1932)
- Unemployment department established (1934)
- Federal Social Security Board approves state law (1935)
- Pay unemployment benefits (1936)
- Telephone initial claims (1995)
- Interactive Voice Response telephone system (1998) (ended 2017)

- Constitutional Worker's Compensation Law (1911)



First unemployment check issued August 17, 1936

NOT GOOD FOR MORE THAN $15
THIS CHECK MUST BE HONORED AT PAR

INDUSTRIAL COMMISSION OF WISCONSIN
UNEMPLOYMENT COMPENSATION DEPARTMENT
MADISON, WISCONSIN

FIRST NATIONAL BANK
MADISON, WISCONSIN

UNEMPLOYMENT RESERVE FUND
(SECTION 108.15 OF THE WISCONSIN STATUTES)

No 1

PAY $15 DOLLARS 00 CENTS

DATE AUG 17'36

NEILS B RUUD
824 E DAYTON ST
MADISON WIS

IDENTIFICATION NO.

WEEKS CHARGED 35 (UNDER RATIO) 36

1936 WEEK OF UNEMPLOYMENT: 31 32 33 34 36-27

AMOUNT OF THIS CHECK: 32 15 00

INDUSTRIAL COMMISSION OF WISCONSIN
ADMINISTRATOR OF THE UNEMPLOYMENT RESERVE FUND

Peter A. Hapiecinski
Harry R. McLogan
Auditor

BROCK ENGRAVING CO
NAME OF EMPLOYER AND NUMBER

141

VOID UNLESS PRESENTED FOR PAYMENT WITHIN ONE YEAR

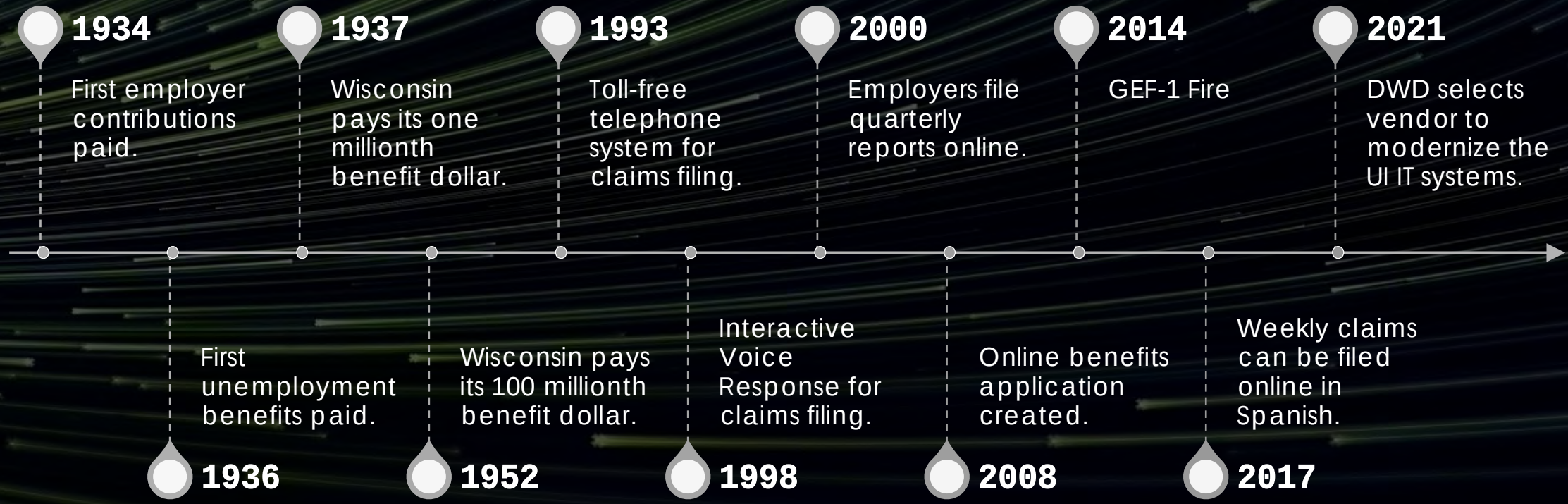
UIAC History

- Advisory Committee on Unemployment Compensation established in about March 1932.
- Originally 7 members: 3 labor, 3 management, 1 chair.
  - The 3 original labor members were nominated by the Wisconsin Federation of Labor.
  - The 3 original management members were nominated by the Wisconsin Manufacturers' Association.
- Committee members previously received a per diem.


MEN'S
SECTION

1938 – UI Registration

UI Program Milestones



Thank you

UI Reserve Fund Highlights

May 19,2022

1. Benefit payments for 2022 declined by $151.7 million or 56.7% when compared to benefits paid in 2021.

Benefits Paid	**2022 YTD*** *(in millions)*	**2021 YTD*** *(in millions)*	**Change** *(in millions)*	**Change** *(in percent)*
Total Regular UI Paid*	$115.8	$267.5	($151.7)	(56.7%)

**Total Regular UI Paid includes payments funded by employers through the UI Trust Fund. It excludes benefits funded and reimbursed to the state by the federal government and reimbursable employers.*

2. Tax receipts in 2022 increased by $2.1 million or 4.0% when compared to taxes paid in 2021. Since both tax years were rated in Schedule D, the increase in taxes paid is a sign of recovery. Since first quarter taxes were not due by the close of the Financial Statements of March 31, 2022, it may reflect additional fourth quarter activity.

Tax Receipts	**2022 YTD*** *(in millions)*	**2021 YTD*** *(in millions)*	**Change** *(in millions)*	**Change** *(in percent)*
Total Tax Receipts	$54.4	$52.3	$2.1	4.0%

3. The March 2022 Trust Fund ending balance was $958.1, an increase of 14.8% when compared to the same time last year.

UI Trust Fund Balance	March **2022** *(in millions)*	March **2021** *(in millions)*	**Change** *(in millions)*	**Change** *(in percent)*
Trust Fund Balance*	$958.1	$834.5	$123.6	14.8%

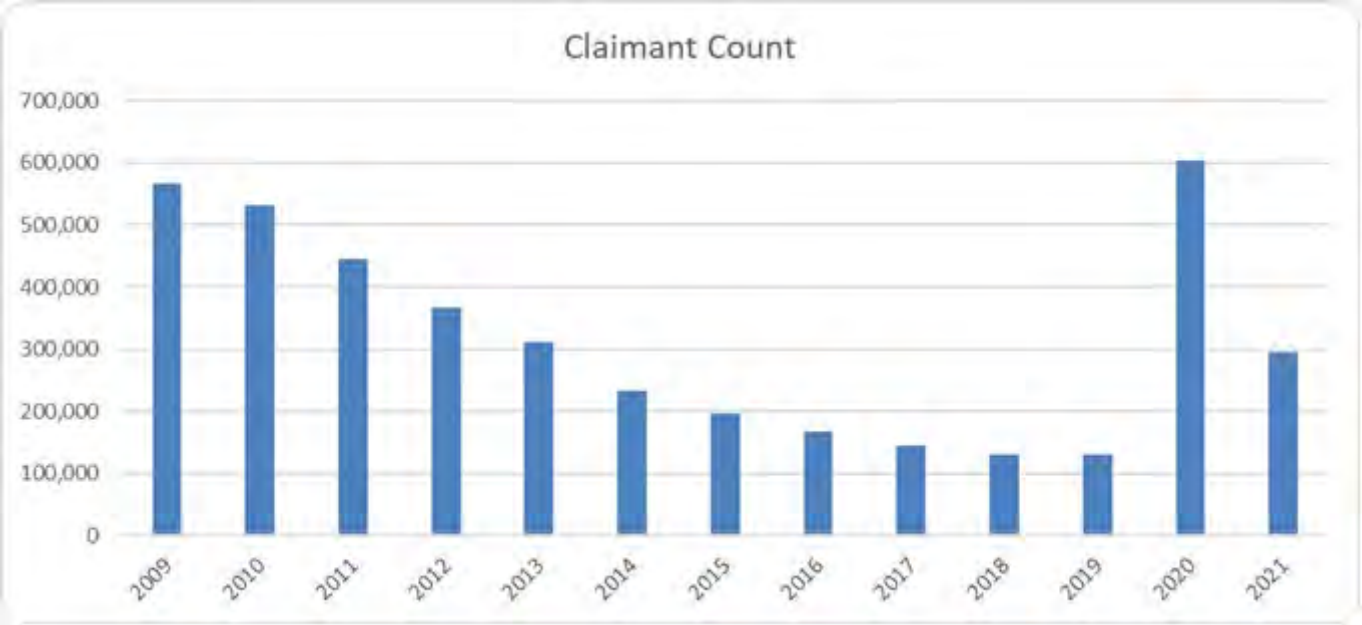
**The Trust Fund Balance is the Ending UI Cash Balance less footnoted amounts that are not available to pay for benefits as reported in the U.I. Treasurer's Report Cash Analysis Statement.*

4. Interest earned on the Trust Fund is received quarterly. Interest for the first quarter of 2022 was $4.4 million compared to $6.0 million for the first quarter of 2021. The U.S. Treasury annualized interest rate for first quarter is 1.6%.

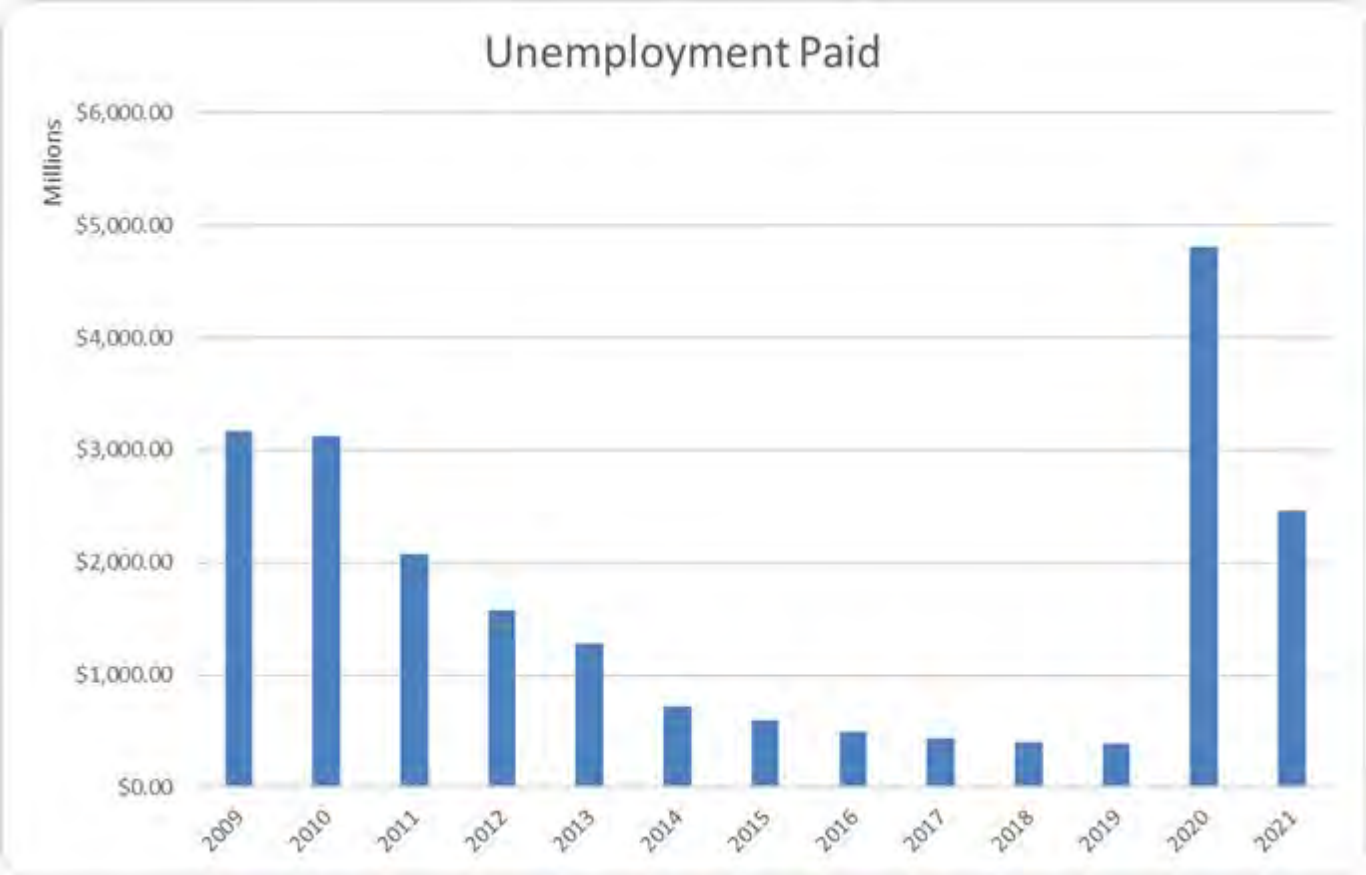
UI Trust Fund Interest	**2022 YTD*** *(in millions)*	**2021 YTD*** *(in millions)*	**Change** *(in millions)*	**Change** *(in percent)*
Total Interest Earned	$4.4	$6.0	($1.6)	(26.4%)

***All calendar year-to-date (YTD) numbers are based on the March,31 2022 Financial Statements**

5. Claimant tax statements (1099-G) for 2021 have been filed with the Internal Revenue Service (IRS). Payments for all programs, including federal payments, totaled $2.5 billion for 295,249 claimants in 2021.



Source: IRS 1099 File



Source: IRS 1099 File

FINANCIAL STATEMENTS

For the Month Ended March 31, 2022

Unemployment Insurance Division

Bureau of Tax and Accounting

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
BALANCE SHEET
FOR THE MONTH ENDED March 31, 2022

	CURRENT YEAR	PRIOR YEAR
ASSETS		
CASH:		
U.I. CONTRIBUTION ACCOUNT	(441,396.94)	(54,097.34)
U.I. BENEFIT ACCOUNTS	(378,241.48)	(10,880,107.56)
U.I. TRUST FUND ACCOUNTS (1) (2) (3)	1,068,337,843.97	941,172,866.45
TOTAL CASH	1,067,518,205.55	930,238,661.55
ACCOUNTS RECEIVABLE:		
BENEFIT OVERPAYMENT RECEIVABLES	201,526,689.58	103,791,033.82
LESS ALLOWANCE FOR DOUBTFUL ACCOUNTS (4)	(40,792,028.36)	(28,568,184.49)
NET BENEFIT OVERPAYMENT RECEIVABLES	160,734,661.22	75,222,849.33
TAXABLE EMPLOYER RFB & SOLVENCY RECEIV (5) (6)	32,701,796.70	29,248,487.79
LESS ALLOWANCE FOR DOUBTFUL ACCOUNTS (4)	(14,597,752.52)	(15,860,222.88)
NET TAXABLE EMPLOYER RFB & SOLVENCY RECEIV	18,104,044.18	13,388,264.91
OTHER EMPLOYER RECEIVABLES	22,486,809.86	59,425,540.93
LESS ALLOWANCE FOR DOUBTFUL ACCOUNTS	(7,623,998.00)	(8,488,373.92)
NET OTHER EMPLOYER RECEIVABLES	14,862,811.86	50,937,167.01
TOTAL ACCOUNTS RECEIVABLE	193,701,517.26	139,548,281.25
TOTAL ASSETS	1,261,219,722.81	1,069,786,942.80
LIABILITIES AND EQUITY		
LIABILITIES:		
CONTINGENT LIABILITIES (7)	131,560,153.80	57,253,659.14
OTHER LIABILITIES	77,039,442.63	14,424,915.60
FEDERAL BENEFIT PROGRAMS	409,811.78	(11,857,646.24)
CHILD SUPPORT HOLDING ACCOUNT	18,220.00	237,996.00
FEDERAL WITHHOLDING TAXES DUE	65,634.00	4,084,744.00
STATE WITHHOLDING TAXES DUE	3,432,322.27	27,857,609.09
DUE TO OTHER GOVERNMENTS (8)	753,938.84	626,310.36
TOTAL LIABILITIES	213,279,523.32	92,627,587.95
EQUITY:		
RESERVE FUND BALANCE	2,534,581,138.98	1,447,902,867.94
BALANCING ACCOUNT	(1,486,640,939.49)	(470,743,513.09)
TOTAL EQUITY	1,047,940,199.49	977,159,354.85
TOTAL LIABILITIES AND EQUITY	1,261,219,722.81	1,069,786,942.80

1. $19,199,357 of this balance is for administration purposes and is not available to pay benefits.

2. $1,295,513 of this balance is the remaining amount set aside for charging of benefits financed by Reimbursable Employers in cases of Identity Theft.

3. $11,417,551 of this balance is Emergency Unemployment Compensation Relief (EUR) reserved exclusively for funding 50% of the benefits paid for Reimbursable Employers for UI Weeks 12/20-14/21 and 75% of the benefits paid for reimbursable employers for UI Weeks 15/21-36/21 per 2103 of the CARES Act, the Continued Assistance Act, and the American Rescue Act.

4. The allowance for uncollectible benefit overpayments is 34.0%. The allowance for uncollectible delinquent employer taxes is 44.0%. This is based on the historical collectibility of our receivables. This method of recognizing receivable balances is in accordance with generally accepted accounting principles.

5. The remaining tax due at the end of the current month for employers utilizing the 1st quarter deferral plan is $0. Deferrals for the prior year were $0.

6. $15,084,532, or 46.1%, of this balance is estimated.

7. $110,321,213 of this balance is net benefit overpayments which, when collected, will be credited to a reimbursable or federal program. $21,238,941 of this balance is net interest, penalties, SAFI, and other fees assessed to employers and penalties and other fees assessed to claimants which, when collected, will be credited to the state fund.

8. This balance includes SAFI Payable of $3,072. The 03/31/2022 balance of the Unemployment Interest Payment Fund (DWD Fund 214) is $55,904. Total LIfe-to-date transfers from DWD Fund 214 to the Unemployment Program Integrity Fund (DWD Fund 298) were $9,501,460.

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
RESERVE FUND ANALYSIS
FOR THE MONTH ENDED March 31, 2022

	CURRENT ACTIVITY	YTD ACTIVITY	PRIOR YTD
BALANCE AT BEGINNING OF MONTH/YEAR:			
U.I. TAXABLE ACCOUNTS	3,013,824,345.58	3,025,371,200.23	2,067,917,022.31
BALANCING ACCOUNT	(1,937,774,284.95)	(1,920,053,262.30)	(896,424,588.78)
TOTAL BALANCE	1,076,050,060.63	1,105,317,937.93	1,171,492,433.53
INCREASES:			
TAX RECEIPTS/RFB PAID	1,211,556.25	39,301,896.90	38,451,513.43
ACCRUED REVENUES	176,528.55	2,370,058.60	1,556,178.87
SOLVENCY PAID	373,903.57	15,092,755.12	13,865,924.56
FORFEITURES	(2,457.00)	286.00	4,375.00
BENEFIT CONCEALMENT INCOME	398,573.61	566,125.93	138,219.30
INTEREST EARNED ON TRUST FUND	4,430,818.37	4,430,818.37	6,022,942.91
FUTA TAX CREDITS	147.00	147.00	7,113.23
OTHER CHANGES	(41,805.31)	(143,376.58)	13,162,717.20
TOTAL INCREASES	6,547,265.04	61,618,711.34	73,208,984.50
DECREASES:			
TAXABLE EMPLOYER DISBURSEMENTS	29,535,133.28	80,386,980.62	211,936,229.93
QUIT NONCHARGE BENEFITS	3,540,678.84	6,392,565.71	41,918,135.31
OTHER DECREASES	142,401.82	3,290,297.17	211,118.18
OTHER NONCHARGE BENEFITS	1,438,912.24	28,926,606.28	13,476,579.76
TOTAL DECREASES	34,657,126.18	118,996,449.78	267,542,063.18
BALANCE AT END OF MONTH/YEAR:			
RESERVE FUND BALANCE	2,534,581,138.98	2,534,581,138.98	1,447,902,867.94
BALANCING ACCOUNT	(1,486,640,939.49)	(1,486,640,939.49)	(470,743,513.09)
TOTAL BALANCE (9) (10) (11) (12)	1,047,940,199.49	1,047,940,199.49	977,159,354.85

9. This balance differs from the cash balance related to taxable employers of $988,747,125 because of non-cash accrual items.

10. $19,199,357 of this balance is set up in the Trust Fund in two subaccounts to be used for administration purposes and is not available to pay benefits.

11. $1,295,513 of this balance is the remaining amount set aside for charging of benefits financed by Reimbursable Employers in cases of Identity Theft.

12. $11,417,551 of this balance is Emergency Unemployment Compensation Relief (EUR) reserved exclusively for funding 50% of the benefits paid for Reimbursable Employers for UI Weeks 12/20-14/21 and 75% of the benefits paid for reimbursable employers for UI Weeks 15/21-36/21 per 2103 of the CARES Act, the Continued Assistance Act, and the American Rescue Act.

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
RECEIPTS AND DISBURSEMENTS STATEMENT
FOR THE MONTH ENDED 03/31/2022

RECEIPTS	CURRENT ACTIVITY	YEAR TO DATE	PRIOR YEAR TO DATE
TAX RECEIPTS/RFB	$1,211,556.25	$39,301,896.90	$38,451,513.43
SOLVENCY	373,903.57	15,092,755.12	13,865,924.56
ADMINISTRATIVE FEE	25.16	89.24	204.63
ADMINISTRATIVE FEE - PROGRAM INTEGRITY	8,370.71	370,875.12	317,190.11
UNUSED CREDITS	(761,028.14)	(2,547,847.56)	388,146.13
GOVERNMENTAL UNITS	733,731.98	2,651,009.78	10,075,402.58
NONPROFITS	738,734.91	2,739,171.98	8,989,424.86
INTERSTATE CLAIMS (CWC)	250,665.24	696,138.31	3,515,477.61
ERROR SUSPENSE	2,198.31	3,897.01	(6,926.00)
FEDERAL PROGRAMS RECEIPTS	3,583,408.74	23,384,409.34	742,142,474.82
OVERPAYMENT COLLECTIONS	6,497,926.26	13,238,295.01	12,768,171.69
FORFEITURES	(2,457.00)	286.00	4,375.00
BENEFIT CONCEALMENT INCOME	398,573.61	566,125.93	138,219.30
EMPLOYER REFUNDS	(10,135,352.12)	(69,145,543.02)	(1,834,926.20)
COURT COSTS	50,366.75	103,579.28	100,854.19
INTEREST & PENALTY	57,695.20	690,427.51	924,691.87
CARD PAYMENT SERVICE FEE	1,981.49	6,773.92	7,917.76
BENEFIT CONCEALMENT PENALTY-PROGRAM INTEGRITY	622,570.55	824,788.98	220,233.81
MISCLASSIFIED EMPLOYEE PENALTY-PROG INTEGRITY	0.00	0.00	8,759.09
LEVY NONCOMPLIANCE PENALTY-PROGRAM INTEGRITY	1,044.92	1,992.72	4,500.14
SPECIAL ASSESSMENT FOR INTEREST	1,809.26	3,072.31	4,258.20
LOST WAGES ASSISTANCE (LWA) ADMIN	29,188.00	29,188.00	350,579.89
EMERGENCY UC RELIEF (EUR)	0.00	0.00	11,912,012.00
INTEREST EARNED ON U.I. TRUST FUND BALANCE	4,430,818.37	4,430,818.37	6,022,942.91
MISCELLANEOUS	12,031.01	20,911.47	17,018.79
TOTAL RECEIPTS	$8,107,763.03	$32,463,111.72	$848,388,441.17
DISBURSEMENTS			
CHARGES TO TAXABLE EMPLOYERS	$35,332,578.55	$93,119,690.96	$228,659,762.97
NONPROFIT CLAIMANTS	390,335.10	369,328.03	7,532,812.91
GOVERNMENTAL CLAIMANTS	507,978.57	(371,490.09)	7,979,054.24
INTERSTATE CLAIMS (CWC)	343,795.78	1,029,576.94	2,668,744.61
QUITS	3,540,678.84	6,392,565.71	41,918,135.31
OTHER NON-CHARGE BENEFITS	1,496,398.43	(38,685,370.21)	13,543,888.86
CLOSED EMPLOYERS	1,036.91	1,813.57	1,299.25
ERROR CLEARING ACCOUNT	(3,742.00)	0.00	0.00
FEDERAL PROGRAMS			
FEDERAL EMPLOYEES (UCFE)	180,732.16	576,412.84	1,447,109.82
EX-MILITARY (UCX)	36,367.51	126,820.38	550,969.19
TRADE ALLOWANCE (TRA/TRA-NAFTA)	158,012.86	449,486.86	(261,431.96)
WORK-SHARE (STC)	(7,500.41)	974,943.73	50,712.58
FEDERAL PANDEMIC UC (FPUC)	1,084,614.14	6,681,838.03	535,018,973.31
LOST WAGES ASSISTANCE $300 ADD-ON (LWA)	460,711.55	3,518,599.58	7,159,625.09
MIXED EARNERS UC (MEUC)	4,100.00	25,100.00	0.00
PANDEMIC UNEMPLOYMENT ASSISTANCE (PUA)	634,862.54	2,429,209.47	53,648,347.00
PANDEMIC EMERGENCY UC (PEUC)	942,052.37	5,253,553.20	154,209,208.00
PANDEMIC FIRST WEEK (PFW)	20,440.47	717,520.53	0.00
EMER UC RELIEF REIMB EMPL (EUR)	140,611.58	2,204,085.62	35,684.80
2003 TEMPORARY EMERGENCY UI (TEUC)	(3,616.83)	(4,525.20)	(2,138.13)
FEDERAL ADD'L COMPENSATION $25 ADD-ON (FAC)	(31,396.50)	(49,488.15)	(53,821.05)
FEDERAL EMERGENCY UI (EUC)	(245,091.24)	(423,278.01)	(377,336.58)
FEDERAL EXTENDED BENEFITS (EB)	41,619.31	(232.16)	2,807,025.87
FEDERAL EMPLOYEES EXTENDED BEN (UCFE EB)	0.00	0.00	4,907.88
FEDERAL EX-MILITARY EXTENDED BEN (UCX EB)	0.00	(147.52)	3,404.96
INTERSTATE CLAIMS EXTENDED BENEFITS (CWC EB)	(5.97)	1,885.16	45,330.93
INTEREST & PENALTY	353,753.21	888,037.59	813,380.91
CARD PAYMENT SERVICE FEE TRANSFER	1,464.09	6,405.07	7,043.00
PROGRAM INTEGRITY	159,786.18	613,400.26	410,002.07
SPECIAL ASSESSMENT FOR INTEREST	0.00	3,960.65	5,221.75
COURT COSTS	31,964.06	69,450.04	66,787.79
ADMINISTRATIVE FEE TRANSFER	17.47	78.90	151.16
LOST WAGES ASSISTANCE (LWA) ADMIN TRANSFER	29,188.00	29,188.00	350,579.89
FEDERAL WITHHOLDING	268,832.00	8,776.00	(3,726,598.00)
STATE WITHHOLDING	(978,174.00)	(500,240.79)	(4,091,166.61)
REED ACT & ARRA SPECIAL ADMIN EXPENDITURES	0.00	1,021,900.43	0.00
FEDERAL LOAN REPAYMENTS	(147.00)	(147.00)	(7,113.23)
TOTAL DISBURSEMENTS	$44,892,257.73	$86,478,708.42	$1,050,418,558.59
NET INCREASE(DECREASE)	(36,784,494.70)	(54,015,596.70)	(202,030,117.42)
BALANCE AT BEGINNING OF MONTH/YEAR	$1,104,302,700.25	$1,121,533,802.25	$1,132,268,778.97
BALANCE AT END OF MONTH/YEAR	$1,067,518,205.55	$1,067,518,205.55	$930,238,661.55

DEPARTMENT OF WORKFORCE DEVELOPMENT
U.I. TREASURER'S REPORT
CASH ANALYSIS
FOR THE MONTH ENDED March 31, 2022

	CURRENT ACTIVITY	YEAR TO DATE ACTIVITY	PRIOR YTD ACTIVITY
BEGINNING U.I. CASH BALANCE	$1,016,384,720.69	$1,048,002,601.08	$1,137,108,896.48
INCREASES:			
TAX RECEIPTS/RFB PAID	1,211,556.25	39,301,896.90	38,451,513.43
U.I. PAYMENTS CREDITED TO SURPLUS	1,377,008.82	16,008,111.38	21,936,808.29
INTEREST EARNED ON TRUST FUND	4,430,818.37	4,430,818.37	6,022,942.91
FUTA TAX CREDITS	147.00	147.00	7,113.23
TOTAL INCREASE IN CASH	7,019,530.44	59,740,973.65	66,418,377.86
TOTAL CASH AVAILABLE	1,023,404,251.13	1,107,743,574.73	1,203,527,274.34
DECREASES:			
TAXABLE EMPLOYER DISBURSEMENTS	29,535,133.28	80,386,980.62	211,936,229.93
BENEFITS CHARGED TO SURPLUS	4,981,381.32	35,383,483.11	55,570,148.45
TOTAL BENEFITS PAID DURING PERIOD	34,516,514.60	115,770,463.73	267,506,378.38
REED ACT EXPENDITURES	0.00	1,021,900.43	0.00
EMER UC RELIEF REIMB EMPL EXPENDITURES	140,611.58	2,204,085.62	35,684.80
ENDING U.I. CASH BALANCE (13) (14) (15) (16)	988,747,124.95	988,747,124.95	935,985,211.16

13. $284,585 of this balance was set up in 2015 in the Trust Fund as a Short-Time Compensation (STC) subaccount to be used for Implementation and Improvement of the STC program and is not available to pay benefits.

14. $18,914,772 of this balance was set up in 2020 in the Trust Fund as an Emergency Admin Grant (EUISAA) subaccount to be used for administration of the Unemployment Compensation Program and is not available to pay benefits.

15. $1,295,513 of this balance is the remaining amount set aside for charging of benefits financed by Reimbursable Employers in cases of Identity Theft.

16. $11,417,551 of this balance is Emergency Unemployment Compensation Relief (EUR) reserved exclusively for funding 50% of the benefits paid for Reimbursable Employers for UI Weeks 12/20-14/21 and 75% of the benefits paid for reimbursable employers for UI Weeks 15/21-36/21 per 2103 of the CARES Act, the Continued Assistance Act, and the American Rescue Act.

BUREAU OF TAX AND ACCOUNTING
U.I. TREASURER'S REPORT
BALANCING ACCT SUMMARY
FOR THE MONTH ENDED March 31, 2022

	CURRENT ACTIVITY	YEAR TO DATE ACTIVITY	PRIOR YTD ACTIVITY
BALANCE AT THE BEGINNING OF THE MONTH/YEAR	($1,546,567,309.79)	($1,527,719,203.28)	($484,263,072.65)
INCREASES:			
U.I. PAYMENTS CREDITED TO SURPLUS:			
SOLVENCY PAID	373,903.57	15,092,755.12	13,865,924.56
FORFEITURES	(2,457.00)	286.00	4,375.00
OTHER INCREASES	1,005,562.25	915,070.26	8,066,508.73
U.I. PAYMENTS CREDITED TO SURPLUS SUBTOTAL	1,377,008.82	16,008,111.38	21,936,808.29
TRANSFERS BETWEEN SURPLUS ACCTS	47,314.47	55,581.66	(15,615.31)
INTEREST EARNED ON TRUST FUND	4,430,818.37	4,430,818.37	6,022,942.91
FUTA TAX CREDITS	147.00	147.00	7,113.23
TOTAL INCREASES	5,855,288.66	20,494,658.41	27,951,249.12
DECREASES:			
BENEFITS CHARGED TO SURPLUS:			
QUITS	3,540,678.84	6,392,565.71	41,918,135.31
OTHER NON-CHARGE BENEFITS	1,440,702.48	28,990,917.40	13,652,013.14
BENEFITS CHARGED TO SURPLUS SUBTOTAL	4,981,381.32	35,383,483.11	55,570,148.45
REED ACT EXPENDITURES	0.00	1,021,900.43	0.00
EMER UC RELIEF REIMB EMPL EXPENDITURES	140,611.58	2,204,085.62	35,684.80
BALANCE AT THE END OF THE MONTH/YEAR	(1,545,834,014.03)	(1,545,834,014.03)	(511,917,656.78)

2022 Financial Outlook: Wisconsin Unemployment Insurance Program

Robert Usarek

Unemployment Insurance Division

Department of Workforce Development

UIAC Meeting

May 19,2022

Madison, WI

2022 UI Financial Outlook

Overview

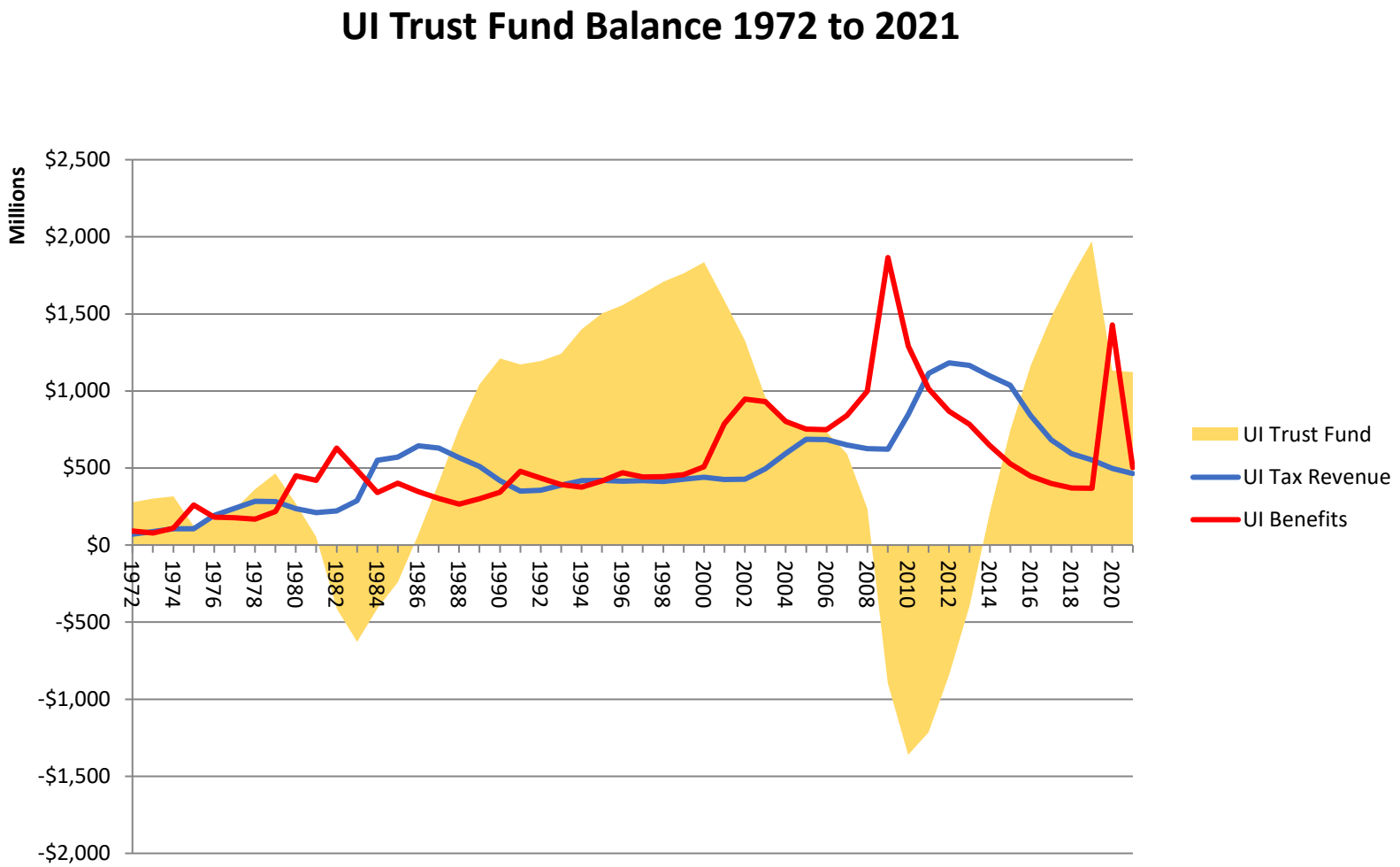
- Introduction
- Review of recent UI Trust Fund activity
- UI Trust Fund projections

2022 UI Financial Outlook: Introduction

- The 2022 *Financial Outlook* of the Wisconsin Unemployment Insurance (UI) program was submitted to the Governor's Office on May 18, 2022 pursuant to Wis. Stat §16.48

- The *Financial Outlook* provides background on the Wisconsin UI financing system and projections of the UI Trust Fund

2022 UI Financial Outlook: Review of Recent UI Trust Fund Activity



2022 UI Financial Outlook: Review of Recent UI Trust Fund Activity

- The UI Trust Fund has decreased slightly over the past year:
  - At the end of 2020 the UI Trust Fund balance was $1.049 billion
  - At the end of 2021 the UI Trust Fund balance was $1.016 billion

2022 UI Financial Outlook: Review of Recent UI Trust Fund Activity

- Between March 15, 2020 and December 26, 2020, the UI Division paid over $4.68 billion to approximately 590,095 claimants.
- Of those benefit payments, $3.18 billion were federally funded COVID-19 relief programs, including
  - Pandemic Unemployment Assistance (PUA),
  - Pandemic Emergency Unemployment Compensation (PEUC),
  - Lost Wages Assistance (LWA),
  - Federal Pandemic Unemployment Compensation (FPUC).
- Wisconsin's UI Trust Fund was in a good position to weather the pandemic, with an Average High Cost Multiple (AHCM) of nearly 1.0.
- The healthy balance likely prevented Wisconsin from needing to borrow from the federal government during the COVID-19 pandemic.
- The ending Trust Fund balance of 2021had an AHCM of approximately 0.5.

2022 UI Financial Outlook: UI Trust Fund Projections

Unemployment Reserve Fund Activity				
(Millions $)				
	2021	2022	2023	2024
Opening Unemployment Reserve Fund Balance	$1,049	$1,016	$1,233	$1,423
Revenues:				
State Unemployment Revenues	$448	$483	$490	$472
Interest Income	$20	$28	$33	$36
Federal Reimbursement for UI Benefits	$88	$2		
State General Purpose Revenue		$60	$60	
Total Revenue	$556	$573	$583	$508
Expenses:				
Unemployment Benefits	$589	$356	$393	$435
Ending Reserve Fund Balance	$1,016	$1,233	$1,423	$1,496

2022 UI Financial Outlook: UI Trust Fund Projections

- Trust Fund Projection Highlights:
  - Revenues from contributions are expected to increase in 2022, remain basically flat in 2023 and then decrease slightly in 2024
  - Benefits are expected to decrease sharply in 2022 and then increase in 2023 and 2024 due to projected increases in wages
  - The Trust Fund balance is expected to grow over the entire period.

2022 UI Financial Outlook Recommendation

Secretary's recommendation:

As Wisconsin's Unemployment Insurance program celebrates its 90th year, the Secretary recommends the Unemployment Insurance Advisory Council (UIAC) review and advance legislative measures that strengthen UI Trust Fund solvency while supporting the integrity of the UI system. While recognizing that some employers are still recovering from the COVID-19 pandemic and many are facing rising costs due to inflation and supply chain disturbances, the Secretary urges the Council to pursue a balanced approach to rebuilding the Trust Fund that acknowledges the imperative of delivering on UI's promise to more fairly distribute, as well as decrease and prevent, the economic burdens resulting from unemployment.

Wisconsin's UI Trust Fund weathered the pandemic without needing to borrow from the federal government due to a strong opening balance, along with one-time financial relief provided by the state and federal governments. Wisconsin began the pandemic with an Average High Cost Multiple (AHCM) of nearly 1.0. States that meet the standard (AHCM of 1.0) are less likely to need to borrow and in a better position to withstand economic downturns. The balance decreased significantly, from an opening balance of $1.961 billion in 2020, to an ending balance of $1.016 billion in 2021. The Trust Fund is currently at an AHCM of about 0.5.

2022 UI Financial Outlook Recommendation

Secretary's recommendation:

The UI Trust Fund will need to grow again to avoid borrowing in a future recession. If there is another economic downturn in the next few years, the projected growth in the Trust Fund may not be sufficient to avoid the need for the UI program to borrow from the federal government to pay benefits. The economic cost to employers of borrowing is significant because it results in not only higher state and federal unemployment taxes, but the SAFI assessment as well, and comes at a time when many employers are struggling. The Secretary encourages the UIAC to review the UI financing system, including the rate schedules, to determine if any adjustments should be made to ensure adequate funding for a solvent Trust Fund that will be able to pay benefits in times of economic downturn without the financial burden on employers of borrowing.

2022 UI Financial Outlook Recommendation

Secretary's recommendation:

When reviewing Trust Fund funding, the Secretary encourages the Council to also consider benefit rates and eligibility policies that are sufficient to provide workers the financial assistance necessary to withstand temporary periods of unemployment. Claimants have not received an increase in the maximum weekly benefit rate in eight years. Currently, UI benefits replace only approximately 28 percent of the average weekly wage, a significant decrease from historical replacement rates that were around 45 percent. Had the federal government not offered supplemental benefits during the pandemic, the decreased purchasing power of those who were out of work due to the pandemic would have significantly affected the livelihood of farmers, merchants, and manufacturers through decreased demand for their products. Eligibility requirements have also impacted claimant recipiency rates. From 2000-2007, the average recipiency rate was 52.44 percent; whereas, from 2015-2019, the average recipiency rate 33.75 percent.

The department is prepared to support the UIAC as it considers options to further strengthen Wisconsin's Unemployment Insurance program. This report is prepared in advance of the UIAC biennial public hearing and agreed bill cycle, allowing time for the UIAC to request assistance with research topics before the next legislative session begins.

Thank You

WISCONSIN DWD

Financial Outlook

Wisconsin Unemployment Insurance Program

Report prepared for the Governor, Legislature and Unemployment Insurance Advisory Council
(Wis. Stat. § 16.48)

Amy Pechacek, Secretary-designee
Department of Workforce Development
May 2022
UCD-8967-P (R. 05/22)

Executive Summary

The Department of Workforce Development's Division of Unemployment Insurance (UI) paid a record number of claims over the last two years due to the COVID-19 global pandemic. The emergence of COVID-19 created not only a historic public health crisis, but a workforce and economic crisis as well. Between March 15, 2020, and December 26, 2020, the UI Division paid over $4.67 billion to approximately 590,000 claimants. Of those benefit payments, $3.18 billion were not charged to Wisconsin's UI Trust Fund but instead were charged to new federally-funded COVID-19 relief programs, including Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), Lost Wages Assistance (LWA), and Federal Pandemic Unemployment Compensation (FPUC). An additional federal program, Mixed Earner Unemployment Compensation (MEUC), was added in 2021.

In 2021, the Department paid fewer benefits than the historic high amount paid in 2020, but the $2.5 billion paid was still higher than any of the last 10 years prior. The federal government funded $1.8 billion of the $2.5 billion of benefits paid in 2021.

At the start of 2020, Wisconsin's UI Trust Fund was in a good position to weather the pandemic, with an Average High-Cost Multiple (AHCM) of nearly 1.0. The healthy Trust Fund account balance likely prevented Wisconsin from borrowing from the federal government to pay benefits during the COVID-19 pandemic. Twenty-three states borrowed federal funds to pay benefits in the last two years, with 10 states still repaying their federal loans as of the end of February 2022.

After the Department paid a record level of claims in 2020, the UI Trust Fund currently has an AHCM of approximately 0.5. The Trust Fund will need further growth to avoid borrowing federal funds to pay benefits during a future recession. At the end of 2021, the amount necessary for the Trust Fund to have an AHCM of 1.0 was estimated to be $2.1 billion.

The Wisconsin economy recovered quickly from the pandemic in the second half of 2021 with unemployment rates reaching record-lows by the spring of 2022. It is expected that UI benefit payments will continue to decline during the rest of 2022 due to continued low unemployment. UI benefit payments are expected to increase slightly in 2023 and 2024 due to increases in wages. The UI Trust Fund is expected to grow to just under $1.5 billion by the end of 2024.

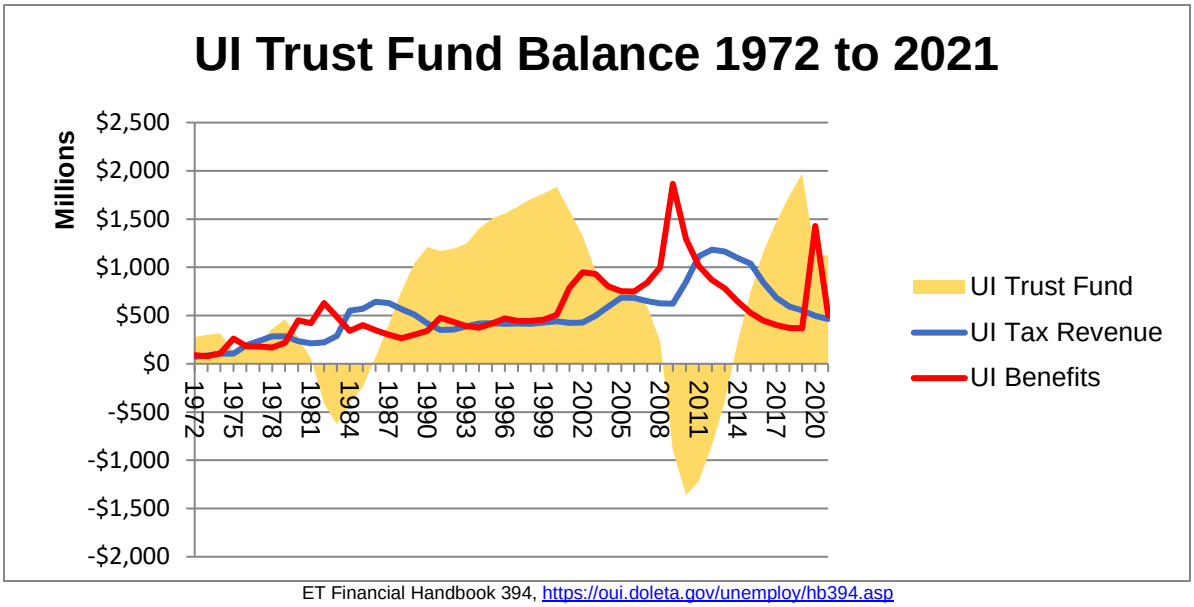
Table of Contents

Introduction

The Department of Workforce Development is pleased to present this report on the financial outlook of the State of Wisconsin Unemployment Insurance (UI) program.

This *Financial Outlook* provides a summary of the UI program to measure the adequacy of the UI Trust Fund and the UI financing system. It provides background on UI financing as well as projections for the near-term future of the program.

Unemployment benefits, which are funded by employer contributions, provide temporary economic assistance to Wisconsin's eligible workers during times of unemployment.



ET Financial Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

Before the COVID-19 pandemic, UI benefit payments had been historically low. However, with a rapid increase in UI benefit payments due to the pandemic, along with a decrease in tax contributions, the UI Trust Fund balance declined significantly. At the end of 2021, the UI Trust Fund had a balance of $1.016 billion.[1] This is a decrease of $33 million from the 2020 ending balance of $1.049 billion.[2] The UI Trust Fund balance peaked at $2.003 billion in October 2019.

1 This amount will differ from the DWD financial statement, which reflected a balance of $1.048 billion. This difference is due to the fact that $18,914,772 of this balance was set up in 2020 in the UI Trust Fund as an Emergency Admin Grant (EUISAA) subaccount to be used for administration of the Unemployment Compensation Program and is not available to pay benefits, and $13,629,290 of this balance is Emergency Unemployment Compensation Relief (EUR) reserved exclusively for funding 50% of the benefits paid for Reimbursable Employers for UI Weeks 12/20-14/21 and 75% of the benefits paid for reimbursable employers for UI Weeks 15/21-36/21 per § 2103 of the CARES Act, the Continued Assistance Act, and the American Rescue Act.

2 This amount will differ from the DWD financial statement, which reflected a balance of $1.137 billion. This difference is due to the fact that $18,914,772 of this balance was set up in 2020 in the UI Trust Fund as an Emergency Admin Grant (EUISAA) subaccount to be used for administration of the Unemployment Compensation Program and is not available to pay benefits, and $68,776,989 of this balance is Emergency Unemployment Compensation Relief (EUR) reserved exclusively for funding 50% of the benefits paid for Reimbursable Employers for UI Weeks 12/20-14/21 and 75% of the benefits paid for reimbursable employers for UI Weeks 15/21-36/21 per § 2103 of the CARES Act, the Continued Assistance Act, and the American Rescue Act.

Section 1 of this Financial Outlook provides the background on the Wisconsin UI Benefits and Financing System, while Section 2 provides the recent history of the UI Trust Fund.[3] Section 3 summarizes recent UI law changes and impacts on UI Financing, which may affect current and future UI benefits and tax revenues. Finally, Section 4 provides UI Trust Fund projections through the end of 2024.

[3] For history of the UI Trust Fund see Appendix A.

Section 1: Background on the Wisconsin UI Benefits and Financing System

Unemployment Insurance Benefits

UI benefits are paid to claimants who have lost employment through no fault of their own and have a work history with one or more employers that participate in the UI program. To continue to qualify for UI benefit payments, a claimant must be able and available for full-time work and, unless granted an exception, must be actively searching for work. The amount of UI benefit payments a claimant may receive is based on the claimant's past wages, up to a maximum weekly benefit rate of $370, which is below the national average of $480 weekly. Wisconsin's maximum weekly rate is also below the average maximum weekly benefit rate of $531 in border states.[4] The maximum weekly benefit rate for all states is in Appendix E. In Wisconsin, a claimant may receive up to 26 weeks of regular UI benefits, which is consistent with the maximum duration for all but 10 states.

Covered Employers in the Unemployment Insurance System

Most employers in Wisconsin are "covered employers" who participate in the UI program.

Covered employers fall into two groups:

Taxable Employers

Nearly all employers in Wisconsin are taxable employers. Individual employers fund UI benefit payments and partially fund UI program operations through quarterly assessed taxes. Unemployment benefit risk is spread across all employers through taxes that are based on the employer's unemployment experience, instead of employers self-financing unemployment benefits.

Reimbursable Employers

Reimbursable employers self-finance unemployment benefits for their workers. Local governmental entities, non-profit organizations, and Native American Tribes can elect to be reimbursable employers. UI administers payment to individuals who worked for reimbursable employers and bills those employers directly to reimburse the Trust Fund for the UI benefits paid.

Unemployment Insurance Taxes (Contributions)

UI benefits are financed by employer contributions (taxes) paid to the Wisconsin UI Trust Fund. The federal government also collects unemployment taxes to fund state administration of the UI program.

<u>State Taxes</u>

State UI taxes finance Wisconsin UI benefits. Employers are assessed UI taxes on each employee's wages up to the taxable wage base. Since 2013, the taxable wage base has been $14,000; an employer is assessed UI taxes on the first $14,000 in annual wages paid to each employee. The tax rate an

[4] Averages provided exclude benefit allowances for dependents. Complete data is provided in Appendix E.

employer pays on wages up to the wage base is determined by two separate factors. The first factor is the UI tax schedule in effect for a given rate year. The UI tax schedule in effect is determined by the UI Trust Fund balance on June 30th of the previous year. The higher the UI Trust Fund balance, the lower the tax rate schedule in effect. Schedule D, the lowest rate schedule, was in effect in 2021 based on the 2020 UI Trust Fund balance. State legislation (2021 Wis. Act 59) set the rate schedule for 2022 and 2023 to Schedule D. The UI Trust Fund balance on June 30, 2023, will determine the rate schedule for 2024.

The second factor that impacts the tax rate an employer pays is the employer's experience with the UI system. The more UI benefits paid to current or former employees of an employer, the higher the tax rate that employer will pay, assuming that the employer's payroll remains constant. Wisconsin employers who were not previously covered by the Wisconsin UI system are assigned a new employer tax rate for the first three years for which they make contributions. This rate varies depending on the industry and size of the employer. After three years, an employer's taxes are then based on their unemployment experience.

There are two components of state UI taxes collected:

Basic Taxes

The basic tax is generally the larger portion of the state tax. The basic tax is the portion of the tax an employer pays that is credited to the employer's UI account. The amount an employer pays in basic taxes is tied to the employer's experience with the UI system.

Solvency Taxes

The solvency tax is generally smaller than the basic tax amount. Solvency taxes are deposited in the Trust Fund and credited to the UI Balancing Account. Benefit payments not charged to specific employers are charged to the UI Balancing Account. The solvency tax covers risk sharing among employers participating in the UI system.

Administrative and Program Integrity Assessment

Since 2017, there has been a separate assessment collected as part of the UI state tax that is used for program integrity purposes. The assessment amount is a flat 0.01% rate with a corresponding reduction in the solvency tax rate for all employers subject to a solvency tax. The administrative assessment does not change the total amount of tax an employer is required to pay.

UI Employer Account

The employer account measures an employer's experience with the UI system. It is not a savings account for the employer to pay for future benefits. The net difference between all the basic taxes collected and the benefit payments charged over the employer's history constitutes the balance of the employer's account, also known as the Reserve Fund Balance. If an employer's account falls below zero, benefits will still be paid to the employer's eligible former workers. The basic tax an employer pays is entered as a credit on the account. UI benefit payments paid to former (or in some cases, current) workers are charged against the account. During the COVID-19 pandemic, many state and federal laws relieved employers of the burden of future tax rate increases due to the pandemic.

An employer's account balance on June 30th determines the employer's tax bracket, and ultimately the tax rate an employer pays during the next calendar year. The employer's account balance is compared to the employer's current taxable payroll.[5] The employer's reserve fund percentage is the ratio of the employer's account balance to the employer's payroll. This percentage is then compared to the current tax schedule in effect, and the employer's tax rate for the following calendar year is determined.

UI Balancing Account

The UI Balancing Account represents the social insurance aspect of the UI system for employers and is primarily funded by two sources.[6] The first source is the solvency tax paid by employers, which totals about $134.7 in 2021. The second source is interest earned on the UI Trust Fund, which was about $20 million in 2021.

Some benefit payments are not charged to a specific employer's account but are instead charged to the UI Balancing Account. There are seven basic categories of benefit payments charged to the UI Balancing Account: write-offs, quits, misconduct, substantial fault, continued employment, approved training, and second benefit year.[7] Laws passed related to the pandemic, 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4, allowed for regular UI benefits related to the pandemic to be charged to the Balancing Account.

The UI Balancing Account represents the lifetime revenues credited and benefits charged to the account. The balance was negative $1.49 billion as of March 31, 2022, which means the solvency taxes and interest are insufficient to cover charges against the UI Balancing Account.

<u>Federal Unemployment Taxes (FUTA)</u>

Employers participating in the UI system also pay federal unemployment taxes,[8] which pay for the following:

1. **Unemployment Insurance Administration**
   The administration of state UI programs is funded by FUTA tax revenue. The United States Department of Labor (US-DOL) determines the amount of administrative grant funding available to each state. Receipt of federal grant funds requires states' administration of unemployment programs to substantially comply with federal requirements and states' unemployment laws to conform to federal UI laws.

2. **Extended Benefits (EB) and Emergency Unemployment Compensation (EUC)**
   Wisconsin qualified for the EB program for six months in 2020. Funding for the EB program is shared equally by both the state and the federal government. The state portion is funded through the state's UI Trust Fund and the federal portion is funded through FUTA tax revenue. However, during 2020, all EB was fully federally-funded except for a small portion due to federal sequestration.

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5 While the payroll used is for the fiscal year ending June 30, employers' 2nd quarter contribution and wage reports and payments due July 31 are reflected in this calculation if made on a timely basis.

6 Other federally distributed funds are also credited to the UI Balancing Account. One example is the FUTA credit reduction revenue, which occurs when the UI system is borrowing.

7 Full descriptions of these charges can be found in Appendix H.

8 Federal Unemployment Tax Act, 26 U.S.C. § 3301.

Congress may authorize EUC payments, which has typically occurred during severe recessions. During the pandemic, Congress authorized Pandemic Emergency Unemployment Compensation (PEUC) and other emergency programs.

3. **Trust Fund Borrowing**
   FUTA tax creates a revenue source for states to borrow to pay benefits when they exhaust their state UI Trust Fund. After the UI Trust Fund was exhausted in 2009, Wisconsin borrowed from the federal government to pay benefits. Wisconsin finished repaying all federal loans with interest in 2014. Unlike many other states, Wisconsin did not need to borrow funds during the recent pandemic.

Costs of Borrowing Federal Funds to Pay UI Benefits

FUTA Credit Reductions

The tax rate for FUTA is 6.0 percent on the first $7,000 of an employee's wages; however, up to 5.4 percent can be credited back to employers if a state's program meets certain requirements, including the state maintaining a positive Trust Fund balance. If a state's Trust Fund remains negative on January 1st for two consecutive years, the FUTA tax credit is reduced by 0.3 percentage points each year the loan is outstanding. From 2011 through 2013, Wisconsin employers were subject to FUTA tax credit reductions for a total cost of $291 million. The additional federal taxes were used to repay the federal loans. When the Trust Fund became positive, employers were again eligible for the full FUTA tax credit.

Special Assessment for Interest (SAFI)

Federal law prohibits using regular state UI taxes to pay interest on a federal loan to a state Trust Fund, so a separate funding source is needed. Wisconsin initially paid the interest charges on its federal loans through a special assessment on employers in 2011 and 2012. Although liability for the interest payments remained, the SAFI was not assessed after 2012. Starting in 2013, the Wisconsin Legislature provided state General Purpose Revenue (GPR) to cover interest due on the UI loan. In total, $103 million in interest costs were assessed on Trust Fund loans due to the Great Recession, with employers paying $78 million through SAFI and the remaining $25 million paid with Wisconsin GPR funds.

The cost to employers of borrowing from the federal government is significant.[9]

[9] See Appendix A for the details of the cost of borrowing.

Section 2: Recent History of the Wisconsin Unemployment Insurance Trust Fund

The modern history of our UI financing system begins in 1981, with the events that produced the system in its current form.[10] This section focuses on the recent experience of the Wisconsin UI Trust Fund, beginning with 2019.

January 2019 through December 2021

The UI Trust Fund ended 2018 with a balance of over $1.7 billion. In 2019, the UI Trust Fund continued to grow, with taxes continuing to exceed historically low benefit payments, even with the lowest UI tax schedule in effect (Schedule D). The UI Trust Fund reached a high balance of over $1.9 billion in October 2019. At the time, the Average High-Cost Multiple (AHCM) of the Trust Fund was approaching 1.0, which is the US-DOL recommended level for trust fund solvency. At that level, the UI Trust Fund should be able to pay benefits at historically high benefit rates for a year without exhausting. Early in 2020, with the onset of the Coronavirus Pandemic, Wisconsin was able to pay benefits without borrowing.

Since March 15, 2020, Wisconsin has faced not only an historic public health crisis with the emergence of COVID-19, but a resulting workforce and economic crisis as well. By December 26, 2020, the UI Division had paid out approximately $4.67 billion to approximately 590,000 claimants since the start of the pandemic. Of those benefit payments, $3.18 billion were for Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), Lost Wages Assistance (LWA), and Federal Pandemic Unemployment Compensation (FPUC), which are federally-funded. In 2021, $2.51 billion was paid in total benefits, including these various federal programs and state UI benefits. From the beginning of the pandemic through the end of 2021, $7.18 billion in benefits have been paid to approximately 677,000 claimants. Of the payments made, 30% was from the Wisconsin UI program and 70% was from federal programs.

During this time, many businesses were closed due to the public health emergency, thus reducing payrolls and, in turn, UI tax revenue. Overall, the UI Trust Fund ended 2020 with a balance of $1.049 billion and 2021 with a balance of $1.016 billion.[11]

Even though a large percentage of benefits were federally funded, the UI Trust Fund declined during the pandemic due to a large increase in regular state UI benefit payments and a reduction in UI tax revenue received because of employers' reduced payrolls. With an ending balance of $1.014 billion, the AHCM was at approximately 0.5 at the end of 2021. If Wisconsin were to face another recession, the UI Trust Fund would not be well-positioned to pay benefits and may need to borrow from the federal government.

Twenty-three states borrowed federal funds to pay unemployment benefits in the last two years, with 10 states still repaying their federal loans as of the end of February 2022.

Under 2019 Wisconsin Act 185, the Department of Workforce Development was required to charge unemployment benefits for initial claims related to the public health emergency declared by Executive Order 72 to the UI Balancing Account of the UI Trust Fund for taxable employers. For reimbursable

[10] See Appendix A for details on the modern history of the UI Trust Fund.
11 See footnotes 1 and 2.

employers, the Department charged non-federally funded benefits to the interest and penalty (I&P) appropriation. This treatment of claims charging applied to weeks of benefits starting with the week of March 15, 2020. Under 2021 Wisconsin Act 4, the relief of benefit charges for employers ended March 13, 2021.

Under Acts 185 and 4, claimants were eligible for unemployment benefits for the first week of unemployment, if the first week of unemployment falls between March 15, 2020 and March 13, 2021. Claimants were previously ineligible for benefits during the first otherwise compensable week of unemployment benefits. This is known as the waiting week.

The I&P appropriation liability for reimbursable employers totaled $69.9 million. This liability was paid in full in 2022. However, the I&P appropriation has a negative cash balance as of May 2022 of approximately $49.9 million, which is being brought into a positive condition using I&P revenues collected annually. Assuming revenue collections and annual expenditures continue at rates similar to prior years, bringing the negative cash balance to a positive condition will take approximately 20 years.

Section 3: Recent UI Law Changes and Impacts on UI Financing

Wisconsin and the federal government took several emergency actions during the pandemic to alleviate the effect of the pandemic on employers and benefit claimants. All have now expired.

Federal law changes.

All temporary federally funded unemployment benefits, including PUA, PEUC, FPUC, MEUC, and federal funding of sharable regular compensation and sharable extended compensation in the Federal-State EB Program have expired.

In addition, the Federal Emergency Management Agency provided LWA benefits also expired.

State law changes

There were two law changes that significantly impacted the UI Trust Fund since the April 2021 Financial Outlook was published. 2021 Wis. Act 58, the 2021-23 State Budget Act, provided $60 million to the Unemployment Division in each of the two fiscal years for the UI Trust Fund. 2021 Wis. Act 59, Unemployment Insurance Contribution Rates, retains Schedule D for 2022 and 2023 for contribution employers.

The UIAC agreed bill was enacted as 2021 Wis. Act 231. None of the provisions in Act 231 are projected to have a significant impact on the UI Trust Fund.

Act 231 provisions are summarized below.

Benefits changes

Effect of a Criminal Conviction
When the department refers matters for criminal prosecution, an administrative determination has usually already been issued. However, criminal prosecution may result in court-ordered restitution when the department has yet not issued an administrative determination that a debt is owed. Act 231 provides that final criminal conviction judgments are binding on criminal defendants for the purposes of related proceedings that arise under unemployment law.

Departmental Error
Under current law, the department waives the recovery of benefits that were erroneously paid if the overpayment was the result of departmental error, such as a computation error, misapplication or misinterpretation of law, or mistake of evidentiary fact. But an amendment, modification, or reversal of a department determination by an appeal tribunal, the Labor and Industry Review Commission, or a court is not departmental error for the purposes of waiving the overpayment. Act 231 amends the law to provide that an error made by an appeal tribunal is not “departmental error.”

Camp Counselor Exclusion
Federal unemployment law excludes the services of camp counselors from the definition of “employment” if certain criteria are met. Act 231 adds a corresponding exclusion to state law for private for-profit employers.

Tax Changes

Reimbursable Employer Debt Assessment Charging

When employers subject to reimbursement unemployment insurance financing ("self- insured") are charged for benefits that are based on identity theft, the department restores those charges to the employers' accounts from the Balancing Account. The 2015 – 2016 UIAC agreed bill (2015 Wis. Act 334) required that the department set aside $2 million in the Balancing Account, plus interest, to pay identity theft charges to reimbursable employers' accounts.

Non-profit reimbursable employers may be subject to an annual reimbursable employer debt assessment (REDA) for payment of uncollectible benefit reimbursements due from other reimbursable employers no longer in business. Under current law, the REDA to recover uncollectible reimbursements must be at least $5,000 but no more than $200,000 and each non-profit employer assessed pays based on the employer's payroll. Employers for whom the assessment would be less than $10 are not assessed, which usually results in about half of non-profit reimbursable employers being assessed the REDA.

Act 231 provides that a limited amount of the reimbursable employer identity theft fraud funds set aside in the Balancing Account will be made available to recover uncollectible reimbursements instead of assessing the REDA (or to reduce the amount of the REDA). This provides that the identity theft fraud funds may be used to pay the REDA only if the use of those funds would not reduce the balance of the funds below $1.75 million. Act 231 also increases the minimum amount of the REDA per employer from $10 to $20.

Fiscal Agent Election of Employer Status

Individuals who receive long-term health support services in their home through government-funded care programs are employers under Wisconsin's unemployment insurance law. These employers receive financial services from fiscal agents, who directly receive and disperse government program funds. The fiscal agent is responsible for reporting employees who provide services for the employers to the department, and for paying unemployment tax liability on behalf of the employer. Under current law, if the worker is a certain class of family member of the person receiving care, the worker is ineligible for unemployment benefits when the employment relationship ends.

Act 231 permits private fiscal agents (not government units) to elect to be the employer of workers who provide care services under Wisconsin Statutes Chapters 46, 47, and 51. The fiscal agent would be required to inform the recipient of care of the election and the fiscal agent would need to be treated as the employer for federal unemployment tax purposes. If the fiscal agent elects to be the employer and the worker is a certain class of family member of the person receiving care, that worker would be an employee of the fiscal agent and could now potentially be eligible for unemployment benefits. Benefits would be charged to the fiscal agent's account, which would affect its experience rating. This provision is expected to simplify unemployment insurance reporting requirements for fiscal agents.

Work-Share Amendments

2019 Wis. Act 185 and 2021 Wis. Act 4 provided greater flexibility for work-share plans, including reducing the minimum number of employees in a work-share plan from 20 to 2, and increasing the maximum reduction in employees' hours from 50% to 60%, which is the maximum allowed under federal law. Act 231 makes these changes permanent, as well as permitting a plan to extend up to 12 months in a 5-year period.

Administrative Changes

Changing the deadlines to submit certain statutorily-required reports to the Legislature

For the UI financial outlook report, the deadline will be changed from April 15 of each odd-numbered year to May 31 of each even-numbered year. For the report summarizing the deliberations of the Unemployment Insurance Advisory Council, the deadline will be changed from May 15 of each odd-numbered year to January 31 of each even-numbered year. These changes are designed to improve the usefulness of the reports to the Legislature, the Governor, and the Council.

Prohibiting DOR collection of UI debts

Current law requires state agencies and the Wisconsin Department of Revenue (DOR) to enter into an agreement to have DOR collect debts owed to agencies under certain conditions. Act 231 prohibits DOR from collecting debts on behalf of the UI Division. This change will ensure that employers and claimants are not assessed additional fees when repaying their debts and will ensure that state recoveries of debts owed to the UI Division continue to be maximized for the benefit of the UI Trust Fund.

Section 4: UI Trust Fund Projection

UI Trust Projection Methodology

The UI Trust Fund projection is the result of numerous other estimates that include future projections of the economy, unemployment insurance recipiency, and estimated UI tax revenue.

Economic projections are from IHS Markit (IHS). The projections include the Wisconsin unemployment rate, labor force growth, and wage growth. The unemployment rate is used in projecting future UI benefits. The labor force growth and wage growth estimates are used both in projections of UI benefit payments and UI tax revenue.

The IHS economic projection assumes low unemployment in 2022 with slight increases to the unemployment rate in 2023 and 2024. Economic growth is expected to be strong in Wisconsin throughout the projection period. The slight increases in the unemployment rate combined with increases in the labor force and wages leads to slightly higher UI benefit projections in 2023 and 2024 than for 2022.

UI tax revenue is based upon the projections of covered payroll as well as UI benefits charged to employer accounts. Labor force growth is expected to follow the rest of the economy with fast expansion in 2022. This growth is expected to start to decline in 2023 and 2024 but still be above typical levels. Wage growth is also expected to be high in 2022 with declines in 2023 and 2024 while remaining above normal levels.

UI benefit charging presents distinct challenges for the current projection. Under normal projection circumstances, UI benefits are directly charged to an employer's account, which then will affect future tax rates that the employer pays. Under 2019 Wis. Act 185 and 2021 Wis. Act 4, UI benefits paid during the pandemic period may instead be charged to the UI Balancing Account rather than charged to the employer accounts. This prevents the UI benefit charges during the pandemic period from impacting employers' experience ratings.

UI has now finished recharging UI benefits from employer accounts to the Balancing Account. However, the first full accounting of UI taxes incorporating the new charging will not occur until 2023. UI tax revenue forecasts have atypical projection risks until the full accounting of recharging of UI benefits is completed during the tax rate process. 2021 Wis. Act 59 set the UI tax schedule to D for tax years 2022 and 2023 regardless of the UI Trust Fund balance.

UI Trust Fund Projections

Unemployment Reserve Fund Activity				
(Millions $)				
	2021	2022	2023	2024
Opening Unemployment Reserve Fund Balance	$1,049	$1,016	$1,233	$1,423
Revenues:				
State Unemployment Revenues	$448	$483	$490	$472
Interest Income	$20	$28	$33	$36
Federal Reimbursement for UI Benefits	$88	$2		
State General Purpose Revenue		$60	$60	
Total Revenue	$556	$573	$583	$508
Expenses:				
Unemployment Benefits	$589	$356	$393	$435
Ending Reserve Fund Balance[12]	**$1,016**	**$1,233**	**$1,423**	**$1,496**

Projections from Wisconsin Unemployment Insurance Division based upon Wisconsin Unemployment Insurance data and IHS Wisconsin projections April 2022.

The UI Trust Fund is expected to grow over this period. 2021 Wis. Act 58 transfers $60 million from general purpose revenue to the UI Trust Fund in fiscal years 2021-2022 and 2022-2023. UI benefit payments are expected to fall substantially in 2022, leading to an expected increase in the UI Trust Fund balance. While benefit payments are projected to increase slightly in future years, that is matched by increased UI taxes and interest leading to growth in the UI Trust Fund during this period. It is expected that UI will remain in tax schedule D for the projection period.

[12] This UI Trust Fund balance only includes funds available to pay state UI benefits. There are currently other funds in the Wisconsin UI Trust fund that are not available to pay state UI benefits. Such funds include holding funds for reimbursable employer benefits as part of the CARES Act and the Continued Assistance Act and an emergency administration grant. These accounts are included with other UI Trust Fund balances so they may not match the balances presented here.

Conclusion and Recommendations

As Wisconsin's Unemployment Insurance program celebrates its 90th year, the Secretary recommends the Unemployment Insurance Advisory Council (UIAC) review and advance legislative measures that strengthen UI Trust Fund solvency while supporting the integrity of the UI system. While recognizing that some employers are still recovering from the COVID-19 pandemic and many are facing rising costs due to inflation and supply chain disturbances, the Secretary urges the Council to pursue a balanced approach to rebuilding the Trust Fund that acknowledges the imperative of delivering on UI's promise to more fairly distribute, as well as decrease and prevent, the economic burdens resulting from unemployment.

Wisconsin's UI Trust Fund weathered the pandemic without needing to borrow from the federal government due to a strong opening balance, along with one-time financial relief provided by the state and federal governments. Wisconsin began the pandemic with an Average High-Cost Multiple (AHCM) of nearly 1.0. States that meet the standard (AHCM of 1.0) are less likely to need to borrow and in a better position to withstand economic downturns. The balance decreased significantly, from an opening balance of $1.961 billion in 2020, to an ending balance of $1.016 billion in 2021. The Trust Fund is currently at an AHCM of about 0.5.

The UI Trust Fund will need to grow again to avoid borrowing in a future recession. If there is another economic downturn in the next few years, the projected growth in the Trust Fund may not be sufficient to avoid the need for the UI program to borrow from the federal government to pay benefits. The economic cost to employers of borrowing is significant because it results in not only higher state and federal unemployment taxes, but the SAFI assessment as well, and comes at a time when many employers are struggling. The Secretary encourages the UIAC to review the UI financing system, including the rate schedules, to determine if any adjustments should be made to ensure adequate funding for a solvent Trust Fund that will be able to pay benefits in times of economic downturn without the financial burden on employers of borrowing.

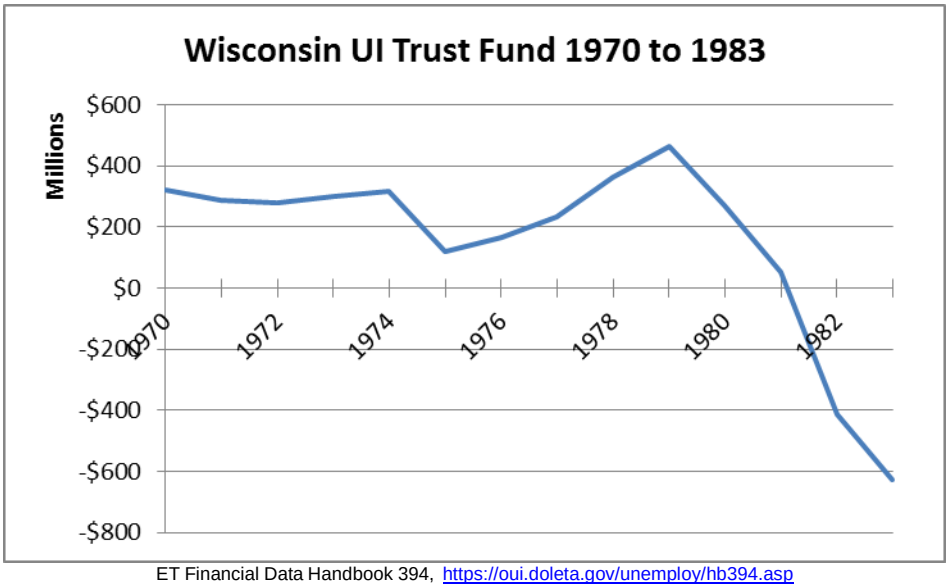
When reviewing Trust Fund financing, the Secretary encourages the Council to also consider benefit rates and eligibility policies that are sufficient to provide workers the financial assistance necessary to withstand temporary periods of unemployment. Claimants have not received an increase in the maximum weekly benefit rate in eight years. Currently, UI benefits replace only approximately 28 percent of the average weekly wage, a significant decrease from historical replacement rates that were around 45 percent. Had the federal government not offered supplemental benefits during the pandemic, the decreased purchasing power of those who were out of work due to the pandemic would have significantly affected the livelihood of farmers, merchants, and manufacturers through decreased demand for their products. Eligibility requirements have also impacted claimant recipiency rates. From 2000-2007, the average recipiency rate was 52.44 percent; whereas, from 2015-2019, the average recipiency rate 33.75 percent.

The department is prepared to support the UIAC as it considers options to further strengthen Wisconsin’s Unemployment Insurance program. This report is prepared in advance of the UIAC biennial public hearing and agreed bill cycle, allowing time for the UIAC to request assistance with research topics before the next legislative session begins.

Appendix A: Modern History of UI Financing System 1981 – 2021

Creation of Our Current UI Financing System: 1981-1982 Recession and Aftermath

Much of the current Wisconsin UI financing system was developed as a response to the difficulties experienced by the UI Trust Fund during the recession of the early 1980s. The UI Trust Fund was rapidly depleted by the recession and Wisconsin had to borrow from the federal government to pay UI benefits.



ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

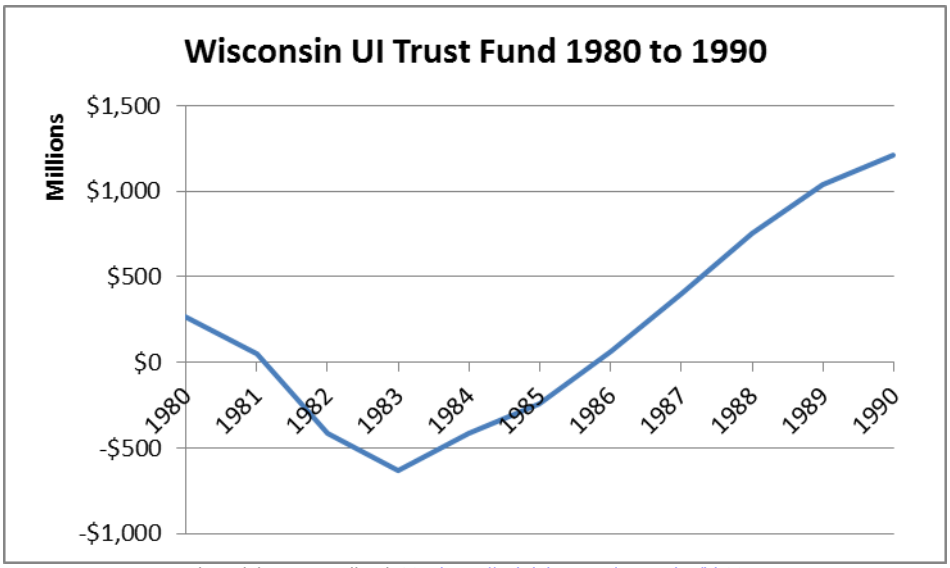
Wisconsin borrowed $988 million between 1982 and 1986. To provide context,this was about 4.1 percent of Total Covered Payroll in the mid-1980s. The same 4.1 percent of Total Covered Payroll of taxable employers in 2020 would be about $4.6 billion. Wisconsin's employers paid $124 million in interest due to the borrowing in the mid-1980s.

To eliminate the large UI Trust Fund debt, Wisconsin enacted legislation that made changes to the UI financing system. These changes included:

- Increasing the taxable wage base from $6,000 to $10,500;
- Creating new tax rate schedules that are dependent on the UI Trust Fund balance;
- Increasing the rate that an employer's tax rate may increase, known as the Rate Limiter, to two percent;
- Temporarily discontinuing the 10 percent write-off provision, which reduced tax liability for employers whose reserve fund was account was very negative;
- Limiting the effect of voluntary contributions;
- Charging the state's portion of Extended Benefits to employers instead of the UI Balancing Account;
- Reducing the maximum benefit duration from 34 weeks to 26 weeks;

- Increasing the requirements to qualify for benefits;
- Increasing the requalification requirements; and
- Eliminating the indexing of the weekly maximum benefit amount.

These changes allowed Wisconsin to rapidly repay the UI Trust Fund loan and build up a sizable UI Trust Fund by the end of the 1980s.



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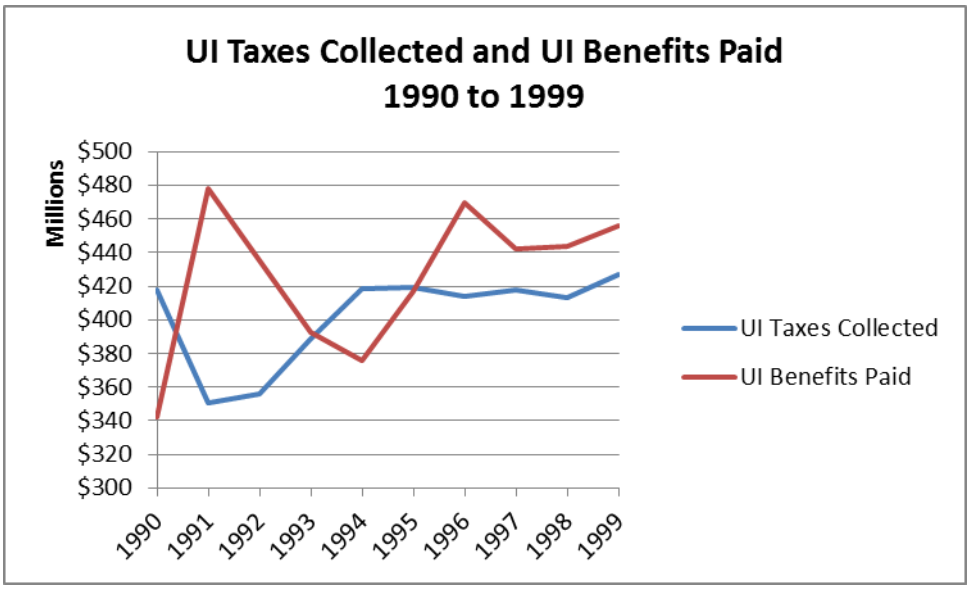
The Static UI Financing System in the 1990s

The UI Trust Fund accumulated a large balance before the onset of the 1991 recession. When the recession hit, total UI benefits paid exceeded UI tax revenue collected; however, the UI Trust Fund remained solvent. As the recession wound down, tax revenue rebounded, and benefit payments fell as expected.

During periods of economic growth, the UI financing system is designed to build up the UI Trust Fund to pay UI benefits during an economic downturn and avoid borrowing. This happened following the 1991 recession. After the UI Trust Fund reaches a balance large enough to finance a recession, year-to-year UI benefits paid and UI tax revenue collected should be roughly equal to maintain the UI Trust Fund balance, ensuring it will be large enough for the next recession.

Beginning in 1996, annual UI benefits paid began to exceed annual UI tax revenue collected. The mid-1990s were a high interest rate environment so the large interest returns allowed the UI Trust Fund to continue to grow despite the UI program running a yearly deficit.



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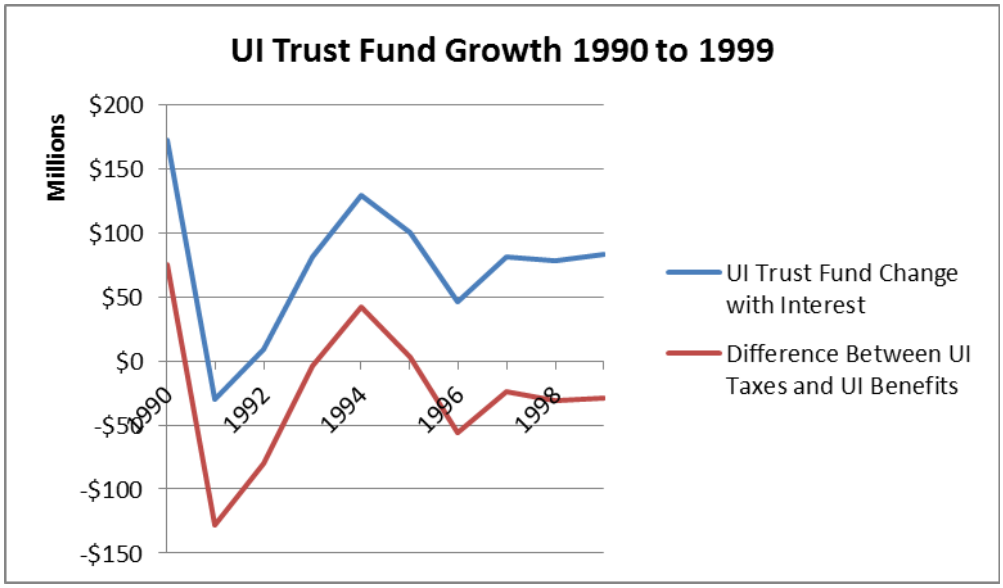

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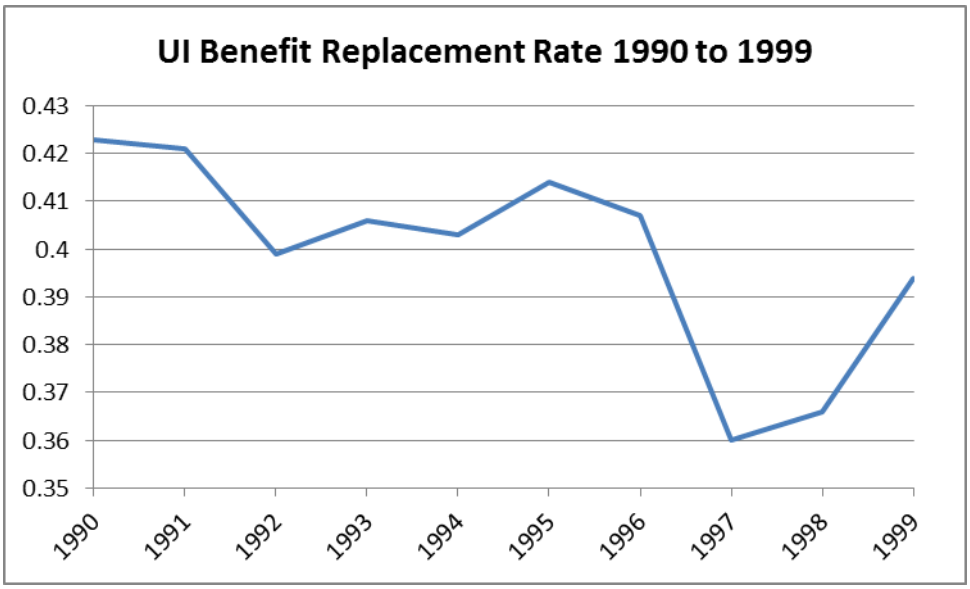
The yearly deficit between benefit payments and tax revenue in the 1990s was not due to increases in the UI benefit formula. In fact, the real value of UI benefits to the unemployed fell during this time. The UI benefit replacement rate (the ratio of the average weekly benefit amount to the average weekly wage) declined over the 1990s. The average weekly benefit amount was 42.3 percent of the average weekly wage in 1990 and fell to 39.4 percent in 1999. (The replacement rate has continued to decline over the past two decades to a rate of 34 percent in 2019.) Although the benefit replacement rate was declining, benefits paid increased in the late 1990s due to the average wage increasing over the period. Increases in an individual's wages increases the amount of a person's benefit entitlement. Benefit payments are expected to increase over time due to increases in wages earned and increases in the number of people

employed and eligible for benefits. The UI Trust Fund ended 1999 with a positive balance of $1.7 billion.



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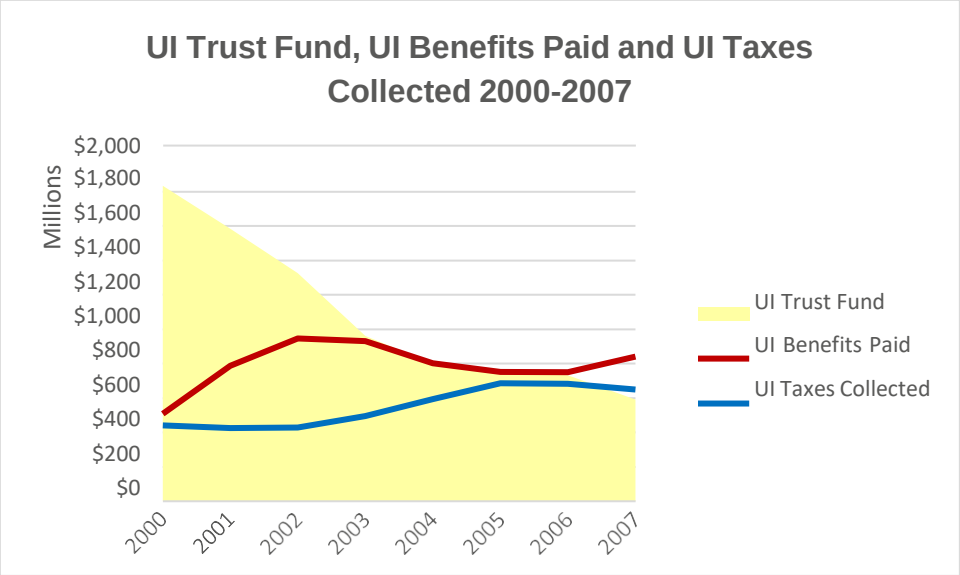
The Shrinking of the UI Trust Fund in the 2000s

The 2001-2002 recession began to expose the structural deficiencies of the 1990s' UI financing system. After the recession ended, the UI Trust Fund continued to dwindle, and taxes collected never exceeded benefits paid. Nationally, growth was tepid during the early part of the decade and growth was slightly slower in Wisconsin than in the rest of the nation.

The level of unemployment claims in the 2000s had increased over levels typical in the late 1990s. Interest earnings were no longer covering the gap between benefit payments and taxes. The system did not respond to either the recession or the shrinking UI Trust Fund. Taxes collected never exceeded benefits paid, and tax revenue started to fall, even though the UI Trust Fund continued to decline.



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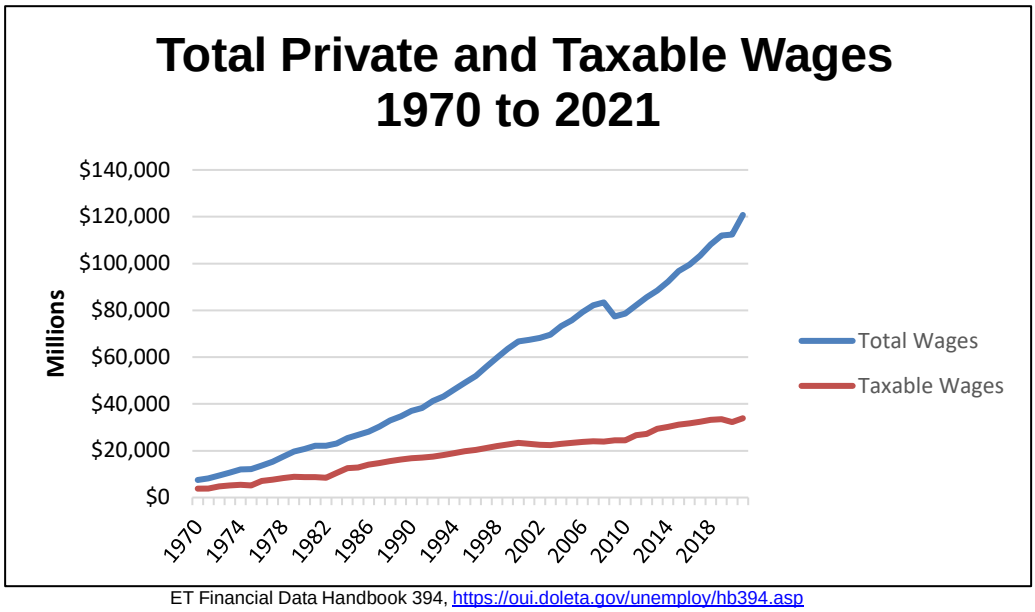
There are two main reasons why the financing system was non-responsive:

1. **UI Taxable Wage Base Not Reflective of Wage Growth**
   The taxable wage base remained at $10,500, the level set in 1986. As a result, the ratio of taxable wages to total wages fell throughout the 1990s and 2000s.

   Increasing wages caused benefit payments to increase faster than tax revenue, even without a change in benefit policy. When the economy started to recover in 2003, employment did not rise as quickly as wages. Because the wage base was set in 1986, the increase in wages was not subject to taxes even though it was still increasing the risk to the system through higher benefit payments.



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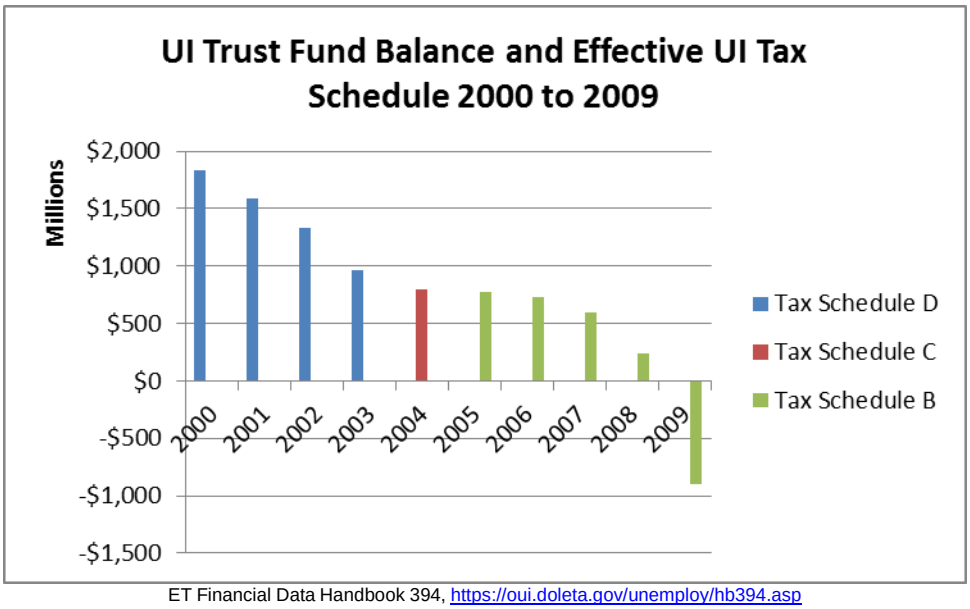
2. **The UI Tax Rate Schedule Change Triggers Reflect the 1980s Economy**
The UI tax system is comprised of four tax rate schedules. The balance of the UI Trust Fund as of June 30th determines which schedule is in effect for the next tax year and the dollar amount will trigger a corresponding tax schedule. When the schedule triggers were first established, they reflected the Wisconsin economy of the late 1980s. However, as the Wisconsin economy grew the triggers did not. When the triggers were adjusted in 1997, the threshold values were not updated to reflect any economic growth between 1989 and 1997. Therefore, the fixed trigger amounts did not reflect the economy of the early 2000s. Even with the UI Trust Fund shrinking rapidly, the balance never fell below the $300 million balance threshold needed to trigger the highest tax rate schedule (Schedule A). Without the implementation of the higher ratesin Schedule A, the UI Trust Fund continued to shrink.



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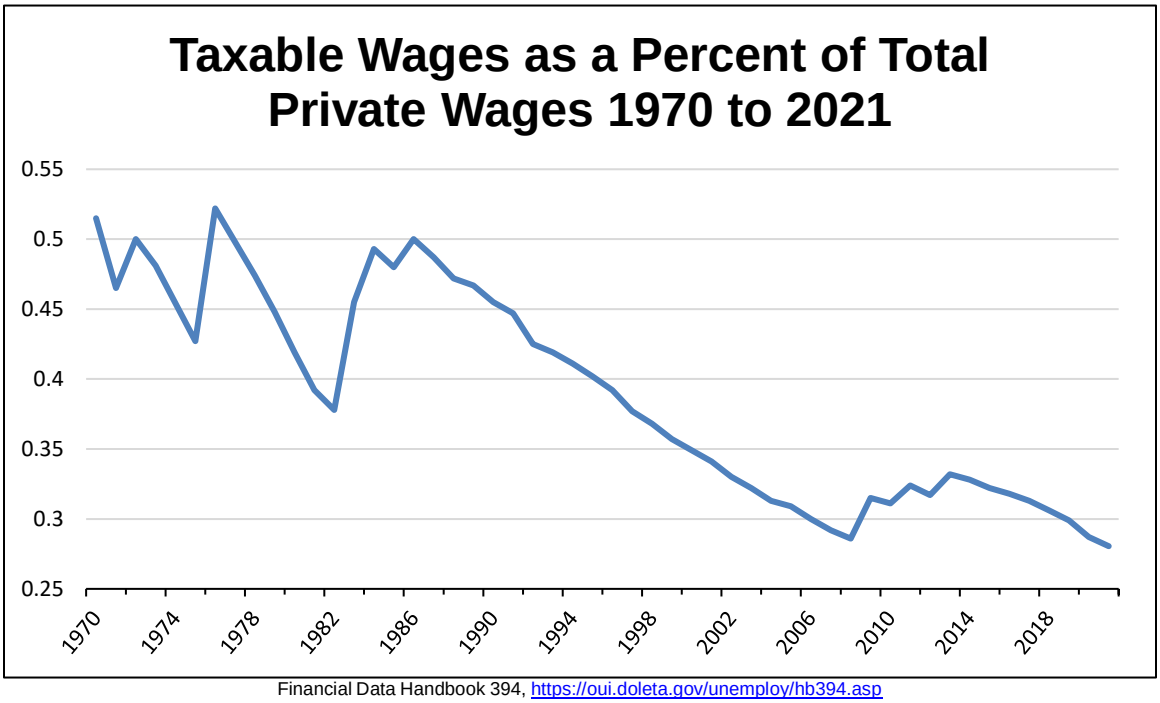
Between 2003 and the onset of the Great Recession, benefits paid remained above taxes collected. Unlike in the 1990s, interest earnings were not large enough to cover the gap and the UI Trust Fund continued to shrink. Any type of downturn would have inevitably caused the depletion of the UI Trust Fund.



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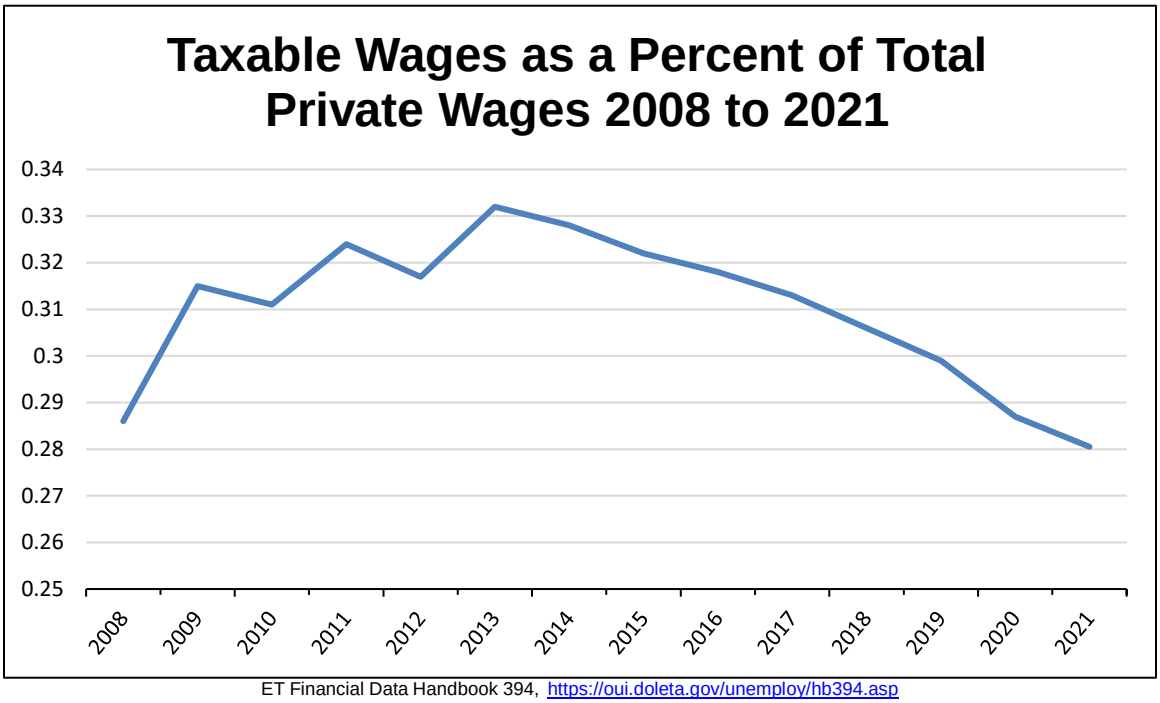
Legislation was enacted in 2008 that increased the taxable wage base to $12,000 in 2009, $13,000 in 2011, and $14,000 in 2013 where it was set to remain. This helped to reduce a portion of the decline of the ratio of the UI taxable wages to overall wages; however, by the time the wage base increased to $14,000 in 2013, the wage base again began to lose value relative to total wages and its value has continued to decline.



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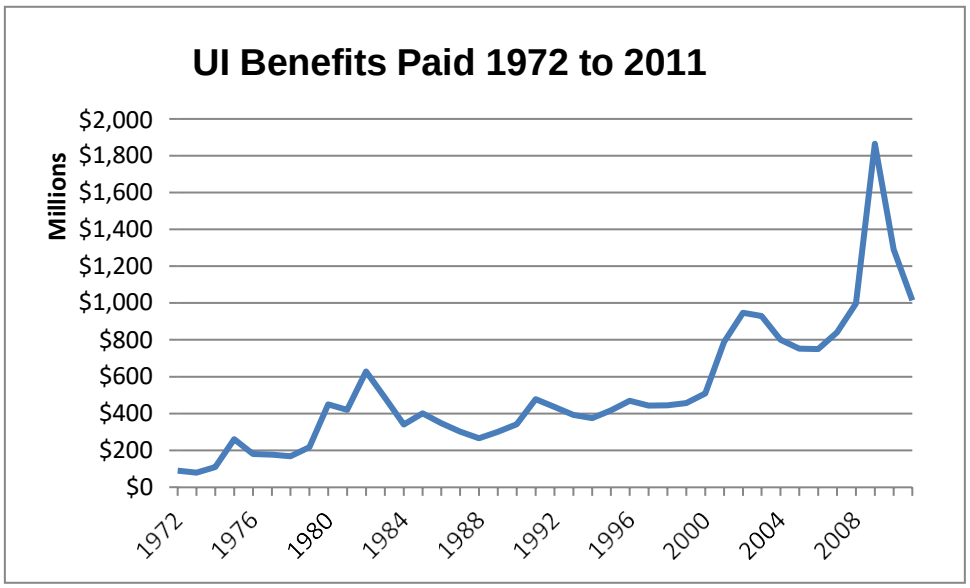
The Great Recession



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The Great Recession strained the entire nation's Unemployment Insurance system. The Great Recession's initial impact on the Wisconsin UI system started in 2007, but it was not until 2008 and 2009 that UI benefit payments increased dramatically while overall employment fell. In raw dollar terms, the four largest benefit outlays in Wisconsin history occurred in the years 2008, 2009, 2010, and 2011, with the largest amount, $1.8 billion, occurring in 2009.

5 Highest Benefit Years based on Benefits Paid as a Percent of Total Payroll 1972-2021

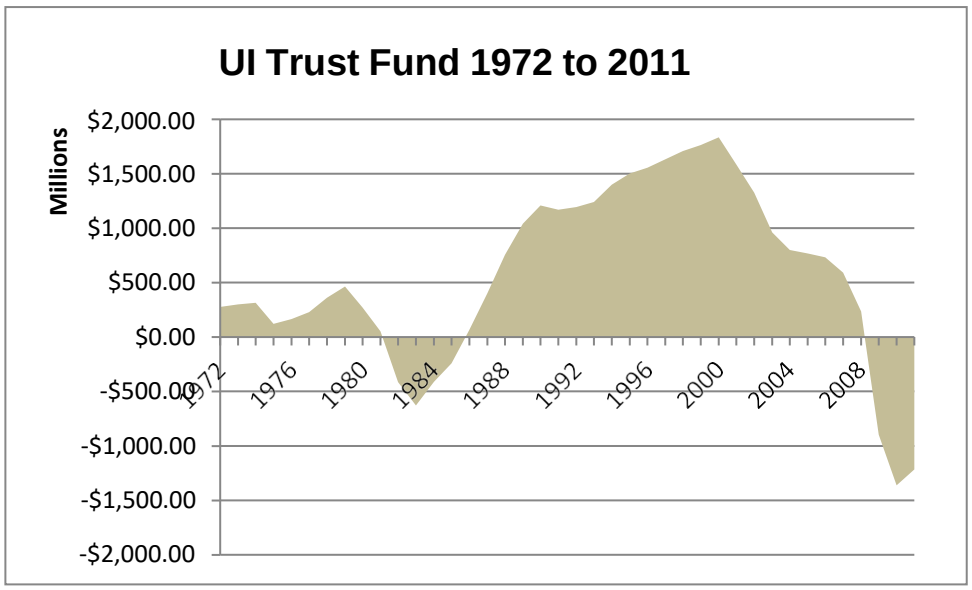
Year	Benefits as a Percent of Total Payroll
1982	2.84
2009	2.41
1980	2.17
1975	2.13
1983	2.11

ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

A better way to measure benefit expenditures is by comparing it to wages in the economy. Payroll can be viewed in terms of how many dollars are at risk. An analogy can be made to homeowner's insurance. The more expensive the home, the more money that needs tobe paid out if there is a fire. For unemployment insurance, the more wages in the economy, the more benefits that will need to be paid during a recession.

When looking at benefit payments as a percentage of total payroll, the percentage during the Great Recession, while high, is below benefit payments during the 1981-1982 recession. When

viewed from this perspective, only 2009 is among the highest benefit years since 1972. The level of benefits paid during the Great Recession was in line with other recessions and reflected the growth of the economy and the increase in total payroll over four decades.



ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

As illustrated above, the Wisconsin UI Trust Fund was shrinking throughout the 2000s; the Great Recession was the catalyst that caused the UI Trust Fund to become insolvent and the state to borrow from the federal government to pay UI benefits.

The decline of the UI Trust Fund and the need to borrow to pay benefits led to policy responses taking effect. These policy responses were in place due to existing laws and regulations:

- The reduction in the FUTA tax credit. Revenue from the tax credit reduction is used to pay off UI Trust Fund loans.

- Trigger to the highest Wisconsin UI tax schedule, Schedule A. When the UI Trust Fund fell below $300 million in 2009, Schedule A went into effect for 2010. This schedule raises approximately $90 to $100 million more per year in tax revenue than the next schedule, Schedule B. When the UI Trust Fund balance exceeds $300 million, an automatic trigger to Schedule B occurs.

Schedule A was not in effect until the UI Trust Fund was already insolvent; a strong indicator that the dollar value assigned to the trigger amounts was too low to prevent the need to borrow from the federal government. To put it in perspective, quarterly benefit payments exceeded $300 million in eight of the 16 quarters between 2009 and 2012.

There were three Wisconsin legislative changes aimed to address the structural deficit in the UI Trust Fund during and following the Great Recession and all reduced benefit payments for claimants:

- Defining full-time work to be 32 hours or more;
- Eliminating partial benefits for individuals earning over $500 per week; and
- Establishing a waiting week for UI claimants.

The waiting week caused the largest reduction in UI benefit payments, reducing payments by approximately 5 percent per year. Under the waiting week, the first week of benefits is withheld from eligible claimants. While the waiting week does not reduce the total amount of benefit payments a claimant is eligible to receive, the waiting week will reduce benefits paid for those claimants who do not exhaust their claim. The fewer weeks an individual claims, the larger the percentage reduction in benefit payments the waiting week represents. For example, a claimant claiming 6 weeks will see a 16.67 percent reduction in benefits under a waiting week versus no waiting week in place. Before the pandemic, with fewer claimants exhausting, many more claimants were having sizeable reductions in benefit payments due to the waiting week than was true when the law was enacted. At that time, more claimants exhausted their claim and still received payment for their maximum number of weeks.

During the Great Recession, UI benefit payments were reduced by approximately $50 million dollars per year. Because of the multiplier effect[13] of UI benefit payments during a recession, this reduced the economic activity in Wisconsin by $80 to $100 million per year. After the recession the waiting week continued to reduce benefit payments; for2019 this amounted to approximately $18.4 million.

Recovery and Paying Off the UI Trust Fund Loan

The nation experienced a slow growth recovery following the end of the Great Recession. This had an attendant slow employment recovery which had many people receiving UI benefits for long periods of time.[14] The low level of benefits paid was both a result of an improving economy and diminished base period wages for many people who were no longer qualified for UI benefits going forward due to a lack of employment.

[13] Estimates of the multiplier for UI benefits during the Great Recession range from 1.6 (The Testimony of Mark Zandi Chief Economist, Moody's Analytics Before the House Budget Committee "Perspectives on the Economy".) to 2.0 (IMPAQ International, The Role of Unemployment Insurance as an Automatic Stabilizer during a Recession by Wayne Vroman).

[14] Additional weeks of these benefits were paid under Emergency Unemployment Compensation (EUC) pursuant to federal legislation and were funded with federal taxes.

Despite the lengthy period of above average benefits paid, the UI Trust Fund finished 2014 with a balance of $215 million and the UI Trust Fund loan paid. There are three significant factors that contributed to repaying the loan and obtaining a positive balance:

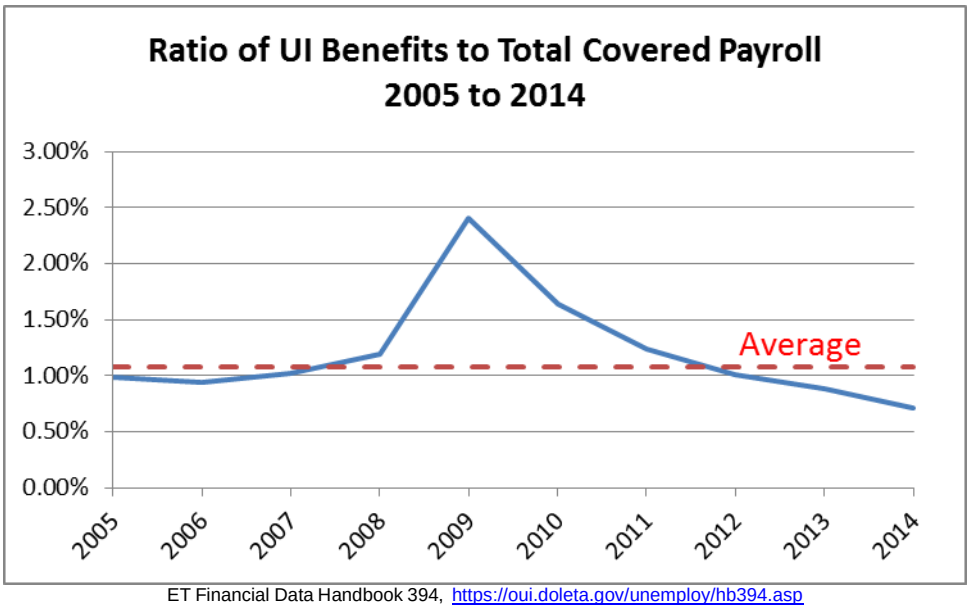
1. Low level of UI benefits paid due to a reduction in filing activity;

2. Increase in UI tax revenue because of the highest tax rate schedule being in effect and a decline in employer experience rating due to high benefit payments;

3. FUTA tax credit reduction.

Wisconsin UI Benefit Payments

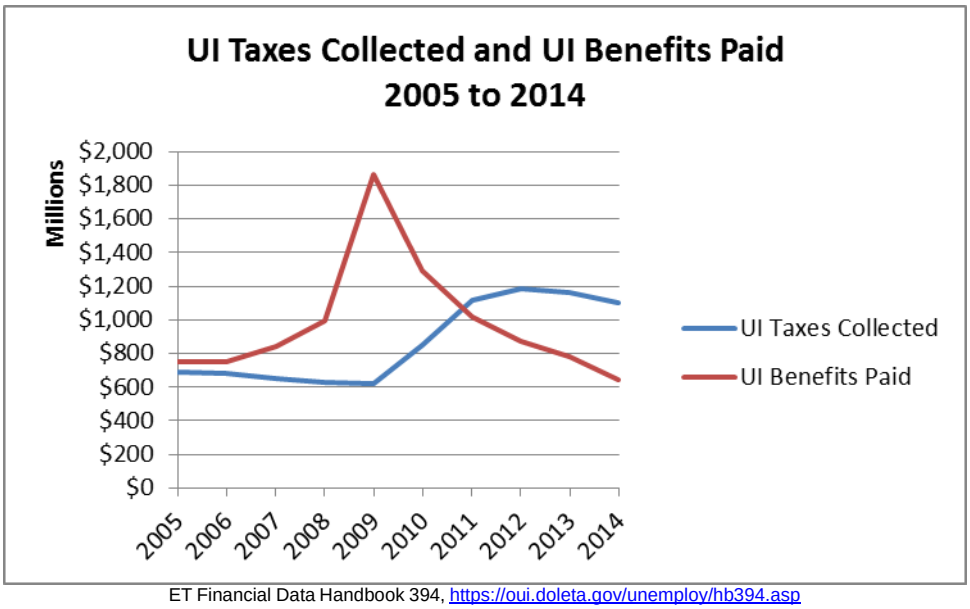
UI benefit payments were elevated through 2011 and fell to a more normal level in 2012. In 2013 UI benefit payments fell to an amount below average and were substantially below average in 2014. The low level of UI benefit payments reduced expenditures from the UI Trust Fund.



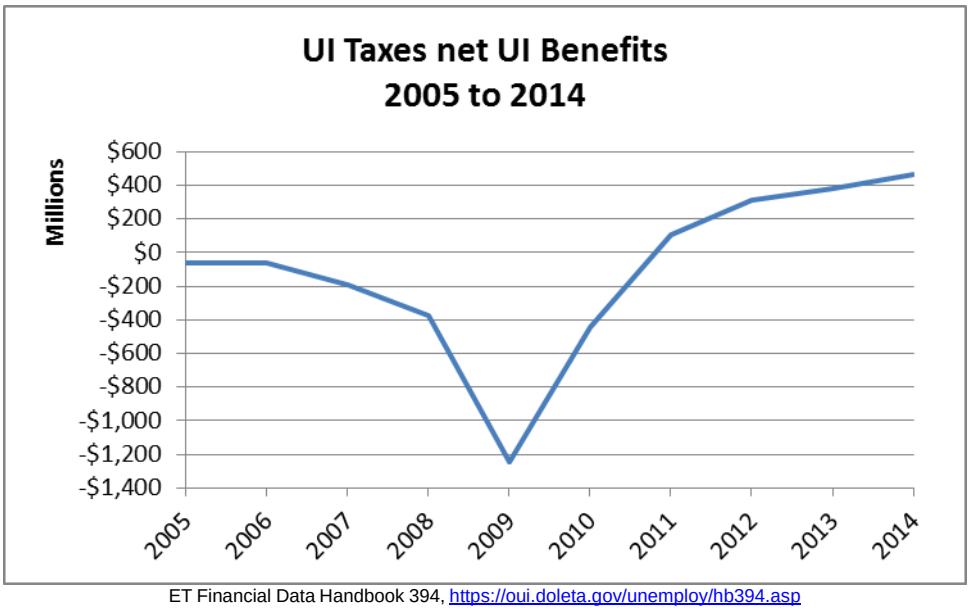
ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

UI Tax Revenue

While UI benefit payments declined rapidly, UI tax revenue also declined but at a slower rate. Before the pandemic, the UI Trust Fund balance had increased as the net positive difference between taxes and benefits had grown.



ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp



ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

FUTA Tax Credit Reduction

As described in Section 1, the Federal Unemployment Tax (FUTA) credit is reduced in states that borrow from the U.S. Treasury at a rate based on the number of years a state has borrowed. Employers in Wisconsin had credit for their FUTA tax reduction, leading to higher federal unemployment tax bills. The funds the federal government collects are used to reduce the state's debt. The FUTA credit reduction experienced by Wisconsin employers added approximately $292 million to the UI Trust Fund. Without the revenue from the FUTA credit reduction, the UI Trust Fund would have remained negative until first quarter receipts at the end of April 2015.

Cost of Wisconsin UI Borrowing during and after the Great Recession

Borrowing federal funds to pay UI benefits has costs associated with it that are borne by covered employers and other Wisconsin taxpayers. As mentioned above, the reduction in employers' FUTA credit increased federal UI taxes by $291 million from 2012 to 2014. The FUTA tax increase differentiates it from state UI taxes in two important ways. First, it is a flat wage tax, meaning the tax rate is not experience-rated. Employers are taxed at the same rate no matter how much or how little they have used the UI system in the past. Second, the FUTA tax does not affect future tax rates.

The other large borrowing cost was interest payments on the federal loans. In total, UI Trust Fund borrowing accumulated $103 million in interest costs. Of the interest costs, $78 million was paid by employers through the Special Assessment for Interest (SAFI). The remaining $25 million was paid with Wisconsin General Purpose Revenue (GPR) funds. Interest rates during this recession were low, but low interest rates do not accompany every recession. For example, the 1982 recession had very high interest rates. In the future, the interest cost can be much higher if interest rates are higher.

Direct Costs of Wisconsin UI Borrowing during and after the Great Recession
(Millions of $)

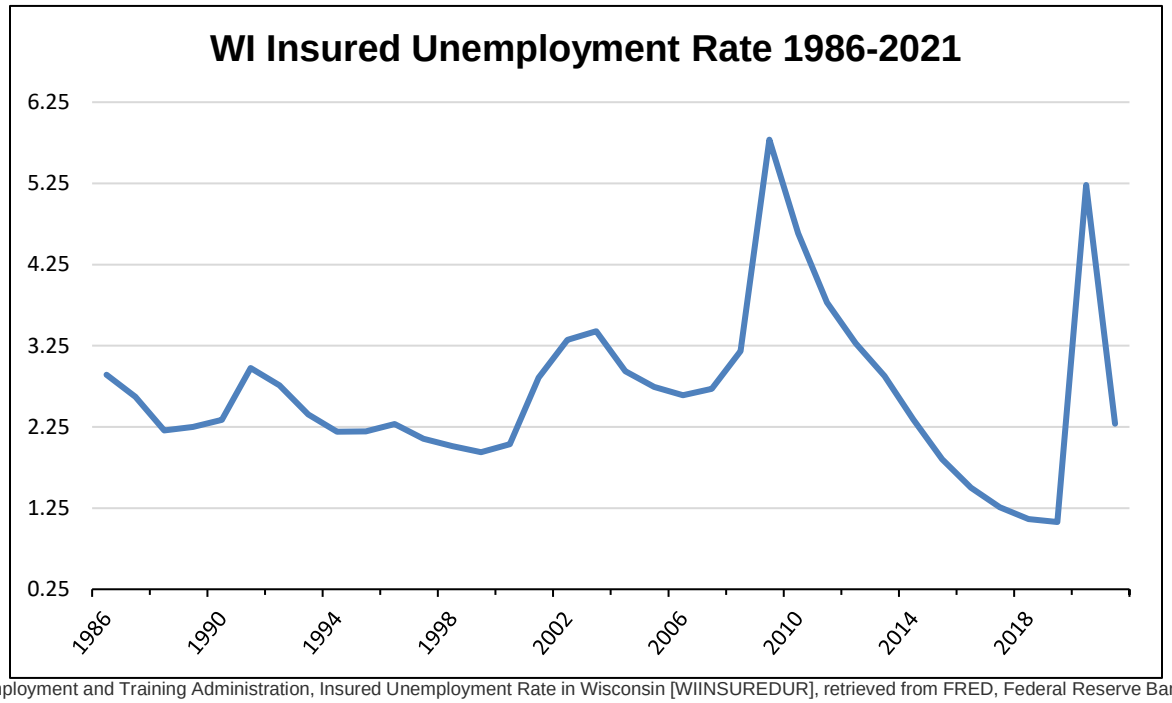
	2011	2012	2013	2014	**Total**
FUTA Credit Reduction		$47	$96	$148	**$291**
UI Trust Fund Loan Interest Paid Via SAFI	$42	$36			**$78**
UI Trust Fund Loan Interest Paid Via GPR			$19	$6	**$25**
Total Borrowing Costs					**$394**
Total Costs Paid by Employers					**$369**

Wisconsin UI Tax Data

Wisconsin UI Benefit Payments post Great Recession

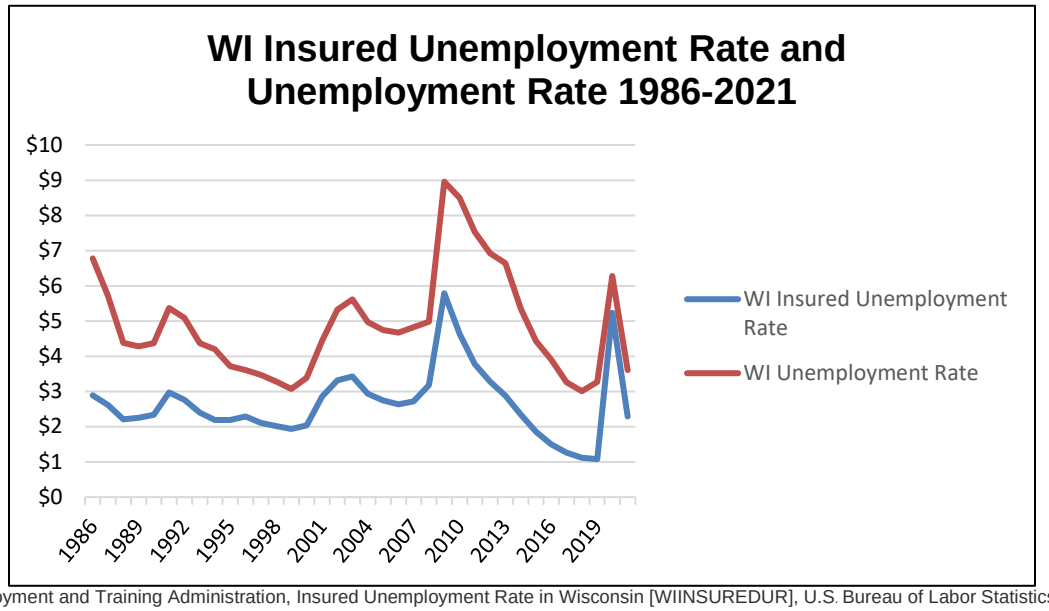
UI benefit payments have continued at historically low levels since the end of the Great Recession. There are two complementary reasons for this decline in benefit payments; a decline in unemployment claims, and the value of unemployment benefits relative to wages.

The decline in unemployment claims is illustrated by the insured unemployment rate declining to levels that have not been experienced in the modern UI system. The insured unemployment rate is the ratio of the UI claims to covered employment, so it represents the percent of covered employment that is collecting UI benefits.



U.S. Employment and Training Administration, Insured Unemployment Rate in Wisconsin [WIINSUREDUR], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/WIINSUREDUR

This decline in claim activity is even more pronounced when compared to the overall unemployment rate over the same period. Unemployment rates for the years immediately before the pandemic were very similar to rates reported in the late 1990s, but the rate of unemployment claims was approximately half of what occurred during that period.

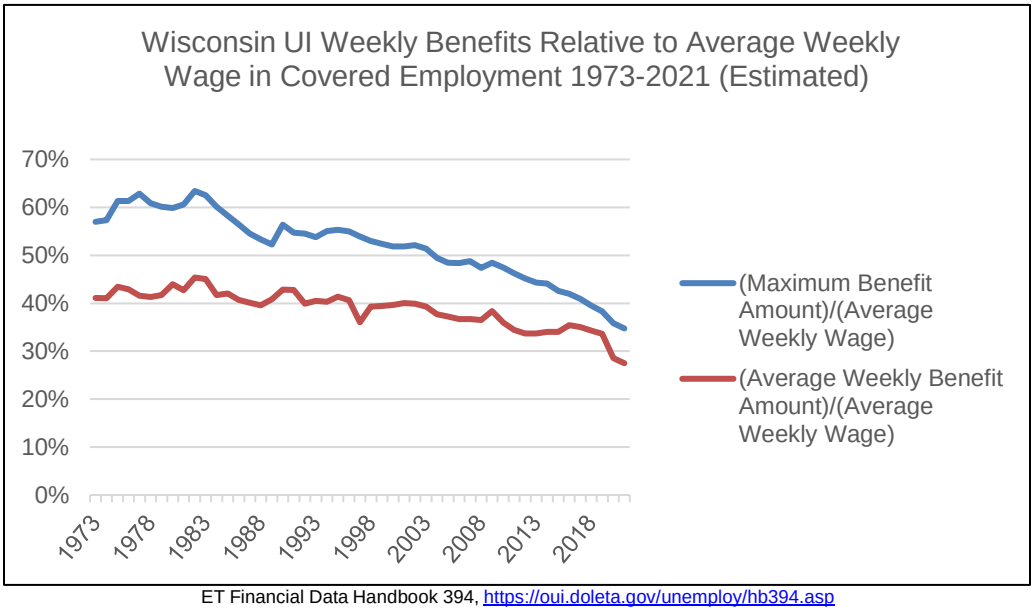


U.S. Employment and Training Administration, Insured Unemployment Rate in Wisconsin [WIINSUREDUR], U.S. Bureau of Labor Statistics, Unemployment Rate in Wisconsin [WIUR], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/

Before the pandemic, there had been a break in the historic relationship between unemployment and unemployment claims. If UI benefit claims following the Great Recession had been closer to

historic normal claim levels, even with the lower unemployment rate, unemployment benefit payments would be expected to be $175 million to $250 million more per year. This equates to about $550 million to $790 million of the increase in the UI Trust Fund balance between 2015 and 2019.

The second reason is less of a break in recent UI history and more of a result of a long-run pattern in UI benefits. Over the last few decades, the value of UI benefits has not kept pace with the growth in wages.



ET Financial Data Handbook 394, https://oui.doleta.gov/unemploy/hb394.asp

As the chart above illustrates, there has been a constant decrease in the maximum benefit rate relative to the average weekly wage. From the end of the Great Recession forward, there has been a sharp decline in the replacement rate of the UI weekly benefit rate. As this ratio falls the value of the UI benefit, both in supporting worker households and supporting the economy during downturns, falters.

From 1992 to 2003, the maximum weekly benefit rate increased each year. Starting in 2003, the rate of increase slowed but there were still regular increases until 2009. Starting in 2009, the maximum weekly benefit rate stalled at $363 for 5 years. In 2014 it increased to $370, where it has remained. All maximum weekly benefit amounts since 1992 are listed in Appendix D.

If the UI benefit rate was closer to the long-term replacement rate of 40 percent of average wages, UI benefit payments would have averaged $68 million more per year in 2018 and 2019, with $64 million being charged to the UI Trust Fund. This likely would have led to increased UI tax revenue of approximately $21 million per year.

In summary, the rapid growth of the UI Trust Fund can be attributed to the historically low UI benefit payments that occurred before the pandemic. Historically low benefit payments added approximately $305 to $400 million to the UI Trust Fund over the reporting period of 2018 to 2019.

Appendix B: Wisconsin Unemployment Statistics 1992 to 2021
Wisconsin Unemployment Reserve Fund[15]

(Amounts in Millions of $)
Wisconsin Unemployment Insurance Division Data

	Revenue						Expense			
Year	UI Revenues	Interest and Other	Reed Act	Federal Distri-butions	FUTA Credit Reduction	Total Receipts	Benefit Expenses	Reed Act Expenses	Total Expenses	Ending Balance
1992	358	90				448	437		437	1,185
1993	391	85				476	394		394	1,267
1994	418	87				505	377		377	1,395
1995	421	98				519	418		418	1,496
1996	415	102				517	471		471	1,542
1997	419	105				524	445		445	1,621
1998	414	110				524	452		452	1,693
1999	431	113				544	466		466	1,771
2000	442	117				559	515		515	1,815
2001	432	110				542	791		791	1,566
2002	430	88	166			684	949		949	1,301
2003	497	65				562	932		932	931
2004	596	48				644	795	3	798	777
2005	687	42				729	752	4	756	750
2006	684	39				723	753	3	756	717
2007	649	37				686	845	4	849	554
2008	628	21				649	997	23	1,020	183
2009	634	1		144		779	1,874	3	1,877	(915)
2010	850					850	1,288	(5)	1,283	(1,348)
2011	1,115					1,115	1,012	(6)	1,006	(1,239)
2012	1,187				47	1,234	876	(5)	871	(876)
2013	1,172				96	1,268	793		793	(401)
2014	1,107	2			148	1,257	642		642	214
2015	1,048	13			1	1,062	535		535	741
2016	852	22				874	458		458	1,157
2017	691	30				721	408		408	1,470
2018	598	37				635	376		376	1,729
2019	557	45				602	372		372	1,959
2020	501	37		69		607	1,450		1,450	1,116
2021	448	20		33		501	589			1,028

[15] Ending reserve fund balances exclude monies set aside under the American Recovery and Reinvestment Act (ARRA) and Short-Time Compensation (STC) and Emergency Administration Grant (EUISAA).

Appendix C: Wisconsin Unemployment Statistics 1992 to 2021
Usage of Wisconsin Unemployment Insurance

ET Financial Data Handbook 394

Year	First Payments	Weeks Compensated	Duration	Insured Unemployment Rate	Maximum Weekly Benefit Amount
1992	215,669	2,978,897	13.8	2.7	$240
1993	197,203	2,608,193	13.2	2.3	$243
1994	191,952	2,443,988	12.7	2.1	$256
1995	213,327	2,518,458	11.8	2.1	$266
1996	234,291	2,791,774	11.9	2.3	$274
1997	210,504	2,857,991	13.6	2.1	$282
1998	219,771	2,726,008	11.5	2.0	$290
1999	209,497	2,473,569	11.8	1.9	$297
2000	230,458	2,582,328	11.2	2.0	$305
2001	327,155	3,762,208	11.5	2.9	$313
2002	328,083	4,363,674	13.3	3.4	$324
2003	315,409	4,346,562	13.8	3.4	$329
2004	269,306	3,759,400	14.0	2.9	$329
2005	262,724	3,500,388	13.3	2.7	$329
2006	258,845	3,421,577	13.2	2.6	$341
2007	279,814	3,678,462	13.1	2.8	$355
2008	321,164	4,225,212	13.2	3.2	$355
2009	447,970	7,605,705	17.0	6.1	$363
2010	324,879	5,770,210	17.8	4.7	$363
2011	283,624	4,588,323	16.2	3.7	$363
2012	232,949	3,926,156	16.9	3.3	$363
2013	214,125	3,407,788	15.9	2.9	$363
2014	175,853	2,698,223	15.3	2.3	$370
2015	152,641	2,152,899	14.1	1.8	$370
2016	133,083	1,716,415	12.9	1.5	$370
2017	115,199	1,494,556	13.0	1.3	$370
2018	106,770	1,352,076	12.7	1.1	$370
2019	108,010	1,305,850	12.1	1.1	$370
2020	396,187	6,007,541	15.2	5.5	$370
2021[16]	83,920	2,421,448	NA[17]	2.2	$370

[16] 2021 data is not finalized.

[17] This figure is not yet published by US-DOL.

Appendix D: Wisconsin Unemployment Statistics 1992 to 2021 Total Covered Employment, Average Weekly Wage, Average Weekly Benefit Amounts and Maximum Weekly Benefit Amount

ET Financial Data Handbook 394

Year	Covered Employment	Average Weekly Wage	Average Weekly Benefit	Maximum Weekly Benefit Amount
1992	2,253,976	$440	$175	$240
1993	2,308,361	$452	$183	$243
1994	2,384,509	$465	$188	$256
1995	2,449,029	$481	$199	$266
1996	2,493,484	$498	$202	$274
1997	2,550,955	$523	$188	$282
1998	2,602,559	$547	$215	$290
1999	2,661,710	$567	$223	$297
2000	2,703,542	$588	$233	$305
2001	2,686,548	$604	$242	$313
2002	2,660,922	$622	$248	$324
2003	2,657,571	$640	$252	$329
2004	2,684,896	$665	$251	$329
2005	2,714,477	$679	$253	$329
2006	2,737,431	$705	$259	$341
2007	2,751,715	$728	$267	$355
2008	2,743,267	$749	$273	$355
2009	2,614,062	$749	$288	$363
2010	2,600,206	$765	$275	$363
2011	2,634,447	$785	$270	$363
2012	2,664,283	$804	$271	$363
2013	2,692,053	$819	$276	$363
2014	2,729,876	$839	$285	$370
2015	2,765,376	$869	$296	$370
2016	2,799,146	$881	$312	$370
2017	2,821,131	$905	$317	$370
2018	2,847,429	$936	$321	$370
2019	2,857,063	$966	$325	$370
2020	2,698,767	$1,032	$295	$370
2021[18]	2,666,922[19]	$1,065	$293	$370

[18] 2021 data is not finalized.

[19] U.S. Employment and Training Administration, Covered Employment in Wisconsin [WICEMPLOY], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/WICEMPLOY

Appendix E: Maximum Weekly Benefit Rate by State

US-DOL Comparison of State Unemployment Laws (2021)

State	Maximum Weekly Benefit Rate	Maximum Weekly Benefit Rate with Dependent Allowance	State	Maximum Weekly Benefit Rate	Maximum Weekly Benefit Rate with Dependent Allowance
AL	$275	$275	NE	$456	$456
AK	$370	$442	NV	$483	$483
AZ	$240	$240	NH	$427	$427
AR	$451	$451	NJ	$731	$731
CA	$450	$450	NM	$484	$535
CO	$649	$649	NY	$504	$504
CT	$667	$724	NC	$350	$350
DE	$400	$400	ND	$640	$640
DC	$444	$444	OH	$498	$672
FL	$275	$275	OK	$461	$461
GA	$365	$365	OR	$673	$673
HI	$639	$639	PA	$583	$591
ID	$463	$463	PR	$240	$240
IL	$505	$693	RI	$599	$748
IN	$390	$390	SC	$326	$326
IA	$493	$605	SD	$428	$428
KS	$503	$503	TN	$275	$275
KY	$569	$569	TX	$521	$521
LA	$284	$284	UT	$617	$617
ME	$462	$693	VT	$531	$531
MD	$430	$430	VA	$378	$378
MA	$855	$1,282	VI	$667	$667
MI	$362	$362	WA	$844	$844
MN	$762	$762	WV	$424	$424
MS	$235	$235	**WI**	**$370**	**$370**
MO	$320	$320	WY	$526	$526
MT	$572	$572			
			National Average	**$480**	**$508**

Appendix F: Wisconsin Unemployment Statistics 1992 to 2021 Taxable UI Benefits and UI Taxes as a Percentage of Total Wages in Taxable Covered Employment

(Amounts in Millions of $)
ET Financial Data Handbook 394

Year	Total Wages in Taxable Covered Employment	Taxable Benefits as a Percent of Total Wages	Taxes as a Percent of Total Wages
1992	$41,212	1.06%	0.86%
1993	$43,218	0.91%	0.90%
1994	$46,208	0.81%	0.90%
1995	$49,104	0.85%	0.85%
1996	$51,877	0.91%	0.80%
1997	$55,968	0.79%	0.75%
1998	$59,724	0.74%	0.69%
1999	$63,497	0.72%	0.67%
2000	$66,771	0.76%	0.66%
2001	$67,452	1.17%	0.63%
2002	$68,151	1.39%	0.63%
2003	$69,588	1.34%	0.71%
2004	$73,323	1.09%	0.81%
2005	$75,730	0.99%	0.91%
2006	$79,249	0.95%	0.86%
2007	$82,118	1.02%	0.79%
2008	$83,328	1.20%	0.75%
2009	$77,419	2.41%	0.80%
2010	$78,617	1.64%	1.08%
2011	$82,114	1.23%	1.36%
2012	$85,601	1.02%	1.38%
2013	$88,456	0.89%	1.32%
2014	$92,220	0.70%	1.19%
2015	$96,775	0.55%	1.07%
2016	$99,564	0.45%	0.85%
2017	$103,291	0.39%	0.66%
2018	$108,159	0.34%	0.55%
2019	$111,985	0.33%	0.49%
2020	$112,392	1.27%	0.44%
2021[20]	$120,760	0.42%	0.38%

[20] 2021 data is not finalized.

Appendix G: Wisconsin Unemployment Statistics 1992 to 2021 UI Benefits Directly Charged to the UI Balancing Account (Excludes Charges for the -10 percent Write-Off[21])

(Amounts in Millions of $)

Wisconsin Unemployment Insurance Division Data

Year	Quit	Misconduct	Substantial Fault	Suitable Work	PTNC Continued Employment	Waiver Agency Error	2nd Benefit Year	Temporary Supplemental Benefits	Training Benefits	COVID-19	Subtotal Bal Acct Direct Charges	Total UI Benefit Charges
1992	50.8	1.2		0.2	0.9	----	----	----			53.1	437.5
1993	47.7	1.1		0.2	0.9	----	----	----			49.9	393.9
1994	50.4	1.1		0.2	1.0	0.1	----	----			52.8	377.1
1995	61.0	1.4		0.2	1.1	0.2	----	----			63.9	418.2
1996	69.1	1.6		0.2	2.3	0.3	3.0	----			76.5	471.2
1997	67.6	1.8		0.3	3.7	0.3	12.1	----			85.8	444.9
1998	68.7	1.9		0.3	3.7	0.2	10.4	----			85.2	452.0
1999	73.4	2.0		0.3	3.6	0.2	10.4	----			89.9	466.2
2000	81.2	2.3		0.3	3.6	0.2	11.6	----			99.2	515.6
2001	116.7	3.4		0.5	4.8	0.2	16.6	----			142.2	790.7
2002	111.8	3.8		0.5	5.9	0.6	27.7	10.8			161.1	949.3
2003	98.8	3.6		0.5	6.8	0.3	30.8	-0.2			140.6	931.8
2004	84.7	2.8		0.5	6.3	0.4	24.7	----			119.4	795.2
2005	89.4	2.9		0.5	5.2	0.4	19.8	----			118.2	752.4
2006	94.0	3.2		0.4	5.2	0.3	18.5	----			121.6	752.6
2007	104.4	3.9		0.5	5.3	0.3	19.3	----			133.7	845.2
2008	112.4	4.2		0.4	6.1	0.4	24.9	----			148.4	996.8
2009	167.7	7.2		0.5	10.5	0.5	49.7	----			236.1	1,873.6
2010	85.7	4.6		0.3	11.9	0.6	54.5				157.6	1,288.5
2011	82.7	4.1		0.3	9.1	0.5	33.4		16.3		146.4	1,011.7
2012	85.9	3.0		0.4	7.2	0.5	24.2		18.5		139.7	875.8
2013	82.0	3.4		0.3	5.4	0.4	21.7		15.0		128.2	792.8
2014	69.4	3.1	0.4	0.3	4.7	0.1	17.1		8.1		103.2	642.5
2015	64.3	2.8	1.0	0.3	3.8	0.4	12.1		6.2		90.9	535.3
2016	51.8	2.4	0.8	0.2	3.3	0.1	9.7		5.1		73.4	457.4
2017	46.7	2.3	0.5	0.1	3.1	0.1	8.1		3.9		64.8	408.0
2018	44.9	2.2	0.2	0.1	2.8	0.1	6.8		3.0		60.1	375.9
2019	45.5	2.4	0.4	0.1	2.4	0.1	6.8		4.4		62.0	372.3
2020	202.4	5.5	4.8	0.1	9.5	0.3	15.8		5.3		243.7	1,450.1
2021	-102.3	-1.4	2.7	0.0	-3.4	4.0	2.5		-2.0	1,247.3	1,147.4	502.2

[21] Does not include noncharging for Act 185 and Act 4. Those amounts will not be known until after the recharging effort is completed in the upcoming months.

Appendix H: Explanation of UI Benefit Charges to the UI Balancing Account

Standard Charges to the UI Balancing Account

Write-Offs
When the UI Division calculates the Reserve Fund Percentage for basic tax purposes, the Reserve Fund Percentage is limited to -10 percent, and charged benefits that would decrease the Reserve Fund Percentage below that level are written-off. The employer is relieved of these benefit charges which are charged to the UI Balancing Account.

Quits
When an employee quits work but becomes eligible for benefits, the benefits are charged to the UI Balancing Account instead of the employer's account. This relieves employer accounts of benefit charges when a claimant collects UI benefits due to no action on behalf of the employer. A quit can occur if the claimant falls under one of the quit exceptions enumerated in statute or, more likely, if the claimant quits a job to take a new one and then is subsequently laid off.

Misconduct
Pro-rated benefit charges paid to claimants who were terminated for misconduct are charged to the UI Balancing Account. After an employee is terminated for misconduct, the employee then finds employment at a second employer. This second employer then lays off the employee (i.e., the employee is not terminated for misconduct from the second employer). The claimant's benefit amount is based on his work history from both employers, assuming the claimant's new work history is sufficient to requalify for benefits. Wages from the terminated with-cause employer are removed from consideration when calculating a claimant's maximum benefit amount. These wages, however, will be used to determine the weekly benefit amount a claimant can receive. Any portion of the pro-rated benefit amount that comes from the terminated with-cause employer will be charged to the UI Balancing Account.

Substantial Fault
Substantial fault provides a disqualification based on certain terminations for cause. If an employee who is terminated with justifiable cause under substantial fault finds work with another employer and is then laid off, he or she may requalify for benefits. If the employee qualifies for benefits, wages from the terminated with-cause employer are used both in calculating the maximum benefit amount and the weekly benefit rate. The pro-rated portion of benefits assigned to the terminated with-cause employer is instead charged to the UI Balancing Account.

Continued Employment
The typical case for this occurs when a claimant is working for two employers, either both part time, or one full time and one part time. The claimant is laid off from one employer but continues working at the second employer. The claimant files a claim based upon the reduction in wages earned. These benefits will be based upon the entire earnings of the claimant but the current employer, who did not reduce the claimant's wages, will not be charged for their benefit share; instead, they are charged to the UI Balancing Account.

Second Benefit Year
This occurs when an employer was charged for a claimant's benefits in the first benefit year, and wages paid by the employer are part of a second benefit year for a claimant, but the employer has

not employed the claimant for over a year. This can occur because benefits are based upon the first 4 of the previous 5 quarters. The fifth quarter could be part of a future benefit claim. That employer would not be charged for the fifth quarter, but those benefits would instead be charged to the UI Balancing Account.

Training Benefits

UI benefits paid to claimants participating in department-approved training programs are charged to the UI Balancing Account. The Training Benefits category includes benefits paid to claimants who were enrolled in the Extended Training program. The Extended Training program was ended by the Wisconsin Legislature in 2013, so no future charges for that program are expected.

Non-standard Charges to the UI Balancing Account

Temporary Supplemental Benefits

In 2002, special state Temporary Benefits were charged to the UI Balancing Account and similar programs in the future could also be changed to the UI Balancing Account.

COVID-19: Wisconsin Act 185 Pandemic Benefit Non-Charging

Under 2019 Wisconsin Act 185 and 2021 Wisconsin Act 4, the Department of Workforce Development was required to charge unemployment benefits for initial claims related to the public health emergency declared by Executive Order 72 to the UI Balancing Account of the UI Trust Fund for taxable employers.

STATE OF WISCONSIN

DWD

Department of Workforce Development

WISCONSIN UNEMPLOYMENT INSURANCE

Integrity Customer Service Accountability

2022

FRAUD REPORT TO THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

This report is presented to the Wisconsin Unemployment Insurance Advisory Council pursuant to Wis. Stat. § 108.14(19). The report contains information relating to the detection and prosecution of unemployment insurance fraud in the preceding year.

UCD-17392-P (R. 05/2022)

March 15, 2022

Dear Members of the Unemployment Insurance Advisory Council:

On behalf of the Department of Workforce Development (DWD), Unemployment Insurance Division Administrator Jim Chiolino and I are pleased to present the 2022 Unemployment Insurance (UI) Fraud Report, outlining the division's efforts to combat waste, fraud, and abuse in 2021.

In 2021, Wisconsin paid out nearly $2.5 billion in UI benefits while holding the fraud rate to 1.1%. This remains well below the highest fraud rate in recent history of 3.4%, which occurred in 2013. This underscores the commitment of Governor Tony Evers and DWD leadership to combat fraud in the UI system. The COVID-19 pandemic sparked numerous fraud schemes targeting UI programs and claimants. Utilizing the many safeguards that DWD has implemented, the department was able to protect the integrity of the trust fund while also communicating alerts and helpful tips to avoid fraud to UI claimants via social media, the DWD website, and the news media.

Maintaining the integrity of Wisconsin's UI program is critical to ensure benefits are paid only to those who qualify under the law and to assess employers the proper tax rate. Our focus in 2021 was paying the many individuals in need the benefits they were due.

Sincerely,

Amy Pechacek, Secretary-designee
Department of Workforce Development

Jim Chiolino, Administrator
Unemployment Insurance Division

DETECTION TOOLS

Dedicated UI Workers

Staff vigilance is one of the division's best tools for detection. The Integrity and Quality Section within the Benefit Operations Bureau provides training to staff on methods for detecting and reporting fraud. The Integrity and Quality Section consists of experienced investigators who investigate the most complex and organized efforts to defraud the system.

Wage Verification

The division sends wage verification notices to employers when claimants report wages in a week as well as when claimants, who had been reporting wages weekly, report no wages in a week. This allows employers the opportunity to timely report wages and other eligibility issues.

Cross-Matches

The division uses numerous cross-matches that assist in detecting UI fraud:

Quarterly Wage Cross-Match – This cross-match compares benefit payment records with quarterly wage records submitted by employers covered under Wisconsin's UI program. This helps to verify wages are properly reported on unemployment claims.

Interstate Wage Record Cross-Match – This cross-match compares benefit payment records with quarterly wage records submitted by employers from other states. This helps to verify wages are properly reported on unemployment claims.

Inmate Cross-Match – Claimants may be ineligible for UI benefits if incarcerated. This tool consists of two cross-match programs: one that compares benefit payment records to incarceration records for all of Wisconsin's county jails and prisons, and a second that compares benefit payment records to incarceration records for facilities nationwide.

Wisconsin and National New Hire Cross-Match – Employers must report basic information about employees who are newly hired, rehired, or return to work after a separation from employment. Division staff cross-match UI payment records with new hire information. Wisconsin cross-matches quarterly federal wage data from the National Directory of New Hires reports for claimants who are former federal government employees.

Vital Statistics (Death Records) Cross-Match – The Wisconsin Department of Health Services provides a record of deaths in Wisconsin that is cross-matched with UI data to determine whether UI claims continue to be filed after a claimant is deceased.

SSDI Cross-match – This cross-match compares individuals currently listed as receiving Social Security Disability Insurance with claimants filing initial and weekly unemployment claims.

Other Detection Approaches

Additional detection approaches used to preserve and protect the integrity of the UI Trust Fund include:

- Audits of employers - resulting in additional employer contributions totaling $675,894 in 2021;
- Employer complaints and tips from the public concerning suspected fraudulent claims;
- Using 1099 information from the Internal Revenue Service to investigate employers who may be misclassifying employees as independent contractors;

- Contacts from local, state, and federal law enforcement officers regarding suspicious activities;
- U.S. Bank's sophisticated fraud monitoring tools, which allow the department to monitor, predict, and respond quickly to suspected fraudulent activity; and
- Meetings with several other state agencies on a quarterly basis to discuss fraud trends and cases of mutual interest. The agencies share fraud tips to ensure fraud occurring across agencies is thoroughly investigated and stopped.

WORKER CLASSIFICATION

Worker misclassification contributes to waste and fraud in the UI program through the loss of UI tax revenue from employers who misclassify workers, and the creation of an unfair business climate that places businesses that follow the law at a competitive disadvantage. It also denies workers, who are out of work through no fault of their own, access to the UI benefits they may have been eligible for if they were properly classified.

The historic number of claims related to the COVID-19 pandemic required the division to prioritize claims processing over audit and worker classification investigations. Nevertheless, Wisconsin UI auditors conducted 1,709 audits and identified 3,365 misclassified workers. Due to the division's efforts to detect worker misclassification, $675,894 was generated in UI taxes and $103,741 in interest. Worksite investigations are conducted by experienced division investigators, many of whom have law enforcement backgrounds in white collar and economic crime investigations. The division conducted 287 worker classification field investigations in 2021.

FRAUD OVERPAYMENTS

The division remains committed to ensuring the integrity of the UI program. Fraud overpayments increased in 2021 as UI concluded many investigations that determined fraud occurred in the previous year that saw record amounts of benefits paid and claims filed. It is important to remember that fraud overpayment figures reflect the amount of fraud detected in the stated calendar year. Our fraud rate in 2021 was 1.1 percent. For comparison, in the last nine years, the highest rate of detected fraud in a calendar year occurred in 2014 at 2.8 percent.

	2021 Amount	2020 Amount	Dollar Change
Total UI Payments	$2,481,203,431	$4,839,149,601	($2,357,946,170)
Fraud Overpayment[1] Combined State and Federal	$27,171,973	$4,534,899	$22,637,074
As Percent of Total Payments	1.1%	0.1%	

	2021 Number of Cases	2020 Number of Cases	Case Change
Fraud Cases	11,474	3,561	7,913

[1]Overpayment figures reflect the amounts detected in the stated calendar year. A portion of those overpayments were disbursed in prior calendar years.

Another measure of fraud is the United States Department of Labor's Improper Payment Rate – Overpayment with Fraud. In that measure Wisconsin had a 3.65 percent fraud rate from June 30, 2020 to June 30, 2021. For context, the United States' rate during that time period for this measure was 8.57 percent.

The two rates differ for two main reasons: the different time periods being reported on and the size of the sample. The federal fraud rate is based on a small, statistically valid sample, while the state fraud rate is calculated using 100 percent of claims during the reporting period.

The pandemic caused the large increase in total UI payments in 2020. Although 2021 was significantly lower, the benefits paid in 2021 were still historically high. The federal CARES Act programs, including Pandemic Unemployment Assistance (PUA), Pandemic Emergency Unemployment Compensation (PEUC), Lost Wages Assistance (LWA), and Federal Pandemic Unemployment Compensation (FPUC) ended in 2021.

FRAUD OVERPAYMENT DETECTION AMOUNTS AND DECISIONS BY SOURCE FOR 2020-2021

Detection Method	2021		2020	
	Amount	Decisions	Amount	Decisions
Wage Record Cross-Match	$2,859,563	1,008	$570,578	400
Post Verification of Wages	$488,962	219	$118,893	80
Liable Employer Protests Benefit Charges	$3,903,589	1,546	$1,247,693	862
Tips and Leads from Other than Liable Employer	$2,244,111	1,006	$191,023	161
State New Hire Cross-Match	$2,502,943	1,791	$613,868	774
National New Hire Cross-Match	$149,712	116	$40,566	26
Quality Control	$154,706	40	$47,432	25
Inmate Cross-Match	$140,135	144	$5,324	6
Appriss Inmate Cross-Match	$243,228	535	$94,996	172
Post Verification - No Wages Reported	$983,876	451	$120,312	225
SSDI Cross-Match	$1,606,888	265	$102,419	46
Audit of Work Search	$30,614	12	$270	1
Field Audit Discoveries	$6,120	3	$0	0
Interstate Cross-Match	$89,073	19	$10,924	4
Deceased Citizen Cross-Match	$0	0	$2,220	1
Agency Detection - Not Covered by Other Codes	$10,905,194	3,987	$1,238,941	702
Claimant Initiated	$863,259	332	$129,440	76
Total	**$27,171,973**	**11,474**	**$4,534,899**	**3,561**

BENEFIT AMOUNT REDUCTION AND PENALTY ASSESSMENT 2017-2021

Other Fraud-Related Activity	2021	2020	2019	2018	2017
Benefit Amount Reduction	$20,719,813	$8,384,948	$13,221,457	$13,183,450	$13,912,308
Penalties Assessed	$10,048,170	$1,088,758	$1,883,649	$1,899,471	$1,961,063

WORK SEARCH

The division has a well-established work search auditing program. UI claimants who are required to search for work must submit their work search record each week a claim is filed. These records are subject to random audits for program integrity purposes. These audits uncover mistakes made by claimants, instances of intentional fraud, and provide an opportunity for the division to educate claimants on what constitutes a valid work search action and what information is needed for the division to verify the action.

The work search requirement was reinstated as of the week ending May 29, 2021, after having been suspended in response to the spread of COVID–19. State law requires those who are applying for UI benefits to look for suitable jobs and provide information about their work search activities for each week they request benefits. After reinstatement, the division began targeted work search audits with the ultimate objective of 100% compliance. The department conducted 1,261 work search audits in 2021. Those audits resulted in 962 decisions finding work search requirements were not met.

COMPLIANCE TOOLS

Wisconsin is very successful at recovering overpayments when they do occur. According to an internal UI longitudinal state study, over a 10-year period, 83 percent of fraud and 80 percent of non-fraud overpayments are collected. In 2021, the division recovered $43.6 million in overpayments, including more than $4.2 million in debts older than five years. This was achieved by utilizing the various mechanisms outlined below.

Tax Refund Intercept – The division can intercept claimant state and federal tax refunds. The division participates in the Treasury Offset Program (TOP) to intercept federal tax refunds. By utilizing the tools available through TOP, the division recovered almost $4.7 million in overpayments, penalties, and collection costs in 2021. Another $2.5 million was collected from the State Tax Offset program. The division is also able to intercept tax refunds for employer delinquencies. In 2021, receipts related to employer TOP totaled $427,000. In addition, rather than have their tax refund intercepted, employers paid $109,000 upon receipt of the Notice of Intent to Certify Debt to IRS for a collection total attributable to employer TOP of $536,000.

Benefit Offset – Benefits are withheld from a claimant as an offset for an overpayment. The claimant does not receive UI benefit payments until the overpayment has been repaid.

Out of State Offset – Wisconsin UI can have another state withhold unemployment benefits to a claimant in that state to repay a Wisconsin overpayment.

Bankruptcy – Fraud debts are not dischargeable in bankruptcy. Division attorneys file adversary petitions to dispute discharge of the debt. A claim is also filed against the assets of the debtor.

Warrants – A lien is placed on the debtor's personal property to secure repayment of a delinquent debt.

Levy Against Wages and Bank Accounts – A levy is issued against wages, bank accounts, or any property belonging to the debtor.

Financial Record Matching Program – A financial record matching program is used by UI debt collectors to identify the bank accounts of delinquent UI debtors.

CRIMINAL PROSECUTION FOR UI FRAUD

The division pursues criminal prosecution in cases of egregious fraudulent activity, and works cooperatively with county district attorneys, the Wisconsin Department of Justice (DOJ), and federal prosecutors.

Division staff investigate complex fraud cases. Many of these professionals have law enforcement experience.

All criminal investigations completed by benefit fraud investigators are referred to our Bureau of Legal Affairs (BOLA) for review by legal and investigative staff to ensure the investigations meet division standards for prosecution referral. After review, BOLA staff refer the cases to either a county district attorney or DOJ.

DWD works collaboratively with DOJ and the county district attorneys to determine which cases should be referred for prosecution. Although there were no new cases in 2021, two prosecution cases from 2020 were found guilty while the other six cases that were referred for prosecution in 2020 are still pending.

Ultimately, it is DOJ and the district attorneys who make the decision to file criminal charges. DOJ evaluates several factors in determining whether a case will be prosecuted, including:

- Whether evidence exists to prove intent to defraud;
- An individual's criminal history/history of defrauding government programs; and
- In cases involving employers, the employer's enforcement and compliance history.

In addition, the division works with the U.S. Department of Labor, Office of Inspector General, on complex fraud cases.

STATE OF WISCONSIN

DWD

Department of Workforce Development

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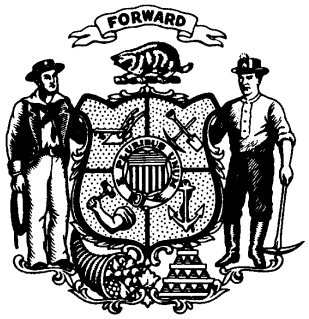
State of Wisconsin



Date of enactment: **April 8, 2022**
2021 Assembly Bill 910 Date of publication*: **April 9, 2022**

2021 WISCONSIN ACT 231

AN ACT ***to repeal*** 16.48 (1) (b), 16.48 (2), 108.02 (26) (c) 9., 108.02 (26) (c) 14., 108.062 (1) (c), 108.062 (2) (b), 108.062 (2) (e), 108.062 (4) (a) 2., 108.062 (19) (a), 108.062 (19) (b), 108.062 (20) and 108.19 (3); ***to renumber*** 108.04 (7) (h); ***to renumber and amend*** 16.48 (1) (a) (intro.), 16.48 (1) (a) 1., 2., 3., 4., 5. and 6., 71.93 (8) (b) 1., 108.062 (4) (a) 1. and 108.062 (19) (intro.); ***to amend*** 16.48 (3), 59.40 (4), 108.02 (2) (c), 108.02 (13) (c) 2. a., 108.02 (13) (k), 108.02 (14), 108.02 (15) (j) 5., 108.02 (15) (k) 5., 108.02 (17m), 108.02 (19), 108.04 (12) (b), 108.04 (16) (d) 1., 108.04 (18) (a), 108.04 (18) (b), 108.062 (2) (a), 108.062 (2) (c), 108.062 (2) (d), 108.062 (2) (h), 108.062 (2) (m), 108.062 (3), 108.062 (3r), 108.062 (4) (b), 108.062 (6) (b), 108.062 (15), 108.065 (1e) (intro.), 108.10 (intro.), 108.13 (4) (a) 2., 108.14 (8n) (a), 108.14 (8n) (e), 108.14 (26), 108.141 (1) (h), 108.141 (3g) (a) 3. b., 108.141 (7) (a), 108.141 (7) (b), 108.145, 108.15 (3) (d), 108.151 (2) (d), 108.151 (7) (c), 108.151 (7) (f), 108.152 (1) (d), 108.155 (2) (a) and (d), 108.16 (6m) (a), 108.16 (6w), 108.16 (6x), 108.16 (9) (a), 108.18 (3) (c), 108.22 (8e), 108.22 (10), 108.223 (2) (b), 108.23, 108.24 (3) (a) 3. a. and 108.24 (3) (a) 4.; and ***to create*** 16.48 (4), 71.93 (8) (b) 1. d., 108.02 (10e) (c), 108.02 (15) (k) 21., 108.065 (3m), 108.101 (5), 108.151 (7) (i) and 108.16 (6m) (j) of the statutes; **relating to:** various changes to the unemployment insurance law.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 16.48 (1) (a) (intro.) of the statutes is renumbered 16.48 (1) (intro.) and amended to read:

16.48 **(1)** (intro.) No later than ~~April 15~~ May 31 of each ~~odd−numbered~~ even−numbered year, the secretary of workforce development shall prepare and furnish to the governor, the speaker of the assembly, the minority leader of the assembly, ~~and~~ the majority and minority leaders of the senate, and the council on unemployment insurance, a statement of unemployment insurance financial outlook, which shall contain all of the following, together with the secretary's recommendations and an explanation for such recommendations:

SECTION 2. 16.48 (1) (a) 1., 2., 3., 4., 5. and 6. of the statutes are renumbered 16.48 (1) (am), (bm), (c), (d), (e) and (f), and 16.48 (1) (bm), (c) and (f), as renumbered, are amended to read:

16.48 **(1)** (bm) Specific proposed changes, if any, in the laws relating to unemployment insurance financing, benefits, and administration.

(c) Projections specified in ~~subd. 1.~~ par. (am) under the proposed laws.

(f) If unemployment insurance program debt is projected at the end of the forecast period, the ~~reasons why it is not~~ methods proposed to liquidate the debt.

SECTION 3. 16.48 (1) (b) of the statutes is repealed.

SECTION 4. 16.48 (2) of the statutes is repealed.

* Section 991.11, WISCONSIN STATUTES: Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication."

SECTION 5. 16.48 (3) of the statutes is amended to read:

16.48 **(3)** ~~No~~ Biennially, no later than ~~June 15~~ January 31 of each ~~odd−numbered~~ even−numbered year, the secretary of workforce development~~, under the direction of~~ shall submit to the governor, ~~shall submit to each member of~~ the ~~legislature an updated~~ speaker of the assembly, the minority leader of the assembly, the majority and minority leaders of the senate, and the council on unemployment insurance the statement of unemployment insurance financial outlook ~~which shall contain the information specified in~~ prepared under sub. (1) ~~(a)~~, together with ~~the governor's recommendations and an explanation for such recommendations, and a copy of the~~ a report ~~required~~ that summarizes the deliberations of the council and the position of the council regarding any proposed change to the unemployment insurance laws submitted under sub. (1) ~~(b)~~.

SECTION 6. 16.48 (4) of the statutes is created to read:

16.48 **(4)** The department shall post the most recent version of the statement prepared under sub. (1) and the most recent version of the report prepared under sub. (3) on the department's Internet site.

SECTION 7. 59.40 (4) of the statutes is amended to read:

59.40 **(4)** CLERK OF CIRCUIT COURT; DEBT COLLECTOR CONTRACT. If authorized by the board under s. 59.52 (28), the clerk of circuit court may contract with a debt collector, as defined in s. 427.103 (3), or enter into an agreement with the department of revenue under s. 71.93 (8) for the collection of debt. Any contract entered into with a debt collector shall provide that the debt collector shall be paid from the proceeds recovered by the debt collector. Any contract entered into with the department shall provide that the department shall charge a collection fee, as provided under s. 71.93 (8) (b) ~~1.~~ 1m. The net proceeds received by the clerk of circuit court after the payment to the debt collector shall be considered the amount of debt collected for purposes of distribution to the state and county under sub. (2) (m).

SECTION 8. 71.93 (8) (b) 1. of the statutes is renumbered 71.93 (8) (b) 1. (intro.) and amended to read:

71.93 **(8)** (b) 1. (intro.) Except as provided in subd. 2., a state agency and the department of revenue shall enter into a written agreement to have the department collect any amount owed to the state agency that is more than 90 days past due, unless ~~negotiations~~ any of the following applies:

a. Negotiations between the agency and debtor are actively ongoing~~, the~~.

b. The debt is the subject of legal action or administrative proceedings~~, or the~~.

c. The agency determines that the debtor is adhering to an acceptable payment arrangement.

1m. At least 30 days before the department pursues the collection of any debt referred by a state agency, either the department or the agency shall provide the debtor with a written notice that the debt will be referred to the department for collection. The department may collect amounts owed, pursuant to the written agreement, from the debtor in addition to offsetting the amounts as provided under sub. (3). The department shall charge each debtor whose debt is subject to collection under this paragraph a collection fee and that amount shall be credited to the appropriation under s. 20.566 (1) (h).

SECTION 9. 71.93 (8) (b) 1. d. of the statutes is created to read:

71.93 **(8)** (b) 1. d. The debt is an amount owed under ch. 108 or under a federal unemployment benefit program administered by the department of workforce development.

SECTION 10. 108.02 (2) (c) of the statutes is amended to read:

108.02 **(2)** (c) In connection with the production or harvesting of any commodity defined as an agricultural commodity ~~in s. 15 (g) of the federal agricultural marketing act, as amended (46 Stat. 1550, s. 3;~~ under 12 USC 1141j~~) or~~ (f), in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes.

SECTION 11. 108.02 (10e) (c) of the statutes is created to read:

108.02 **(10e)** (c) "Departmental error" does not include an error made by an appeal tribunal appointed under s. 108.09 (3).

SECTION 12. 108.02 (13) (c) 2. a. of the statutes is amended to read:

108.02 **(13)** (c) 2. a. Such crew leader holds a valid certificate of registration under ~~the federal farm labor contractor registration act of 1963~~ 29 USC 1801 to 1872; or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment which is provided by such crew leader; and

SECTION 13. 108.02 (13) (k) of the statutes is amended to read:

108.02 **(13)** (k) ~~"Employer"~~ Except as provided in s. 108.065 (3m), "employer" does not include a county department, an aging unit, or, under s. 46.2785, a private agency that serves as a fiscal agent or contracts with a fiscal intermediary to serve as a fiscal agent under s. ~~46.27 (5) (i),~~ 46.272 (7) (e)~~,~~ or 47.035 as to any individual performing services for a person receiving long−term support services under s. 46.272 (7) (b), 46.275, 46.277, 46.278, 46.2785, 46.286, 46.495, 51.42, or 51.437 or personal assistance services under s. 47.02 (6) (c).

SECTION 14. 108.02 (14) of the statutes is amended to read:

108.02 **(14)** EMPLOYER'S ACCOUNT. "Employer's account" means ~~a~~ an employer's separate account in the

fund~~, reflecting the employer's experience with respect to contribution credits and benefit charges under this chapter~~ maintained as required under s. 108.16 (2) (a).

SECTION 15. 108.02 (15) (j) 5. of the statutes is amended to read:

108.02 **(15)** (j) 5. In any quarter in the employ of any organization exempt from federal income tax under ~~section~~ 26 USC 501 (a) ~~of the internal revenue code~~, other than an organization described in ~~section~~ 26 USC 401 (a) or 501 (c) (3) ~~of such code~~, or under section 26 USC 521 ~~of the internal revenue code~~, if the remuneration for such service is less than $50;

SECTION 16. 108.02 (15) (k) 5. of the statutes is amended to read:

108.02 **(15)** (k) 5. With respect to which unemployment insurance is payable under ~~the federal railroad unemployment insurance act (52 Stat. 1094)~~ 45 USC 351 to 369;

SECTION 17. 108.02 (15) (k) 21. of the statutes is created to read:

108.02 **(15)** (k) 21. Performed by a full−time student, as defined in 26 USC 3306 (q), for less than 13 calendar weeks in a calendar year in the employ of an organized camp, if one of the following applies:

a. The camp does not operate for more than 7 months in the calendar year and did not operate for more than 7 months in the preceding calendar year.

b. The camp had average gross receipts for any 6 months in the preceding calendar year that were not more than 33 1/3 percent of its average gross receipts for the other 6 months in the preceding calendar year.

SECTION 18. 108.02 (17m) of the statutes is amended to read:

108.02 **(17m)** INDIAN TRIBE. "Indian tribe" has the meaning given in 25 USC 4~~50b~~ 5304 (e), and includes any subdivision, subsidiary, or business enterprise that is wholly owned by such an entity.

SECTION 19. 108.02 (19) of the statutes is amended to read:

108.02 **(19)** NONPROFIT ORGANIZATIONS. "Nonprofit organization" means an organization described in ~~section~~ 26 USC 501 (c) (3) ~~of the Internal Revenue Code~~ that is exempt from federal income tax under ~~section~~ 26 USC 501 (a) ~~of the Internal Revenue Code~~.

SECTION 20. 108.02 (26) (c) 9. of the statutes is repealed.

SECTION 21. 108.02 (26) (c) 14. of the statutes is repealed.

SECTION 22. 108.04 (7) (h) of the statutes is renumbered 108.04 (7) (u).

SECTION 23. 108.04 (12) (b) of the statutes is amended to read:

108.04 **(12)** (b) Any individual who receives, through the department, any other type of unemployment benefit or allowance for a given week is ineligible for benefits for that same week under this chapter, except as specifically required for conformity with ~~the federal trade act of 1974 (P.L. 93−618)~~ 19 USC 2101 to 2497b.

SECTION 24. 108.04 (16) (d) 1. of the statutes is amended to read:

108.04 **(16)** (d) 1. The department shall not deny benefits under sub. (7) as a result of the individual's leaving unsuitable work to enter or continue such training, as a result of the individual's leaving work that the individual engaged in on a temporary basis during a break in the training or a delay in the commencement of the training, or because the individual left on−the−job training not later than 30 days after commencing that training because the individual did not meet the requirements ~~of the federal trade act~~ under 19 USC 2296 (c) (1) (B); and

SECTION 25. 108.04 (18) (a) of the statutes is amended to read:

108.04 **(18)** (a) The wages paid to an employee who performed services while the employee was an alien shall, if based on such services, be excluded from the employee's base period wages for purposes of sub. (4) (a) and ss. 108.05 (1) and 108.06 (1) unless the employee is an alien who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for the purpose of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of ~~section 212 (d) (5) of the federal immigration and nationality act (~~8 USC 1182 (d) (5)~~)~~. All claimants shall be uniformly required to provide information as to whether they are citizens and, if they are not, any determination denying benefits under this subsection shall not be made except upon a preponderance of the evidence.

SECTION 26. 108.04 (18) (b) of the statutes is amended to read:

108.04 **(18)** (b) Any amendment of ~~s.~~ 26 USC 3304 (a) (14) ~~of the federal unemployment tax act~~ specifying conditions other than as stated in par. (a) for denial of benefits based on services performed by aliens, or changing the effective date for required implementation of par. (a) or such other conditions, ~~which~~ that is a condition of approval of this chapter for full tax credit against the tax imposed by the federal unemployment tax act, shall be applicable to this subsection.

SECTION 27. 108.062 (1) (c) of the statutes is repealed.

SECTION 28. 108.062 (2) (a) of the statutes is amended to read:

108.062 **(2)** (a) Specify the ~~work unit in which the plan will be implemented, the~~ affected positions~~,~~ and the names of the employees filling those positions on the date of submittal.

SECTION 29. 108.062 (2) (b) of the statutes is repealed.

SECTION 30. 108.062 (2) (c) of the statutes is amended to read:

108.062 **(2)** (c) Provide for initial coverage under the plan of at least ~~20~~ 2 positions that are filled on the effective date of the work−share program.

SECTION 31. 108.062 (2) (d) of the statutes is amended to read:

108.062 **(2)** (d) Specify the period or periods when the plan will be in effect, which may not exceed a total of ~~6~~ 12 months in any 5−year period ~~within the same work unit~~.

SECTION 32. 108.062 (2) (e) of the statutes is repealed.

SECTION 33. 108.062 (2) (h) of the statutes is amended to read:

108.062 **(2)** (h) Specify the normal average hours per week worked by each employee ~~in the work unit~~ and the percentage reduction in the average hours of work per week worked by that employee, exclusive of overtime hours, which shall be applied in a uniform manner and which shall be at least 10 percent but not more than ~~50~~ 60 percent of the normal hours per week of that employee.

SECTION 34. 108.062 (2) (m) of the statutes is amended to read:

108.062 **(2)** (m) Indicate whether the plan includes employer−sponsored training to enhance job skills and acknowledge that the employees in the ~~work unit~~ work−share program may participate in training funded under the federal Workforce Innovation and Opportunity Act, 29 USC 3101 to 3361, or another federal law that enhances job skills without affecting availability for work, subject to department approval.

SECTION 35. 108.062 (3) of the statutes is amended to read:

108.062 **(3)** APPROVAL OF PLANS. The department shall approve a plan if the plan includes all of the elements specified in sub. (2) ~~or (20), whichever is applicable~~. The approval is effective for the effective period of the plan unless modified under sub. (3m).

SECTION 36. 108.062 (3r) of the statutes is amended to read:

108.062 **(3r)** APPLICABILITY OF LAWS. A work−share program shall be governed by the law that was in effect when the plan or modification was last approved under sub. (3) or (3m), until the program ends as provided in sub. (4), but an employer ~~with a work−share program governed by sub. (2)~~ may~~, while sub. (20) is in effect,~~ apply for a modification under sub. (3m), and that modification application shall be governed by ~~sub. (20)~~ the law in effect when the modification is approved.

SECTION 37. 108.062 (4) (a) 1. of the statutes is renumbered 108.062 (4) (a) and amended to read:

108.062 **(4)** (a) ~~Except as provided in subd. 2., a~~ A work−share program becomes effective on the later of the Sunday of ~~the 2nd week beginning~~ or after approval of a work−share plan under sub. (3) or any Sunday after that day specified in the plan.

SECTION 38. 108.062 (4) (a) 2. of the statutes is repealed.

SECTION 39. 108.062 (4) (b) of the statutes is amended to read:

108.062 **(4)** (b) A work−share program ends on the earlier of the last Sunday that precedes the end of the ~~6−month~~ 12−month period beginning on the effective date of the program or any Sunday before that day specified in the plan unless the program terminates on an earlier date under sub. (5), (14), or (15).

SECTION 40. 108.062 (6) (b) of the statutes is amended to read:

108.062 **(6)** (b) No employee who is included ~~in a work unit~~ under a work−share program is eligible to receive any benefits for a week in which the plan is in effect in which the employee is engaged in work for the employer that sponsors the plan ~~which~~ that, when combined with work performed by the employee for any other employer for the same week, ~~exceed~~ exceeds 90 percent of the employee's average hours of work per week for the employer that creates the plan, as identified in the plan.

SECTION 41. 108.062 (15) of the statutes is amended to read:

108.062 **(15)** INVOLUNTARY TERMINATION. If in any week there are fewer than ~~20~~ 2 employees who are included in a work−share program of any employer, the program terminates on the 2nd Sunday following the end of that week. ~~This subsection does not apply to a work−share program to which sub. (20) applies.~~

SECTION 42. 108.062 (19) (intro.) of the statutes is renumbered 108.062 (19) and amended to read:

108.062 **(19)** SECRETARY MAY WAIVE COMPLIANCE. The secretary may ~~do any of the following~~ waive compliance with any requirement under this section if the secretary determines that doing so is necessary to permit continued certification of this chapter for grants to this state under Title III of the federal Social Security Act, for maximum credit allowances to employers under the federal Unemployment Tax Act, or for this state to qualify for full federal financial participation in the cost of administration of this section and financing of benefits to employees participating in work−share programs under this section~~:~~.

SECTION 43. 108.062 (19) (a) of the statutes is repealed.

SECTION 44. 108.062 (19) (b) of the statutes is repealed.

SECTION 45. 108.062 (20) of the statutes, as affected by 2021 Wisconsin Act 4, is repealed.

SECTION 46. 108.065 (1e) (intro.) of the statutes is amended to read:

108.065 **(1e)** (intro.) Except as provided in subs. (2) ~~and (3)~~ to (3m), if there is more than one employing unit that has a relationship to an employee, the department shall determine which of the employing units is the employer of the employee by doing the following:

SECTION 47. 108.065 (3m) of the statutes is created to read:

108.065 **(3m)** A private agency that serves as a fiscal agent or contracts with a fiscal intermediary to serve as a fiscal agent to recipients of services under ch. 46, 47, or 51 may elect to be the employer of one or more employees providing those services. As a condition of eligibility for election to be the employer of one or more employees providing those services, the private agency shall notify in writing the recipient of any such services of its election, for purposes of the unemployment insurance law, to be the employer of any worker providing such services to the recipient, and must be treated as the employer under 26 USC 3301 to 3311 for purposes of federal unemployment taxes on the worker's services.

SECTION 48. 108.10 (intro.) of the statutes is amended to read:

108.10 Settlement of issues other than benefit claims. (intro.) Except as provided in s. 108.245 (3), in connection with any issue arising under this chapter as to the status or liability of an employing unit ~~in this state~~, for which no review is provided under s. 108.09, 108.095, or 108.227 (5) and whether or not a penalty is provided in s. 108.24, the following procedure shall apply:

SECTION 49. 108.101 (5) of the statutes is created to read:

108.101 **(5)** Notwithstanding sub. (4), a final order or judgment of conviction for a crime entered by a court is binding on the convicted person in an action or proceeding under this chapter that relates to the criminal conviction. A person convicted of a crime is precluded from denying the essential allegations of the criminal offense that is the basis for the conviction in an action or proceeding under this chapter.

SECTION 50. 108.13 (4) (a) 2. of the statutes is amended to read:

108.13 **(4)** (a) 2. "Legal process" has the meaning given under 42 USC ~~662 (e)~~ 659 (i) (5).

SECTION 51. 108.14 (8n) (a) of the statutes is amended to read:

108.14 **(8n)** (a) The department shall enter into a reciprocal arrangement ~~which is~~ approved by the U.S. secretary of labor ~~pursuant to section~~ under 26 USC 3304 (a) (9) (B) ~~of the internal revenue code~~, to provide more equitable benefit coverage for individuals whose recent work has been covered by the unemployment insurance laws of 2 or more jurisdictions.

SECTION 52. 108.14 (8n) (e) of the statutes is amended to read:

108.14 **(8n)** (e) The department shall charge this state's share of any benefits paid under this subsection to the account of each employer by which the employee claiming benefits was employed in the applicable base period, in proportion to the total amount of wages he or she earned from each employer in the base period, except that if s. 108.04 (1) (f), (5), (5g), (7) (a), (c), (cg), (e), (L), (q), (s), or (t), (7m) or (8) (a) ~~or (b)~~ to (c), 108.07 (3), (3r), or (5) (am) 2., or 108.133 (3) (f) would have applied to employment by such an employer who is subject to the contribution requirements of ss. 108.17 and 108.18, the department shall charge the share of benefits based on employment with that employer to the fund's balancing account, or, if s. 108.04 (1) (f) ~~or~~, (5), or (5g) or 108.07 (3) would have applied to an employer that is not subject to the contribution requirements of ss. 108.17 and 108.18, the department shall charge the share of benefits based on that employment in accordance with s. 108.07 (5) (am) 1. and 2. The department shall also charge the fund's balancing account with any other state's share of such benefits pending reimbursement by that state.

SECTION 53. 108.14 (26) of the statutes is amended to read:

108.14 **(26)** The department shall prescribe by rule a standard affidavit form that may be used by parties to appeals under ss. 108.09, 108.095, and 108.10 and shall make the form available to employers and claimants. The form shall be sufficient to qualify as admissible evidence in a hearing under this chapter if the authentication is sufficient and the information set forth by the affiant is admissible, but its use by a party does not eliminate the right of an opposing party to cross examine the affiant concerning the facts asserted in the affidavit.

SECTION 54. 108.141 (1) (h) of the statutes is amended to read:

108.141 **(1)** (h) "State law" means the unemployment insurance law of any state~~,~~ that has been approved by the U.S. secretary of labor under ~~section~~ 26 USC 3304 ~~of the internal revenue code~~.

SECTION 55. 108.141 (3g) (a) 3. b. of the statutes is amended to read:

108.141 **(3g)** (a) 3. b. The gross average weekly remuneration for the work exceeds the claimant's weekly benefit rate plus any supplemental unemployment benefits, as defined in ~~section~~ 26 USC 501 (c) (17) (D) ~~of the internal revenue code~~, then payable to the claimant;

SECTION 56. 108.141 (7) (a) of the statutes is amended to read:

108.141 **(7)** (a) The department shall charge the state's share of each week of extended benefits to each employer's account in proportion to the employer's share of the total wages of the employee receiving the benefits in the employee's base period, except that if the employer is subject to the contribution requirements of ss. 108.17 and 108.18 the department shall charge the share of extended benefits to which s. 108.04 (1) (f), (5), (5g), (7) (a), (c), (cg), (e), (L), (q), (s), or (t), (7m) or (8) (a) ~~or (b)~~

to (c), 108.07 (3), (3r), or (5) (am) 2., or 108.133 (3) (f) applies to the fund's balancing account.

SECTION 57. 108.141 (7) (b) of the statutes is amended to read:

108.141 **(7)** (b) The department shall charge the full amount of extended benefits based on employment for a government unit to the account of the government unit, except that if s. 108.04 (5), (5g), or (7) applies and the government unit has elected contribution financing the department shall charge one−half of the government unit's share of the benefits to the fund's balancing account.

SECTION 58. 108.145 of the statutes is amended to read:

108.145 Disaster unemployment assistance. The department shall administer under s. 108.14 (9m) the distribution of disaster unemployment assistance to workers in this state who are not eligible for benefits whenever such assistance is made available by the president of the United States under ~~26~~ 42 USC 5177 (a). In determining eligibility for assistance and the amount of assistance payable to any worker who was totally self−employed during the first 4 of the last 5 most recently completed quarters preceding the date on which the worker claims assistance, the department shall not reduce the assistance otherwise payable to the worker because the worker receives one or more payments under the social security act ~~(~~, 42 USC ~~301 et seq.)~~ ch. 7, for the same week that the worker qualifies for such assistance.

SECTION 59. 108.15 (3) (d) of the statutes is amended to read:

108.15 **(3)** (d) If a government unit elects contribution financing for any calendar year after the first calendar year it becomes newly subject to this chapter, it shall be liable to reimburse the fund for any benefits based on prior employment. If a government unit terminates its election of contribution financing, ss. 108.17 and 108.18 shall apply to employment in the prior calendar year, but after all benefits based on such prior employment have been charged to its contribution account any balance remaining in such account shall be transferred to the fund's balancing account.

SECTION 60. 108.151 (2) (d) of the statutes is amended to read:

108.151 **(2)** (d) Sections 108.17 and 108.18 shall apply to all prior employment, but after all benefits based on prior employment have been charged to any account it has had under s. 108.16 (2) any balance remaining therein shall be transferred to the fund's balancing account as if s. 108.16 (6) (c) or (6m) (d) applied.

SECTION 61. 108.151 (7) (c) of the statutes is amended to read:

108.151 **(7)** (c) The fund's treasurer shall determine the total amount due from employers electing reimbursement financing under this section that is uncollectible as of June 30 of each year, but not including any amount that the department determined to be uncollectible ~~prior to~~ before January 1, 2004. No amount may be treated as uncollectible under this paragraph unless the department has exhausted all reasonable remedies for collection of the amount, including liquidation of the assurance required under sub. (4). The department shall charge the total amounts so determined to the uncollectible reimbursable benefits account under s. 108.16 (6w). Whenever, as of June 30 of any year, ~~this~~ that account has a negative balance of $5,000 or more, the treasurer shall, except as provided in par. (i), determine the rate of an assessment to be levied under par. (b) for that year, which shall then become payable by all employers that have elected reimbursement financing under this section as of that date.

SECTION 62. 108.151 (7) (f) of the statutes is amended to read:

108.151 **(7)** (f) If any employer would otherwise be assessed an amount less than ~~$10~~ $20 for a calendar year, the department shall, in lieu of requiring that employer to pay an assessment for that calendar year, apply the amount that the employer would have been required to pay to the other employers on a pro rata basis.

SECTION 63. 108.151 (7) (i) of the statutes is created to read:

108.151 **(7)** (i) In lieu of or in addition to assessing employers as provided in par. (b), the fund's treasurer may apply amounts set aside in the fund's balancing account under s. 108.155 (2) (a) to amounts determined to be uncollectible under par. (c) by transferring those amounts to the account under s. 108.16 (6w). The fund's treasurer may not act under this paragraph whenever the balance remaining of the amount set aside under s. 108.155 (2) (a) is less than $1,750,000 and may not act to reduce the amount set aside below that amount.

SECTION 64. 108.152 (1) (d) of the statutes is amended to read:

108.152 **(1)** (d) If the Indian tribe or tribal unit is an employer ~~prior to~~ before the effective date of an election, ss. 108.17 and 108.18 shall apply to all employment ~~prior to~~ before the effective date of the election, but after all benefits based on prior employment have been charged to any account that it has had under s. 108.16 (2), the department shall transfer any positive balance or charge any negative balance remaining therein to the fund's balancing account as if s. 108.16 (6) (c) and (6m) (d) applied.

SECTION 65. 108.155 (2) (a) and (d) of the statutes are amended to read:

108.155 **(2)** (a) On October 2, 2016, the fund's treasurer shall set aside $2,000,000 in the fund's balancing account for accounting purposes. On an ongoing basis, the fund's treasurer shall tally the amounts allocated to reimbursable employers' accounts under s. 108.04 (13) (d) 4. c. and all amounts transferred to the account under s. 108.16 (6w) as provided in s. 108.151 (7) (i) and shall

deduct those amounts from the amount set aside plus any interest calculated thereon.

(d) If the department assesses reimbursable employers under par. (c), the department shall determine the amount of assessments to be levied as provided in sub. (3), and the fund's treasurer shall notify reimbursable employers that the assessment will be imposed. Except as provided in sub. (3) (c), the assessment shall be payable by each reimbursable employer that is subject to this chapter as of the date the assessment is imposed. Assessments imposed under this section shall be credited to the fund's balancing account.

SECTION 66. 108.16 (6m) (a) of the statutes is amended to read:

108.16 **(6m)** (a) The benefits thus chargeable under sub. (7) (a) or (b) or s. 108.04 (1) (f), (5), (5g), (7) ~~(h)~~ (u), (7m), (8) (a) ~~or (b)~~ to (c), (13) (c) or (d) or (16) (e), 108.07 (3), (3r), (5) (am) 2. and (bm) 3. a., (5m), and (6), 108.133 (3) (f), 108.14 (8n) (e), 108.141, 108.15, 108.151, or 108.152 ~~or sub. (6) (e) or (7) (a) and (b)~~.

SECTION 67. 108.16 (6m) (j) of the statutes is created to read:

108.16 **(6m)** (j) Any amount transferred to the account under sub. (6w) as provided in s. 108.151 (7) (i).

SECTION 68. 108.16 (6w) of the statutes is amended to read:

108.16 **(6w)** The department shall maintain within the fund an uncollectible reimbursable benefits account to which the department shall credit all amounts received from employers under s. 108.151 (7) and all amounts transferred from the fund's balancing account as provided in s. 108.151 (7) (i).

SECTION 69. 108.16 (6x) of the statutes is amended to read:

108.16 **(6x)** The department shall charge to the uncollectible reimbursable benefits account the amount of any benefits paid from the fund's balancing account that are reimbursable under s. 108.151 but for which the department does not receive reimbursement after the department exhausts all reasonable remedies for collection of the amount.

SECTION 70. 108.16 (9) (a) of the statutes is amended to read:

108.16 **(9)** (a) Consistently with ~~section~~ 26 USC 3305 ~~of the internal revenue code~~, relating to federal instrumentalities ~~which~~ that are neither wholly nor partially owned by the United States nor otherwise specifically exempt from the tax imposed ~~by section~~ under 26 USC 3301 ~~of the internal revenue code~~:

1. Any contributions required and paid under this chapter for ~~1939 or~~ any ~~subsequent~~ year by any such instrumentality, including any national bank, shall be refunded to ~~such~~ that instrumentality in case this chapter is not certified with respect to such year under ~~s.~~ 26 USC 3304 ~~of said code~~.

2. No national banking association ~~which~~ is ~~subject to this chapter shall be~~ required to comply with any ~~of its~~ provisions or requirements under this chapter, to the extent that such compliance would be contrary to ~~s.~~ 26 USC 3305 ~~of said code~~.

SECTION 71. 108.18 (3) (c) of the statutes is amended to read:

108.18 **(3)** (c) Permitting the employer to pay such lower rate is consistent with the relevant conditions then applicable to additional credit allowance for such year under ~~section~~ 26 USC 3303 (a) ~~of the federal unemployment tax act~~, any other provision to the contrary notwithstanding.

SECTION 72. 108.19 (3) of the statutes is repealed.

SECTION 73. 108.22 (8e) of the statutes is amended to read:

108.22 **(8e)** If the department determines a payment has been made to an unintended recipient erroneously without fault on the part of the intended payee or payee's authorized agent, the department may issue the correct payment to the intended payee if necessary, and may recover the amount of the erroneous payment from the recipient under this section or s. 108.225 or 108.245. Any amount so recovered shall be credited to the fund's balancing account.

SECTION 74. 108.22 (10) of the statutes is amended to read:

108.22 **(10)** A private agency that serves as a fiscal agent under s. 46.2785 or contracts with a fiscal intermediary to serve as a fiscal agent under s. 46.272 (7) (e) or 47.035 as to any individual performing services for a person receiving long–term support services under s. 46.272 (7) (b), 46.275, 46.277, 46.278, 46.2785, 46.286, 46.495, 51.42, or 51.437 or personal assistance services under s. 47.02 (6) (c) may be found jointly and severally liable for the amounts owed by the person under this chapter, if, at the time the person's quarterly report is due under this chapter, the private agency served as a fiscal agent for the person. The liability of the agency as provided in this subsection survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the person and shall be set forth in a determination or decision issued under s. 108.10. An appeal or review of a determination under this subsection shall not include an appeal or review of determinations of amounts owed by the person. This subsection does not apply with respect to a private agency that has made an election under s. 108.065 (3m).

SECTION 75. 108.223 (2) (b) of the statutes is amended to read:

108.223 **(2)** (b) The department shall enter into agreements with financial institutions doing business in this state to operate the financial record matching program under this section. An agreement shall require the

financial institution to participate in the financial record matching program by electing either the financial institution matching option under sub. (3) or the state matching option under sub. (4). The financial institution and the department may by mutual agreement ~~make changes to~~ amend the agreement. A financial institution that wishes to choose a different matching option shall provide the department with at least 60 days' notice. The department shall furnish the financial institution with a signed copy of the agreement.

SECTION 76. 108.23 of the statutes is amended to read:

108.23 Preference of required payments. In the event of an employer's dissolution, reorganization, bankruptcy, receivership, assignment for benefit of creditors, judicially confirmed extension proposal or composition, or any analogous situation including the administration of estates in circuit courts, the payments required of the employer under this chapter shall have preference over all claims of general creditors and shall be paid next after the payment of preferred claims for wages. If the employer is indebted to the federal government for taxes due under the federal unemployment tax act and a claim for the taxes has been duly filed, the amount of contributions which should be paid to allow the employer the maximum offset against the taxes shall have preference over preferred claims for wages and shall be on a par with debts due the United States, if by establishing the preference the offset against the federal tax can be secured under ~~s.~~ 26 USC 3302 (a) (3) ~~of the federal unemployment tax act~~.

SECTION 77. 108.24 (3) (a) 3. a. of the statutes is amended to read:

108.24 **(3)** (a) 3. a. Refrain from claiming or accepting benefits, participating in an audit or investigation by the department, or testifying in a hearing held under s. 108.09, 108.095, or 108.10.

SECTION 78. 108.24 (3) (a) 4. of the statutes is amended to read:

108.24 **(3)** (a) 4. Discriminates or retaliates against an individual because the individual claims benefits, participates in an audit or investigation by the department under this chapter, testifies in a hearing under s. 108.09, 108.095, or 108.10, or exercises any other right under this chapter.

SECTION 79. Initial applicability.

(1) The treatment of s. 108.02 (15) (k) 21. first applies to services performed on the effective date of this subsection.

(2) The treatment of s. 108.02 (10e) (c) first applies to determinations issued under s. 108.09 on the effective date of this subsection.

SECTION 80. Effective dates. This act takes effect on the first Sunday after publication, except as follows:

(1) The treatment of s. 16.48 (1) (a) (intro.), 1., 2., 3., 4., 5., and 6. and (b), (2), (3), and (4) takes effect on February 1, 2022.

(2) The treatment of ss. 108.02 (13) (k) and 108.065 (1e) (intro.) and (3m) takes effect on January 1, 2023.

(3) The creation of s. 108.02 (15) (k) 21. and SECTION 79 (1) of this act take effect on the first Sunday of the first year beginning after the date of publication.

Unemployment Insurance Advisory Council Agreed-Upon Bill (2021 Wis. Act 231) Plain Language Summary

Benefits Changes

Effect of a Criminal Conviction

When the department refers matters for criminal prosecution, an administrative determination has usually already been issued. However, criminal prosecution may result in court-ordered restitution when the department has yet not issued an administrative determination that a debt is owed. Act 231 provides that final criminal conviction judgments are binding on criminal defendants for the purposes of related proceedings that arise under unemployment law.

Statute created: section 108.101(5), effective April 10, 2022.

Departmental Error

Under current law, the department waives the recovery of benefits that were erroneously paid if the overpayment was the result of departmental error, such as a computation error, misapplication or misinterpretation of law, or mistake of evidentiary fact. But an amendment, modification, or reversal of a department determination by an appeal tribunal, the Labor and Industry Review Commission, or a court is not departmental error for the purposes of waiving the overpayment. The Commission currently waives some overpayments if it finds that an appeal tribunal allows benefits in error, even if the appeal tribunal followed an erroneous LIRC or court decision. The Commission considers appeal tribunals to be part of the department because the administrative law judges are department employees. Act 231 amends the law to provide that an error made by an appeal tribunal is not "departmental error." **This provision applies to determinations issued on or after April 10, 2022 (statute created: section 108.02(10e)(c)).**

Camp Counselor Exclusion

Federal unemployment law excludes the services of camp counselors from the definition of "employment" if the following criteria are met:

1. The worker is a full-time student. This means that the worker is currently enrolled in an educational institution **or** is between academic years/terms, was enrolled in the preceding year/term, and will be enrolled in the succeeding year/term.
2. The worker worked for the camp for less than 13 calendar weeks in a year.
3. The camp operates in less than seven months in a year **or** had average gross receipts for any 6 months in the preceding calendar year which were not more than 33⅓ percent of its average gross receipts for the other 6 months in the preceding calendar year.

Act 231 adds a corresponding exclusion to state law for private for-profit employers. **This exclusion applies to services performed on or after January 1, 2023 (statute created: section 108.02(15)(k)21.).**

Tax Changes

Reimbursable Employer Debt Assessment Charging

When employers subject to reimbursement unemployment insurance financing ("self-insured") are charged for benefits that are based on identity theft, the department restores those charges to the employers' accounts from the balancing account. The 2015 – 2016 UIAC agreed bill (2015 Wis. Act 334) required that the department set aside $2 million in the balancing account, plus interest, to pay identity theft charges to reimbursable employers' accounts.

Non-profit reimbursable employers may be subject to an annual reimbursable employer debt assessment (REDA) for payment of uncollectible benefit reimbursements due from other reimbursable employers no longer in business. Under current law, the REDA to recover

uncollectible reimbursements must be at least $5,000 but no more than $200,000 and each non-profit employer assessed pays based on the employer's payroll. Employers for whom the assessment would be less than $10 are not assessed, which usually results in about half of non-profit reimbursable employers being assessed the REDA.

Act 231 provides that a limited amount of the reimbursable employer identity theft fraud funds set aside in the balancing account will be made available to recover uncollectible reimbursements instead of assessing the REDA (or to reduce the amount of the REDA). This provides that the identity theft fraud funds may be used to pay the REDA only if the use of those funds would not reduce the balance of the funds below $1.75 million. Act 231 also increases the minimum amount of the REDA per employer from $10 to $20.

Statutes created or amended: sections 108.151(7)(c), (f), (i), 108.155(2)(a), effective April 10, 2022.

Fiscal Agent Election of Employer Status

Individuals who receive long-term health support services in their home through government-funded care programs are employers under Wisconsin's unemployment insurance law. These employers receive financial services from fiscal agents, who directly receive and disperse government program funds. The fiscal agent is responsible for reporting employees who provide services for the employers to the department, and for paying unemployment tax liability on behalf of the employer. Under current law, if the worker is a certain class of family member of the person receiving care, the worker is ineligible for unemployment benefits when the employment relationship ends.

Act 231 permits private fiscal agents (not government units) to elect to be the employer of workers who provide care services under chapters 46, 47, and 51. The fiscal agent would be

required to inform the recipient of care of the election and the fiscal agent would need to be treated as the employer for federal unemployment tax purposes. If the fiscal agent elects to be the employer and the worker is a certain class of family member of the person receiving care, that worker would be an employee of the fiscal agent and could now potentially be eligible for unemployment benefits. Benefits would be charged to the fiscal agent's account, which would affect its experience rating. This provision is expected to simplify unemployment insurance reporting requirements for fiscal agents.

Fiscal agents may elect to be the employer of the care workers as of January 1, 2023 (statute amended and created: sections 108.02(13)(k) and 108.065(3m)).

Work Share Amendments

2019 Wis. Act 185 and 2021 Wis. Act 4 provided greater flexibility for work share plans such as:

1. Reducing the minimum number of employees in a work share plan from 20 to 2.
2. Increasing the maximum reduction in employees' hours from 50% to 60%, which is the maximum allowed under federal law.
3. Permitting work share plans to cover any employees, not just employees in a particular work unit.
4. Eliminating the requirement that hours be apportioned equitably among employees in the work share plan.
5. Providing that work share plans become effective on the later of the Sunday of or after approval of the work-share plan, instead of the second Sunday after approval of the plan, unless a later Sunday is specified.

Act 231 makes these changes permanent, as well as permitting a plan to extend up to 12 months in a 5-year period. The changes to the work share law are effective on **April 10, 2022**. A work-share plan is governed by the law that was in effect when the plan or modification was last approved. **(Various changes to section 108.062.)**

Administrative Changes

Changing the deadlines to submit certain statutorily-required reports to the Legislature

For the UI financial outlook report, the deadline will be changed from April 15 of each odd-numbered year to May 31 of each even-numbered year. For the report summarizing the deliberations of the Unemployment Insurance Advisory Council, the deadline will be changed from May 15 of each odd-numbered year to January 31 of each even-numbered year. These changes are designed to improve the usefulness of the reports to the Legislature, the Governor, and the Council. **This change will require the Department to issue a financial outlook by May 31, 2022 (statute amended: section 16.48, effective April 10, 2022.)**

Prohibiting DOR collection of UI debts

Current law requires state agencies and the Wisconsin Department of Revenue (DOR) to enter into an agreement to have DOR collect debts owed to agencies under certain conditions. Act 231 prohibits DOR from collecting debts on behalf of the UI Division. This change will ensure that employers and claimants are not assessed additional fees when repaying their debts and will ensure that state recoveries of debts owed to the UI Division continue to be maximized for the benefit of the UI Trust Fund. **(Statute created: section 71.93(8)(b)1.d., effective April 10, 2022.)**

COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2022

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

Appeal No. 2020AP2002 **Cir. Ct. No. 2020CV2371**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

SUSAN A. WOZNIAK AND MEIJER STORES LIMITED PARTNERSHIP,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

Before Donald, P.J., Dugan and White, JJ.

¶1 DONALD, P.J. The Labor and Industry Review Commission (LIRC) challenges a circuit court order reversing its decision to grant unemployment benefits to Susan A. Wozniak. As discussed below, we conclude that Wozniak's use of derogatory, homophobic language about her coworker's sexual orientation constituted misconduct, pursuant to WIS. STAT. § 108.04(5)(d) (2019-20),[1] and as a result, she is not entitled to unemployment benefits.

BACKGROUND

¶2 On October 17, 2017, Wozniak began working as a part-time greeter for Meijer Stores Limited Partnership (Meijer). Approximately, seven weeks later, Wozniak became angry that a coworker, who was supposed to be working with her as a greeter at the front of the store, was not doing his job. Wozniak expressed her irritation in a conversation with two cashiers. Several days later, one of the cashiers reported the conversation to management. The cashier reported that Wozniak had referred to the coworker as "pretty boy," "fairy," and "fruit loop," said that he was gay, and that "the way he skipped around the store made her sick." Neither of the cashiers testified at the hearing in this matter.

¶3 Management interviewed Wozniak. Wozniak denied calling her coworker a "fairy." She provided a written statement in which she admitted to calling her coworker a "pretty boy," and stated that if she mentioned other things, she "didn't mean it and should not have said it." Wozniak was suspended pending further investigation. Wozniak had not previously been subject to discipline.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

¶4 On December 15, 2017, Meijer discharged Wozniak for making "discriminatory remarks towards a team member, calling him a 'fruit loop' and a 'fairy,' and commenting on how he skipped around and it made her sick."

¶5 Wozniak filed a claim for unemployment insurance benefits. Based on the information provided by Wozniak, the Department of Workforce Development (DWD) issued an initial determination on January 12, 2018. DWD found that Wozniak was discharged, but her discharge was not for misconduct or substantial fault connected with her employment. Benefits were, therefore, allowed.

¶6 Meijer appealed. A hearing on the matter was held before a DWD administrative law judge (ALJ). The ALJ found that Wozniak had referred to her coworker as a "pretty boy" and a "fruit loop." The ALJ reversed the initial determination, finding that Wozniak was discharged for misconduct, pursuant to WIS. STAT. § 108.04(5), and, thus, was ineligible for benefits.

¶7 Wozniak petitioned for review of the appeal tribunal decision to LIRC. In a decision dated November 30, 2018, LIRC reversed the ALJ's decision, thus, allowing benefits. Two commissioners found that Wozniak was discharged, but not for misconduct, pursuant to WIS. STAT. § 108.04(5) and (5)(d), or substantial fault, pursuant to § 108.04(5g). One commissioner dissented, finding that Wozniak's comments regarding her coworker's sexual orientation constituted misconduct pursuant to § 108.04(5) and (5)(d), and also substantial fault, pursuant to § 108.04(5g).

¶8 DWD sought judicial review, and on August 16, 2019, the circuit court issued a decision finding that LIRC erred as a matter of law by defining harassment under WIS. STAT. § 108.04(5)(d) as requiring more than one act. The

circuit court remanded the case to LIRC to issue a new decision based on the correct interpretation of the statute.

¶9 Following the remand, LIRC issued a new decision on March 12, 2020. LIRC again found that Meijer discharged Wozniak, but that her discharge was not for misconduct or substantial fault connected with her employment. Therefore, Wozniak was eligible for benefits.

¶10 DWD brought an action for judicial review of LIRC's second decision. The circuit court reversed. The circuit court found that LIRC erred in finding that Wozniak's comments did not constitute misconduct or substantial fault.

¶11 LIRC appealed that decision to this court. Additional relevant facts are referenced below.

DISCUSSION

¶12 "Wisconsin's unemployment compensation statutes embody a strong public policy in favor of compensating the unemployed." ***Operton v. LIRC***, 2017 WI 46, ¶31, 375 Wis. 2d 1, 894 N.W.2d 426. Not all employees, however, are entitled to unemployment benefits. ***Id.***, ¶33. An individual may be disqualified from receiving benefits if the employer establishes that the individual was discharged under a disqualifying provision. ***Id.***, ¶¶33, 38.

¶13 LIRC utilizes a three-step approach in analyzing discharges. First, LIRC determines whether the employee was discharged for misconduct by engaging in any of the actions enumerated in WIS. STAT. § 108.04(5)(a)-(g). If those provisions do not apply, LIRC then determines whether the employee's actions constitute misconduct under § 108.04(5), the codified misconduct

definition from ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 296 N.W. 636 (1941). Finally, if misconduct is not found, LIRC then determines whether the discharge was for substantial fault, as set forth in § 108.04(5g).

¶14 In this case, LIRC contends Wozniak's discharge was not for misconduct within the meaning of WIS. STAT. § 108.04(5) or (5)(d), or substantial fault under § 108.04(5g).

¶15 As discussed below, we conclude that Wozniak's discharge was for misconduct within the meaning of WIS. STAT. § 108.04(5)(d) and, thus, we affirm the denial of benefits. As a result, we do not address whether Wozniak's discharge was for misconduct within the meaning of § 108.04(5) or substantial fault under § 108.04(5g). *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that "cases should be decided on the narrowest possible ground").

A. Principles of Law and Standard of Review

¶16 "On appeal, we review LIRC's decision and not the circuit court's." ***City of Kenosha v. LIRC***, 2011 WI App 51, ¶7, 332 Wis. 2d 448, 797 N.W.2d 885. A reviewing court "may set aside an order of LIRC if LIRC acted 'without or in excess of its powers.'" ***DWD v. LIRC***, 2018 WI 77, ¶12, 382 Wis. 2d 611, 914 N.W.2d 625 (citing WIS. STAT. § 108.09(7)(c)6.a.). LIRC acts without or in excess of its powers if it bases its order on an incorrect interpretation of the law. ***Id.***

¶17 This case requires us to interpret WIS. STAT. § 108.04(5)(d). Statutory interpretation begins with the language of a statute. ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

If the meaning of a statute is plain, we ordinarily stop our inquiry. ***Id.*** "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** "A dictionary may be utilized to guide the common, ordinary meaning of words." ***Noffke ex rel. Swenson v. Bakke***, 2009 WI 10, ¶10, 315 Wis. 2d 350, 760 N.W.2d 156.

¶18 "Statutory interpretation is a matter of law which we review *de novo*, giving no deference to the agency's legal conclusions." ***Cree, Inc. v. LIRC***, 2022 WI 15, ¶13, 400 Wis. 2d 827, 970 N.W.2d 837. "Whether the facts of a case fulfill a legal standard is also a matter of law we review *de novo*." ***Id.***[2]

B. WISCONSIN STAT. § 108.04(5)(d)

¶19 WISCONSIN STAT. § 108.04(5)(d) provides that "[o]ne or more threats or acts of harassment, assault, or other physical violence instigated by an employee at the workplace of his or her employer" constitutes misconduct. The statute does not define harassment.

¶20 Citing Black's Law Dictionary, LIRC defines "harassment" as "a term used in a variety of legal contexts to describe words, gestures, and actions

[2] LIRC notes that a reviewing court may accord "due weight" to a commission's experience, technical competence, and specialized knowledge. *See* ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21. DWD responds that this standard only applies to general administrative proceedings under WIS. STAT. ch. 227, not unemployment proceedings under WIS. STAT. ch. 108. Even if we assume that due weight may be given in unemployment proceedings under chapter 108, LIRC admits that the interpretation of WIS. STAT. § 108.04(5)(d) is a question of first impression. Thus, LIRC cannot be said to have any level of expertise or specialized knowledge in interpreting § 108.04(5)(d). *See* ***Tetra Tech EC***, 382 Wis. 2d 496, ¶79. Accordingly, we conclude that a *de novo* standard of review is appropriate here.

which tend to annoy, alarm, and abuse (verbally) another person."[3] LIRC's decision further states that "[h]arassment may include verbal abuse, epithets, and vulgar or derogatory language, display of offensive cartoons or materials, mimicry, lewd or offensive gestures, and telling of jokes offensive to protected class members."

¶21 DWD agrees with LIRC's definition of harassment. DWD and LIRC disagree, however, as to whether Wozniak's homophobic comments constitute harassment.

¶22 We agree with DWD that Wozniak's homophobic comments qualify as harassment under WIS. STAT. § 108.04(5)(d). The agreed upon definition of harassment includes the use of "derogatory language." As the circuit court observed, Wozniak's comments, which included the use of "pretty boy" and "fruit loop," were "derogatory language" about the coworker's sexual orientation. Whether the comments were made directly to the coworker is of no consequence under the language of § 108.04(5)(d).

¶23 In support of its argument that Wozniak's comments did not constitute misconduct pursuant to WIS. STAT. § 108.04(5)(d), LIRC faults Meijer for not providing a specific definition of harassment, or examples of harassment, in its work rules. LIRC also argues that Meijer did not prove that Wozniak "knowingly" violated Meijer's work rules.

¶24 LIRC, however, reads additional requirements into WIS. STAT. § 108.04(5)(d). Nothing in (5)(d) requires that an employer have an anti-

[3] LIRC cites the Sixth edition of Black's Law Dictionary.

harassment policy or rule. Nor does (5)(d) say that an employee must "knowingly harass" or "intend to harass" another. Rather, (5)(d) simply provides that "[o]ne or more threats or acts of harassment … instigated by an employee at the workplace of his or her employer" constitutes misconduct. We will not read additional language into a statute. *See* ***County of Dane v. LIRC***, 2009 WI 9, ¶33, 315 Wis. 2d 293, 759 N.W.2d 571.

¶25 Finally, we note that the dissent emphasizes that Wozniak's homophobic comments were made in the context of a short, private conversation with two co-workers that Wozniak believed were like-minded. *See* Dissent, ¶34. First, the record suggests that at least one of the co-workers was not in fact like-minded or unaffected as Wozniak's comments prompted him or her to report the conversation to management. Second, by the dissent's reasoning, so long as an employee believes a conversation is private with like-minded individuals, his or her comments cannot constitute misconduct under WIS. STAT. § 108.04(5)(d). This is illogical. The statute contains no such limitation. *See* ***County of Dane***, 315 Wis. 2d 293, ¶33.

CONCLUSION

¶26 Therefore, for the reasons stated above, we conclude that Wozniak was discharged for misconduct pursuant to WIS. STAT. § 108.04(5)(d), and thus, is not entitled to unemployment benefits.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 2020AP2002(D)

¶27 DUGAN, J. (*dissenting*). I write separately because I would conclude that Meijer has not met its burden to demonstrate that Wozniak was discharged for misconduct or substantial fault within the meaning of WIS. STAT. § 108.04(5) or § 108.04(5g). Thus, I would uphold LIRC's decision granting unemployment benefits to Wozniak. Accordingly, I respectfully dissent.

¶28 Initially, I recite the following facts in addition to those already provided. Meijer provided a Summary of Work Rules during the agency proceedings.[1] One rule was entitled "Serious Conduct Leading to Discipline or Discharge" and stated that "[d]iscriminatory acts, sexual harassment or harassment of any nature" is serious conduct leading to discipline or discharge. The rule does not provide any definition of harassment. An additional rule entitled "Conduct Leading to Discharge Without Prior Discipline" stated that "[v]iolent behavior of any kind, including provoking or engaging in fighting, threatening, intimidation or coercive conduct, using abusive language, possession of weapons on company property, or interfering with other team members' ability to work" may lead to termination without prior discipline. Wozniak electronically acknowledged receipt of these rules.

[1] The Summary of Work Rules indicates that further explanation can be found in the Company Policies & Procedures. Meijer bears the burden of demonstrating that Wozniak was discharged for misconduct or substantial fault, and it has not provided its Company Policies & Procedures. *See* ***Operton v. LIRC***, 2017 WI 46, ¶38, 375 Wis. 2d 1, 894 N.W.2d 426. Thus, this court is restricted to consideration of the Summary of Work Rules that has been provided.

¶29 After the incident in question, Meijer terminated Wozniak's employment, citing to both of the aforementioned workplace rules. Specifically, Meijer provided that Wozniak made "discriminating remarks towards a team member" and deemed Wozniak's remarks "harassment in the workplace." The co-worker who reported Wozniak's remarks to management never testified during the agency proceedings, and no evidence was provided that Wozniak's comments were offensive to her co-workers with whom she spoke or interfered with their ability to work.

¶30 With these additional facts in hand, I proceed to the standard applicable to this case. First, I agree with the Majority that this case presents an issue of statutory interpretation, and as the Majority aptly summarizes the general principles of statutory interpretation, I do not repeat them here.[2] *See* Majority, ¶¶17-18. However, as relevant to my conclusion, it bears repeating that "Wisconsin's unemployment compensation statutes embody a strong public policy in favor of compensating the unemployed." ***Operton v. LIRC***, 2017 WI 46, ¶31, 375 Wis. 2d 1, 894 N.W.2d 426. Thus, while not all employees are ultimately entitled to unemployment benefits, we nonetheless must liberally construe the provisions of WIS. STAT. ch. 108 consistent with the strong public policy favoring

[2] As the Majority notes, this case does not present the issue of whether Meijer could terminate Wozniak's employment, and I similarly emphasize that this case presents only the issue of whether Wozniak was discharged for misconduct or substantial fault such that she is not entitled to unemployment benefits. "The question is only whether there was statutory 'misconduct.' The principle that violation of a valid work rule may justify discharge but at the same time may not amount to statutory 'misconduct' for unemployment compensation purposes has been repeatedly recognized[.]" ***Consolidated Constr. Co., Inc. v. Casey***, 71 Wis. 2d 811, 819-20, 238 N.W.2d 758 (1976). Thus, even if Meijer appropriately discharged Wozniak pursuant to a valid work rule—which is not the question presented here—misconduct must still be analyzed under the meaning of the statute, and while Meijer's work rules are relevant to the analysis, Meijer's work rules are not synonymous with misconduct under the statute.

compensation of the unemployed. *See* ***id.***, ¶¶31-32. Moreover, it is the employer's burden to demonstrate that the employee's termination was due to misconduct or substantial fault. *See* ***id.***, ¶38. With these principles in mind, I turn to the analysis of whether Wozniak was discharged for misconduct or substantial fault within the meaning of either WIS. STAT. § 108.04(5) or § 108.04(5g).

¶31 The Majority concludes that Wozniak was discharged for misconduct within the meaning of WIS. STAT. § 108.04(5)(d) because she engaged in an act of harassment. Majority, ¶¶15, 20-22. It does not reach the issue of misconduct under the general definition or the issue of substantial fault. ***Id.***, ¶15. In reaching its conclusion, the Majority adopts the definition of harassment provided by LIRC and concludes that Wozniak's language was derogatory. ***Id.***, ¶22. It then ends its analysis there.

¶32 I do not agree with the Majority's conclusion because it fails to consider the language of WIS. STAT. § 108.04(5)(d) in its entirety and consider harassment within its statutory context. *See* ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. Rather, by considering the language of § 108.04(5)(d) in its entirety and interpreting harassment within its statutory context, I would conclude that the harassment that rises to the level of misconduct within the meaning of the statute also requires an element of intent. "Context is important to meaning." ***Operton***, 375 Wis. 2d 1, ¶28 (citation omitted). Further, I would conclude that this intent is missing from Wozniak's conduct, and therefore, Wozniak did not engage in misconduct as defined by § 108.04(5)(d).

¶33 In full, WIS. STAT. § 108.04(5)(d) defines misconduct as "[o]ne or more threats or acts of harassment, assault, or other physical violence instigated by

an employee at the workplace of his or her employer." Reading the statute as a whole and placing "harassment" within its statutory context also requires considering whether Wozniak's conduct was "instigated," meaning whether Wozniak's comments "goad[ed]" or "incite[d]" harassment. *See Instigate*, BLACK'S LAW DICTIONARY (11th ed. 2019). As the definition of instigate suggests, there has to be some intention behind the action in order to goad or incite harassment. I would conclude that this intention to goad or incite harassment towards her co-worker of whom Wozniak was privately complaining is missing.

¶34 As even the Majority describes, Wozniak used her chosen language to refer to a co-worker with whom she was frustrated, and she used this language in the context of one brief, private conversation with two of her co-workers with whom she believed she shared an affinity. Her comments were not loud enough for anyone to hear. She did not make her comments to customers, and she did not make her comments directly to the co-worker about whom she was complaining. The record is also devoid of evidence that either of these co-workers were offended or unable to continue with their work responsibilities as a result of the conversation. Thus, Wozniak's comments were part of an isolated incident during a brief, private, casual conversation that does not rise to the level of misconduct and that demonstrates no intent to harass her co-worker within the meaning of WIS. STAT. § 108.04(5)(d).

¶35 The Majority dismisses this context as irrelevant to the analysis, simply looking to the words Wozniak used and nothing more. Majority, ¶22. However, dismissing this context interprets the type of harassment that rises to the level of misconduct out of its statutory context. The Majority rejects the context of Wozniak's comments, concluding that to do so effectively adds language to the statute. ***Id.***, ¶24. However, in ignoring the context in which Wozniak's comments

were made fails to place "harassment" within its statutory context. Moreover, I do not agree that this approach adds language to the statute. Thus, I would conclude that the context of Wozniak's comments is relevant to the analysis and in placing the type of harassment that rises to the level of misconduct within the statutory context, I would conclude that Wozniak's conduct did not rise to the level of misconduct defined in WIS. STAT. § 108.04(5)(d).

¶36 Having so concluded, I would additionally analyze whether Wozniak's conduct constituted misconduct generally or whether Wozniak's conduct constituted substantial fault. Here, I would conclude that Wozniak's conduct constitutes neither.

¶37 The general definition of misconduct first articulated in ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 296 N.W. 636 (1941), and now codified in the introduction of WIS. STAT. § 108.04(5) defines misconduct as

> one or more actions or conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer.

¶38 Under this definition of misconduct, LIRC consistently applies a standard that the conduct must be sufficiently egregious to rise of the level of misconduct or the employee must be aware that his or her job is in jeopardy for engaging in certain conduct. *See* ***Toland v. Nash Finch Co.***, Hearing No. 11203620EC (LIRC Mar. 27, 2012) ("To sustain its burden to establish that an employee's violation of a workplace harassment policy is misconduct, employer

typically needs to show that the harassing conduct was severe and pervasive, or, if a single act, unusually egregious."). As a general rule, an employee must be aware of the employer's requirements in order to find that an employee deliberately or intentionally violated or disregarded the employer's rules.

¶39 As described above, nothing about Wozniak's conduct rises to the level of misconduct under this definition. Her conduct lacks a willful or wanton disregard of her employer's interests. As one brief, private conversation, her conduct was not sufficiently egregious, and the workplace rules provided by Meijer gave Wozniak no reason to suspect that her job was in jeopardy for making such comments to two co-workers in that conversation.

¶40 Meijer submitted a document containing its workplace rules that contained no definition of harassment, and it also never presented testimony from the co-worker who reported Wozniak's comments to management. Furthermore, the second workplace rule provided by Meijer applies to "violent behavior," and Wozniak's comments made during a brief, private conversation cannot be construed in any way as violent behavior. Therefore, I would conclude that Wozniak did not engage in misconduct as provided by this general definition.

¶41 The DWD additionally argues that, in addition to having an interest in Wozniak complying with the workplace rules, Meijer had an interest in having Wozniak refrain from conduct that would expose Meijer to liability under either the Wisconsin Fair Employment Act (WFEA), *see* WIS. STAT. §§ 111.31-.395, or Title VII, *see* 42 U.S.C. §§ 2000e-2000e(17). It also argues that Meijer had an interest in Wozniak refraining from conduct that would expose Meijer to boycotting and protests in the current age of the internet and viral videos for employing someone who makes homophobic comments. Both of these arguments

confuse the issue. The issue is whether Wozniak engaged in misconduct within the meaning of WIS. STAT. ch. 108, not whether Wozniak's comments exposed Meijer to liability under WFEA or Title VII, or whether public opinion would support Meijer's decision to continue to employ Wozniak.

¶42 Last, I would address whether this case qualifies for discharge for substantial fault. Substantial fault is defined as "those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer." WIS. STAT. § 108.04(5g). The statute "defines substantial fault broadly," but "the legislature did not disqualify every employee who commits such errors from receiving unemployment benefits." ***Operton***, 375 Wis. 2d 1, ¶36.

¶43 In this case, I would conclude that Wozniak was not discharged for substantial fault because Wozniak had no reason to believe that her acts would violate a reasonable requirement of her employer. As has been repeatedly stated, there is no dispute that Meijer's workplace rules prohibited harassment but also provided no definition of what was considered harassment under the rule. Under a workplace rule with no further guidance on what conduct constitutes harassment—particularly one indicating that a private conversation could lead to harassment—Wozniak would have had no reason to believe that her brief, private conversation with two co-workers would qualify as harassment. Considering the second workplace rule provided by Meijer—that rule cites violent conduct, of which, as noted, Wozniak's conduct is not. Thus, there is no evidence that Wozniak had a reason to believe that she was violating a requirement of her employer in having a brief, private conversation with her co-workers.

¶44 In sum, I would conclude that Wozniak was not discharged for misconduct or substantial fault within the meaning of WIS. STAT. § 108.04(5) or (5g), and I would uphold LIRC's decision to award benefits to Wozniak. Accordingly, I respectfully dissent.

To: Unemployment Insurance Advisory Council
From: Bureau of Legal Affairs
Date: October 22, 2019
Re: US-DOL's 2019 regulations regarding drug testing occupations

Background

State law instructs the Department to create a program to test unemployment insurance applicants for controlled substances.[1] 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)."[2] US-DOL issued regulations listing occupations that regularly conduct drug testing, but those regulations were nullified.[3] US-DOL published its new final rule identifying occupations that regularly conduct drug testing on October 4, 2019.[4] The new final rule is effective **November 4, 2019**.

US-DOL's New Rule

US-DOL's new 2019 rule identifies ten categories of occupations that regularly conduct drug testing:

(a) An occupation that requires the employee to carry a firearm;
(b) An occupation identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested;
(c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested;
(d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested;
(e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested;
(f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested;
(g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested;

[1] Wis. Stat. § 108.133(2).
[2] 42 U.S.C. § 503(l)(1)(a)(ii).
[3] 2017 CONG US SJ 23.
[4] https://federalregister.gov/d/2019-21227.

(h) An occupation specifically identified in Federal law as requiring an employee to be tested for controlled substances;
(i) An occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances;[5] and
(j) 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 for obtaining or maintaining employment in the occupation.

This new US-DOL rule will permit (but not require)[6] states to identify occupations with drug testing as a standard employment eligibility requirement and, accordingly, drug test unemployment applicants whose only suitable work is in those occupations. Subsection 620.3(j) provides that states may identify additional occupations if there is a "factual basis for finding that employers hiring employees in that occupation conduct **pre- or post-hire drug testing** as a standard eligibility requirement for obtaining or maintaining employment in the occupation."[7]

US-DOL's guidance on this new regulation is as follows: "When identifying an occupation that regularly conducts drug testing, the State must identify a factual basis for its finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation. Factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies."[8] US-DOL indicates that it must review and approve any occupation that a state identifies under subsection 620.3(j) for conformity in advance.

[5] The department is unaware of any state law that requires an employee to be tested for controlled substances.
[6] The department is aware of only two other states, Texas and Mississippi, with conforming enabling legislation.
[7] 20 C.F.R. § 620.3(j) (emphasis added).
[8] Federal Register, 84 FR 53037 at 53042.

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 620

RIN 1205–AB81

Federal-State Unemployment Compensation Program; Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants Under the Middle Class Tax Relief and Job Creation Act of 2012

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (DOL or the Department) is issuing this final rule to permit States to drug test unemployment compensation (UC) applicants and to identify occupations that the Secretary of Labor (Secretary) has determined regularly conduct drug testing. These regulations implement the Middle Class Tax Relief and Job Creation Act of 2012 (the Act) amendments to the Social Security Act (SSA), permitting States to enact legislation that would allow State UC agencies to conduct drug testing on UC applicants for whom suitable work (as defined under the State law) is available only in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary). The Secretary is required under the SSA to issue regulations determining those occupations that regularly conduct drug testing. These regulations succeed a final rule issued on August 1, 2016, that Congress rescinded under the authority of the Congressional Review Act (CRA). These regulations, as required under the CRA, are not substantially the same as the rescinded final rule.

DATES: This final rule is effective November 4, 2019.

FOR FURTHER INFORMATION CONTACT: Gay Gilbert, Administrator, Office of Unemployment Insurance, U.S. Department of Labor, 200 Constitution Avenue NW, Room S–4524, Washington, DC 20210; telephone (202) 693–3029 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

President Obama signed the Middle Class Tax Relief and Job Creation Act of 2012 (the Act), Public Law 112–96, on February 22, 2012. Title II of the Act amended 42 U.S.C. 503 to add a new subsection (l) permitting States to enact legislation to require drug testing of UC applicants as a condition of UC eligibility under two specific circumstances: (1) If the applicant was terminated from employment with his or her most recent employer because of the unlawful use of a controlled substance, *see* 42 U.S.C. 503(l)(1)(A)(i); or (2) if the only available suitable work (as defined in the law of the State providing the UC) for that individual is ''in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary).'' *See* 42 U.S.C. 503(l)(1)(A)(ii). States are not required to drug test in either circumstance; the law merely permits States to enact legislation to do so when either of the two circumstances is present. A State may deny UC to an applicant who tests positive for drug use under either of these circumstances. *See* 42 U.S.C. 503(l)(1)(B).

On October 9, 2014, the Department published a Notice of Proposed Rulemaking (NPRM) determining occupations that regularly conduct drug testing for the purposes of 42 U.S.C. 503(l)(1)(A)(ii). *See* 79 FR 61013 (Oct. 9, 2014). After reviewing the comments received, the rule, as proposed in the 2014 NPRM, was modified, and on August 1, 2016, the Department published regulations determining occupations ''that regularly conduct[ ] drug testing'' in the **Federal Register** as 20 CFR part 620 (81 FR 50298). The 2016 final rule established, as occupations that regularly conduct drug testing, only those occupations ''specifically identified in a State or Federal law as requiring an employee to be tested for controlled substances,'' as well as specific occupations identified in Federal regulations and any occupation that required employees to carry firearms. *See* former 20 CFR 620.3 (81 FR 50298). It became effective on September 30, 2016.

On March 31, 2017, President Trump signed a joint resolution of disapproval under the authority of 5 U.S.C. 801(b), CRA (5 U.S.C. 801 *et seq.*), Public Law 104–121. Section 801(b) provides that a disapproved rule shall not take effect and that such a rule may not be reissued in substantially the same form unless authorized by Congress. Consistent with this law, the Department published the notice of revocation of the regulations in the **Federal Register** at 82 FR 21916 (May 11, 2017).

Because 42 U.S.C. 503(l) was not repealed or amended following the resolution of disapproval, the statute continues to require the Secretary to issue regulations to enable the determination of occupations in which drug testing regularly occurs. To comply with both the mandate to issue regulations to enable the determination of occupations in which drug testing regularly occurs, and the CRA prohibition on reissuing the rule ''in substantially the same form,'' on November 5, 2018, the Department issued a new NPRM substantially departing from the rescinded final rule. *See* 83 FR 55311.

In this final rule, the Department implements a more flexible approach to the statutory requirement that is not substantially the same as the rescinded 2016 final rule, enabling States to enact legislation to require drug testing for a far larger group of UC applicants than the previous final rule permitted. This flexibility recognizes the diversity of States' economies and the different roles of employer drug testing across the States. The Department has determined that imposing a nationally uniform list—like the one-size-fits-all approach that the Department attempted in the disapproved 2016 rule—does not fully effectuate Congress' intent regarding what constitutes employer drug testing in an occupation. Employers exercise a variety of approaches and practices in conducting drug testing of employees. Some States have laws that impose very minimal restrictions on employer drug testing of employees, while other States have very detailed and prescriptive requirements about what actions the employer may take; this means occupations may be regularly drug-tested in some States, but not in others. This diversity among States also renders an exhaustive list of such occupations impractical. This final rule lays out a flexible standard that States can individually meet under the facts of their specific economies and practices. Its substantially different scope and fundamentally different approach satisfies the requirements of the CRA, while still meeting the requirement of 42 U.S.C. 503(l)(1)(A)(ii) to issue regulations addressing what occupations regularly conduct drug testing.

When developing the previous proposed rule published in 2014, the Department consulted with a number of Federal agencies with expertise in drug testing to inform the proposed regulations. Specifically, the Department consulted with the

Substance Abuse and Mental Health Services Administration (SAMHSA) in the U.S. Department of Health and Human Services (HHS); the U.S. Department of Transportation (DOT); the U.S. Department of Defense (DOD); the U.S. Department of Homeland Security (DHS); DOL's Bureau of Labor Statistics (BLS); and DOL's Occupational Safety and Health Administration (OSHA). The Department consulted these agencies because they have experience with required drug testing. DOD and DHS deferred to SAMHSA for interpretation of the drug testing requirements, and the Department gave due consideration to the SAMHSA guidance when developing the 2014 proposed rule.

II. Summary Discussion of the Final Rule

The rule implements the statutory requirement that the Secretary issue regulations determining how to identify ''an occupation that regularly conducts drug testing'' for the purposes of permitting States to require an applicant for UC, for whom suitable work is only available in an occupation that regularly drug tests, to pass a drug test to be eligible for UC.

In this final rule, the Department takes a fundamentally different approach to identifying these occupations than it did in the previous final rule that Congress later rescinded. The list of occupations in the 2016 final rule that ''regularly'' conduct drug testing was limited to certain specifically listed occupations and those in which drug testing is required by Federal or State law. In this final rule, the Department has expanded that list in light of the congressional disapproval of the 2016 final rule. It expands the consideration of what occupations regularly conduct drug testing by accounting for significant variations in State practices with respect to drug testing. An occupation that regularly drug tests in one State may not regularly test in another, making a national one-size-fits-all list impractical and infeasible, and therefore inappropriate. Thus the Secretary has determined in this rule to include in the list of occupations that regularly conduct drug testing those occupations for which each State has a factual basis for finding that employers in that State conduct drug testing as a standard eligibility requirement for employing or retaining employees in the occupation. This new addition provides substantially more flexibility to States and recognizes that, in some States, drug testing is regularly conducted in more occupations than were initially included in the 2016 final rule.

This final rule also provides definitions of key terms. In particular, for the purpose of determining occupations that regularly test for drugs, this rule defines an ''occupation'' as a position or a class of positions with similar functions or duties. While the Department considered adopting a specific taxonomy of occupations, such as the Standard Occupational Classification (SOC), this rule does not do so, in order to provide flexibility to States to choose an approach that best matches its workforce. For further explanation, see the preamble discussion related to § 620.3.

In this rule, the Department is adopting the finding in the 2016 Rule that any occupation for which Federal or State law requires drug testing is among those that are drug tested ''regularly.'' The Department recognizes that Federal and State laws may evolve in identifying which positions or occupations are required to drug test. Thus, this rule allows for occupations identified in future Federal or State laws as requiring drug testing to be occupations that States will be able to consider for drug testing of UC applicants.

This rule also includes a section on conformity and substantial compliance.

Finally, this final rule includes minor changes from the proposed rule to add clarity. Specifically, changes were made to the rule text in the introductory text of section 620.3 and in paragraphs (b) through (g) of that section.

III. Summary of the Comments

Compliance With the Congressional Review Act

Comment: The Department received one comment regarding the CRA and the Department's initiation of new rulemaking. This commenter asserted that the NPRM is inconsistent with the CRA prohibition in 5 U.S.C. 801(b)(2) because that provision, according to the commenter, ''forbids the executive branch from re-regulating the same matter without additional legislation.''

Department's Response: The commenter misunderstands the prohibition in 5 U.S.C. 801(b)(2). That provision does not prohibit re-regulating ''the same matter;'' rather, it prohibits issuing a regulation on the same matter that is ''substantially the same'' as the rescinded regulation.

Section 801(b)(2) provides, in relevant part, that a [disapproved] rule may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. It is clear from a plain reading of this provision that a reissued or new rule on the same subject is permitted provided that it is not substantially the same. Further, the legislative history for Public Law 115–17 demonstrates Congressional intent that the Department issue a new rule permitting drug testing for a broader scope of occupations than the rescinded rule permitted. *See, e.g.,* 163 Cong. Rec. H1200–01 (Feb. 15, 2017) (Rep. Brady, describing the eventually-rescinded rule as ''incredibly narrow,'' stated that it ''ignored the intent of Congress,'' and noted that a comment was submitted by the House Ways and Means Committee during the rulemaking process calling for the Department to issue a broader rule).

The Department looks to the plain meaning of the term ''substantially.'' The Merriam-Webster Dictionary defines ''substantial,'' the adjective form of the adverb ''substantially,'' as ''being largely but not wholly that which is specified.'' The Oxford English Dictionary provides two slightly different definitions of ''substantially:'' (1) ''[t]o a great or significant extent;'' and (2) ''[f]or the most part; essentially.'' These definitions suggest that a rule is ''substantially the same'' where it is for the most part the same as the prior rule. The changes in this rule clear the bar. The scope of occupations that ''regularly conduct drug testing'' is the central issue, and the change in scope here is a significant change to the previous final rule. Thus, a rule that substantially broadens the list of occupations that ''regularly conduct[ ] drug testing'' clearly is not ''in substantially the same form'' as the much more restrictive final rule that Congress rescinded. Further, there is very little legislative history regarding the CRA interpreting what is meant by a rule ''reissued in substantially the same form,'' or a ''new rule'' that is ''substantially the same,'' and the courts have not ruled on the matter.

In the NPRM, the Department proposed a substantially different and more flexible approach to the statutory requirements than the rescinded final rule, enabling States to enact legislation to require drug testing for a larger group of UC applicants than the previous final rule permitted. The proposed rule's substantially different scope and fundamentally different approach satisfies the requirements of the CRA that the Department not reissue a rule that is ''substantially the same'' as the

rule disapproved by Congress. Thus, no changes have been made to the rule text as a result of the comment.

Additional Comments Received on the Proposed Rule

The analysis in this section provides the Department's responses to public comments received on the proposed rule. If a section or paragraph that appeared in the proposed rule is not addressed in the discussion below, it is because the public comments submitted in response to the proposed rule did not substantively address that specific section, or that no comments were received on that section or paragraph; thus, no changes have been made to the regulatory text. Further, the Department received a number of comments on the proposed rule that were outside the scope of the proposed regulations. Accordingly, the Department offers no response to such comments. These comments expressed support for or opposition to drug testing in general, discussed personal narratives, or were opinions on marijuana legalization.

The Department's proposed rule to implement 42 U.S.C. 503(l)(1)(A)(ii) was published on November 5, 2018 (83 FR 55311). During the 60-day public comment period, the Department received a total of 211 public comments on the proposed rule. Of those, 56 comments were deemed substantive, and three were duplicates. The Department, in the NPRM, sought comments on the entirety of the proposed rule, in addition to specific areas where the Department solicited comments, as noted below. The comments of general application received in response to the solicitation have been grouped by subject matter and are discussed below. No changes have been made to the rule text as a result of any of the comments received.

General Comments

Comments: Several commenters voiced support for the proposed rule as a means to help prevent fraud and waste, and to ensure a more efficient unemployment insurance (UI) program.

Department's Response: The issues raised by the comments point to an important issue for the Department; that is, the integrity of the UI program. This rule and 42 U.S.C. 503(l)(1)(A) provide a means of ensuring continued integrity by enabling States to enact laws that will bolster their findings that a claimant is able and available for work as required by Federal law and, therefore, eligible for benefits.

Comments: A number of commenters asserted that drug testing should be mandatory to receive unemployment benefits, or any government benefit. These commenters asserted that if job applicants and employees are required to undergo drug testing for certain occupations, it stands to reason that individuals seeking unemployment benefits or any form of government assistance should be drug tested as well.

Department's Response: The specific language in 42 U.S.C. 503(l)(1)(A) limits States' authority to test UC applicants for drugs to only two circumstances: Where the individual was fired from his or her last employer for testing positive for drugs; or where suitable work is only available in an occupation that regularly tests for drugs. Thus, the Department is limited in these regulations to implementing the specific terms of the statute, and makes no change to the final rule.

Comments: Several commenters asserted that the drug testing permitted by the NPRM is inconsistent with the prohibition against unreasonable searches in the Fourth Amendment to the U.S. Constitution. The objections cited Federal court decisions that have struck down mandatory drug testing as a condition of benefits under the Temporary Aid to Needy Families program in *Lebron* v. *Secretary of Florida, Department of Children & Families,* 772 F.3d 1352 (11th Cir. 2014), and as a condition of candidacy for elected office in *Chandler* v. *Miller,* 520 U.S. 305 (1997). One commenter asserted that the proposed rule would be ''saddling states with the prospect of costly litigation,'' and that it ''would leave states wide open to likely legal challenges in which most courts would rule against the states.'' Another commenter, citing *Chandler* v. *Miller,* above, asserted that ''a suspicion-less drug test can only be Constitutional if the Government shows a 'special need' to conduct testing,'' and that the ''proposed regulation makes no attempt to limit the State's use of this authority to Constitutional boundaries of a 'special need.' '' A commenter also asserted that the Department, ''as administrator of the Federal-State UI system, has a responsibility to foster compliance with all applicable Constitutional and statutory requirements'' and ''should not issue regulations that specifically authorize drug testing that would clearly violate the Fourth Amendment.''

Most commenters acknowledged that any possible Constitutional issues would arise from inappropriate State implementation of drug testing, rather than from the regulations themselves. For example, several commenters (in identical or nearly identical language) stated:

> The proposed regulation does not attempt to limit the State's use of this authority to drug test UI applicants to Constitutional boundaries. The previous version of this regulation may have passed Constitutional muster because of its close adherence to the language of the authorizing statute. However, in this NPRM, the Department's open-ended invitation to impose drug testing on applicants for unemployment compensation based on a standardless exercise in alleged fact-finding opens the door to widespread application of this authority in a manner in clear violation of the Fourth Amendment.

Department's Response: As the comments acknowledge, the NPRM itself did not conflict with the Fourth Amendment. The NPRM merely proposed adding a provision permitting a State to identify additional occupations in that State where employers ''regularly'' require drug testing as a condition of employment, provided that the State has a factual basis for doing so; the proposed rule did not mandate that States engage in drug testing, and the proposed rule did not relieve the States from the responsibility to ensure that whatever practices they adopt meet Constitutional requirements. Thus, the NPRM did not require any action by States that would conflict with the Constitution, nor did it grant States authority to implement the rule in a way that would not meet Constitutional requirements.

In granting broader flexibility to States to identify occupations that regularly test for drugs in the State where there is a factual basis for doing so, the Department neither encourages nor discourages drug testing as a condition of UC eligibility. The flexibility granted is in keeping with the nature of the UC system as a Federal-State partnership that grants broad discretion to States to implement their UC programs. Granting States broader flexibility to implement drug testing in occupations that regularly test for drugs in their particular State does not violate the Fourth Amendment, and States that choose to drug test under this rule are responsible for implementing drug testing in a manner consistent with Constitutional requirements. Accordingly, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters asserted that some individuals could have difficulty accessing testing services, for a variety of reasons: Distance to testing services and lack of transportation, particularly in rural areas; lack of childcare; and lack of income for transportation.

Department's Response: The Department issued Unemployment Insurance Program Letter (UIPL) No.

2–16 (October 1, 2016) to ensure both physical and meaningful access to the UC program. As a result, State UC agencies are already required to ensure access to services, a requirement that will also cover drug testing under this rule. Thus, the Department has not made any changes to the rule as a result of these comments.

Comments: Several commenters asserted that the drug testing provision in 42 U.S.C. 503(l)(1)(A)(ii) would add unfair and unnecessary hurdles to receipt of UC, and will increase harm to workers and families already struggling to meet basic needs. Still others stated that government, and in particular the Department, should be focused on helping more individuals obtain jobs and on protecting workers by addressing challenges to the unemployment insurance system before the next recession. Other commenters urged the Department to withdraw the proposed rule, with one commenter asserting that the Department should follow the clear intent of 42 U.S.C. 503(l)(1)(A)(ii).

Department's Response: The purpose of this regulation is to implement 42 U.S.C. 503(l)(1)(A)(ii) permitting States to enact legislation providing for drug testing of UC applicants if the applicant ''is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]'' This rule implements the statute and assists States in determining that individuals are able and available for work, and can accept work when it is offered in their occupations that regularly conduct drug testing.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Several commenters expressed concern that this regulation would adversely affect low-wage workers, low-income communities, and people of color. Among those commenters, one specifically addressed the wage gap between white males and black males, white women and black women, and white men and women and Latinos and Latinas.

Department's Response: The purpose of this rule is to implement the provisions of sec. 2105 of the Middle Class Tax Act (the Act), which amended sec. 303 of the Social Security Act (SSA) to add sec. 303(l)(1)(A), permitting States to drug test UC applicants in the specified limited circumstances.

This rule is not designed to negatively impact any specific demographic among applicants for UC. It permits States to conduct drug testing of UC applicants for whom suitable work is available only in an occupation that regularly conducts drug testing. States that choose to drug test applicants under the rule are responsible for implementing the drug testing program in a manner that does not result in discrimination against protected classes.

States' UI programs remain subject to sec. 188 of the Workforce Innovation and Opportunity Act and 29 CFR 38.2(a)(2), so they are prohibited from discriminating against UC applicants on the bases of, among other protected characteristics, race, color, sex, national origin, and disability. *See* 29 U.S.C. 3248; *see also* 29 CFR 38.2(a)(2) and 38.5. Section 188's prohibition on discrimination extends to policies and procedures that have discriminatory effects as well as those that have discriminatory purposes. *See, e.g.,* 29 CFR 38.6, 38.11, and 38.12. States are required to collect and maintain data necessary to determine whether they are in compliance with the provisions of sec. 188. *See* 29 CFR 38.41.

The Department previously made clear to the States in UI Program Letter (UIPL) No. 2–16 (published October 1, 2015) that nondiscrimination laws applicable to State UC agencies prohibit discrimination based on both disparate treatment and disparate impact.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters expressed concern that drug testing UC applicants stigmatizes both unemployment insurance use and individuals who use or are addicted to drugs. Some of those commenters suggested that the rule is an attempt to demonize UC applicants, or that requiring drug testing of UC applicants would be arbitrary and would result in humiliating UC applicants. One commenter suggested the rule require States to create funded programs for drug treatment.

Department's Response: The purpose of this regulation is to implement the provisions of 42 U.S.C. 503(l)(1)(A)(ii) to permit States to test UC applicants for drugs if the applicant ''is an individual for whom suitable work . . . is only available in an occupation that regularly conducts drug testing[.]''

This rule, and the enabling statute, do not permit states to indiscriminately test UC applicants for illegal drug use. Rather, only UC applicants who meet the statutory threshold set out above may be tested. Those applicants should, based on prior employment in such an occupation, already know that pre-employment or post-hire drug testing is a requirement for the occupation in which suitable work is available to them. Further, such testing is related to the individual being able to and available for work.

There is no intent to stigmatize employment in these occupations or receipt of UI benefits, and no stigma should attach simply because the State UI agency conducts such a test as a condition of the applicant being able and available for work in occupations which regularly conduct drug testing. Nor is such testing intended to demonize or humiliate the UC applicant for whom drug testing is a usual condition of hire, or continued employment, in those occupations that regularly test employees for drugs, either pre-hire or post-hire. Thus, the Department makes no change to the final rule based on these comments.

As noted in the preamble discussion related to § 620.4, below, States may provide information on the availability of treatment for drug use or addiction if they so choose, but may not use federal UI administrative funding to do so.

Discussion of Comments by Section

Comments Regarding § 620.2 Definitions

The NPRM proposed definitions for several key terms used in the proposed regulatory text. These are: Applicant, controlled substance, occupation, suitable work, and unemployment compensation. The Department received no comments on the definitions of occupation, suitable work, and unemployment compensation. Accordingly, the definitions of these terms are adopted in the final rule as proposed.

Definition of Applicant

Comment: The Department received one comment agreeing with the analysis in the Preamble that limited the definition of ''applicant'' to an individual filing an initial claim for unemployment compensation. The commenter asserted that the definition adopts an interpretation of ''applicant'' that has been consistently applied by both the previous and current administrations at DOL, and which appears well supported by analysis of the language of various statutory provisions relating to initial applications for unemployment compensation and claimants for continuing compensation. There were no comments opposed to the proposed definition. Accordingly, the definition of ''applicant'' is adopted in the final rule as proposed.

Definition of Controlled Substance

With regard to the definition of ''controlled substance,'' the Department,

as required by statute (*see* 42 U.S.C. 503(l)(2)(B)), adopted the definition of that term as set forth in sec. 102 of the Controlled Substances Act (Pub. L. 91–513, 21 U.S.C. 802). As explained in that Act, ''[c]ontrolled substance'' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.* The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Comments: The Department received comments related to the proposed definition of ''controlled substances,'' which includes marijuana, and its impact on States with laws that decriminalize the use of marijuana for medical and/or recreational purposes.

One commenter asserted that the Department was acting arbitrarily and capriciously by defining ''controlled substances'' as that term is defined in Federal law in light of the fact that various States have decriminalized the possession of marijuana for medical and/or recreational use. By adopting such a definition, the commenter asserted, some States may ''deny unemployment compensation benefits to an individual using marijuana for either medical or recreational purposes that are not in violation of any State law.'' This commenter also noted that the NPRM preamble did not even discuss marijuana decriminalization in some States ''thus failing the [Administrative Procedures Act] APA requirement that an agency explain the basis for its actions.'' Another commenter argued that ''the implementation of drug testing requirements for UI applicants as endorsed by this proposed rule would disproportionately punish individuals who use marijuana in compliance with State law.''

Several commenters expressed concerns that the proposed rule would exacerbate the existing conflict between Federal and State laws regarding marijuana use and would disproportionately punish individuals whose marijuana use is decriminalized in their respective States. These commenters added that the proposed rule ''could create issues with states [sic] rights and workers who live in states with legal marijuana but work in states without it.'' As a solution, a couple of commenters suggested that States could provide waivers to those UC claimants who live in States that have decriminalized the use of marijuana, noting that the United States Army has adopted such a solution.

Department's Response: Proposed § 620.4(a) of the NPRM provides, in relevant part, that ''[s]tates may require drug testing for unemployment compensation applicants, as defined in sec. 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation . . . . . '' Proposed § 620.2 defines ''controlled substances'' consistent with how that term is defined in sec. 102 of the Controlled Substances Act (21 U.S.C. 802).

The Department has made no changes to the final rule in response to these comments. As noted above, the statute requires that the Department define ''controlled substance'' according to a provision in a Federal statute, the Controlled Substances Act. Thus, regardless of how State laws treat marijuana, the Department is statutorily required to adopt the definition of ''controlled substances'' as set forth in the Controlled Substances Act. *See* 42 U.S.C. 503(l)(2)(B). The Department does not have the authority to adopt a definition of ''controlled substances'' different from what Congress expressly provided. Furthermore, the Department has no statutory authority to prohibit a State from testing for a substance that is a ''controlled substance'' under Federal law if the other statutory requirements to allow testing are met. This is the case regardless of whether the State has partially or wholly decriminalized marijuana possession or use, or whether an interstate UC claim is filed by a claimant who resides in a State where marijuana is decriminalized and seeks work in another State where it is not decriminalized.

We also note proposed § 620.4(a) is permissive in nature and not mandatory. It provides that a State may drug test, as a condition of UC eligibility, ''for the unlawful use of one or more controlled substances'' as defined in Federal law. The plain language of this regulation allows drug testing; it does not require it. Further, it permits States to omit any controlled substances they so choose from drug testing. Thus, States that choose to drug test as a condition of UC eligibility are permitted to omit marijuana, or any other controlled substance(s), from drug testing. Accordingly, the rule does not conflict with any State laws that partially or wholly decriminalize marijuana, nor can it resolve any conflicts of law within or between States. Regarding the comments that States provide waivers to interstate claimants who live in States that have decriminalized marijuana but work in States that have not, the rule already provides sufficient flexibility for States to exempt claimants from drug testing in such circumstances, or to omit marijuana from drug testing altogether. However, the Department has no authority to require States to provide such waivers.

Comments Regarding § 620.3 Occupations That Regularly Conduct Drug Testing for Purposes of Determining Which Applicants May Be Drug Tested When Applying for State Unemployment Compensation

In this regulation, the Department recognizes both the historic Federal-State partnership that is a key hallmark of the UC program, as well as the wide variation among States' economies and practices. This rule recognizes the need for States' participation in identifying which occupations regularly conduct drug testing in each State, and whether additional occupations should be included. Section 620.3 describes a number of different occupations that the Department has determined regularly drug test. States may use this list, in addition to the broader criterion, in identifying occupations for which drug testing is regularly conducted, based on the criteria set by the Secretary under these regulations. A minor edit to the introductory text of this section, inserting, ''enact legislation to,'' more closely aligns the regulation with the statutory text, but does not change the substance of the requirements in this section.

Paragraph (a) includes the class of positions that requires the employee to carry a firearm as an ''occupation'' that regularly drug tests.

Paragraphs (b)–(g) include various specific occupations that were listed in the previous rule as ones that regularly require drug test, since various Federal laws require drug testing of employees in each of these occupations. This rule identifies in paragraphs (b)–(g) six specific sections of regulations issued by several agencies of DOT and the Coast Guard that identify classes of positions that are subject to drug testing. Any position with a Federal legal requirement for drug testing was determined to constitute an occupation that regularly conducts drug testing. However, this final rule departs from the NPRM by removing the parentheticals describing the categories of occupations. This is because the parentheticals did not fully describe the regulations cited and because the regulations are subject to amendment that could render the descriptions obsolete.

Paragraphs (h) and (i) include in the list of occupations that regularly

conduct drug testing any occupation that is required to be drug tested under any Federal law or under the law of the State seeking to drug test UC applicants in that occupation. The law need not currently exist; future Federal or State law requiring drug testing is included under this provision. As with the previous six sections, any position with a legal requirement for drug testing has been determined to constitute an occupation that regularly conducts drug tests.

Paragraph (j) adds to the list of occupations that regularly drug test a significant provision not contained in the previous final rule, and that fundamentally transforms the regulatory approach and scope of the proposed regulations. This fundamental change satisfies the requirements of the CRA and allows the Department to fulfill its continuing statutory obligation to regulate. Paragraph (j) provides that where there is a factual basis for doing so, a State may identify additional occupations in that State which require pre-hire or post-hire drug testing as a standard eligibility requirement. This provision reflects the Secretary's determination that, because there is wide variation among State economies and employment practices, it is not practicable to exhaustively list all occupations that ''regularly conduct[ ] drug testing.'' Instead, the Department sets out a Federal standard by which it is possible to assess—under Federal, not State, law—whether a State has a sufficient basis to require drug testing of a particular class of UC applicants. The Federal standard is as follows: When identifying an occupation that regularly conducts drug testing, the State must identify a factual basis for its finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation. Factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies. This proposed standard effectuates the plain meaning of the Act's authorization of drug testing where suitable work ''is only available in an occupation that regularly conducts drug testing.'' Section 303(l)(1)(A)(ii). Once this final rule takes effect, the Department will review States' factual bases through reports authorized under 42 U.S.C. 503(a)(6) and 20 CFR 601.3; these reports are currently made through States' submissions of ETA Form MA 8–7 (OMB control number 1205–0222) prior to implementation by the State or any changes to State UI laws. Such reports would similarly be submitted prior to implementation of drug testing of applicants in occupations the State identifies as meeting the Federal standard described above.

The NPRM requested comments on the proposed standard and whether the Department should instead impose a heightened standard of evidence to demonstrate that an occupation is one that regularly conducts drug tests and, therefore, is an occupation for which drug testing is a standard eligibility requirement. The NPRM sought comments also on what heightened level of evidence of drug testing would be appropriate, if commenters believed a different standard than what was proposed in the NPRM should be used.

Comments: The Department received a number of comments regarding the proposed standard, many asserting that the standard was vague. Several commenters favored a heightened standard of evidence, arguing that the standard in the NPRM is insufficient. A few commenters also recommended an alternative standard.

One commenter argued that the proposed rule provides ''little to no guidance concerning how the determination'' of occupations is to be made. The commenter asserted that ''the regulatory text merely requires the State to have an undefined 'factual basis,' '' and that the NPRM preamble ''offers little guidance with its undescriptive and nonexclusive list of vague examples ranging from reports of trade and professional organizations to a virtually standard-less 'other studies'.'' The commenter asserted that this ''is the polar opposite of a determination under DOL regulations.''

Another commenter stated that ''we the regulated community have no idea what the standard is that DOL has proposed, so we don't know how to assess what would be 'heightened' standard.'' The commenter added that ''[a]t the least, a standard should require facts and conclusions that would survive a *Daubert* challenge to an expert witness in federal court.''

Department's Response: The Department does not consider the standard of evidence in the proposed rule to be vague or overly broad. The Department also disagrees with the assertion that the proposed rule provides insufficient guidance on how the determination of occupations must be made. Proposed § 620.3, like the rescinded final rule, contained a list of specific occupations in paragraphs (a) through (g), and a provision permitting drug testing for UC eligibility of any other occupation required to be drug-tested as a condition of employment under Federal or State law in paragraphs (h) and (i). Proposed paragraph (j) was added to account for any variations that may exist from State to State with regard to occupations that regularly conduct drug testing, but where such testing is not required by law. As described elsewhere, the proposed rule required a factual basis for identifying such occupations, and the Department will receive and review such identifications. Acknowledging these variations across States is consistent with the flexibility granted to States in the Federal-State partnership that Federal UC law broadly embraces.

Regarding the portion of the comment suggesting that DOL adopt a standard that would at least survive a *Daubert* challenge, the comment offered no clear alternative standard of evidence. A *Daubert* challenge, originating from the court decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), which established criteria for the admissibility of scientific expert testimony, refers to the process for challenging the validity and admissibility of expert testimony. The expert is required to demonstrate that his/her methodology and reasoning are scientifically valid and can be applied to the facts of the case. However, *Daubert* does not provide an administrable substantive standard of evidence, or a clear level of evidence, that the Department or a State can apply in the context of this regulation.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Many commenters argued that the Department should use submissions from States to narrowly define the relevant occupations into a nationally applicable list.

Department's Response: The Department finds that using submissions of information from States to produce a nationally applicable list of occupations is not administratively feasible. It is extraordinarily difficult to develop a nationally applicable list of occupations that regularly drug test, beyond those that are legally required, while leaving flexibility to account for differences between practices in different States to allow for full implementation of the Congressional mandate. An occupation that is regularly drug-tested in some States might not be regularly drug-tested in others; a national list might not capture this discrepancy, and, indeed, could result in even broader drug testing than is consistent with the statute. Therefore, the Department declines this recommendation and makes no changes

to the final rule as a result of these comments.

Comment: One commenter argued that the Department should impose ''quality standards'' in the States' gathering of information for submissions to the Department on occupations that regularly drug-test; however, the commenter did not specify any recommended ''quality standards.''

Department's Response: The Department finds it is not administratively feasible to provide more definite standards in the rule text while maintaining States' flexibility to provide factual information from a wide range of sources. The Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will provide oversight of States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary. The Department makes no changes to the final rule in response to this comment.

Comment: A commenter criticized abandoning the rescinded regulations' reliance on SOCs established by the Bureau of Labor Statistics (BLS), because these codes ''are used in a variety of other setting [sic] for other uses such as establishing prevailing wages,'' which the commenter asserted undermined a statement in the NPRM that the BLS SOCs ''may not provide the best mechanism to support states in identifying occupations in which employers regularly drug test.''

Department's Response: That the proposed rule does not rely on BLS SOCs does not mean States may not rely on SOCs to identify occupations. Indeed, the rescinded final rule did not define occupations by BLS SOCs, and the NPRM in 2014 that preceded the rescinded final rule (which left unchanged the NPRM definition of ''occupation'') explained that the reliance on a ''class of positions'' in the definition was in contrast to reliance on single occupations identified in the BLS SOCs. The reference to BLS SOCs in the rescinded final rule was merely illustrative, not a requirement to use the system in determining occupations. As in the rescinded final rule, the absence of BLS SOCs in the proposed rule does not discourage States from embracing SOCs. However, the Department does not find it necessary or desirable to impose the SOCs established by BLS, as it may not always be the best system through which to classify occupations for the purposes of these regulations.

Therefore, the Department makes no changes to the final rule in response to this comment.

Comment: A commenter cited the Conference Report accompanying the enactment of the statutory provision on UC drug testing, noting the Conference Report stated that drug testing is permitted under 42 U.S.C. 503(l)(1)(A)(ii) only where passing a drug test is ''a standard eligibility requirement.'' The commenter argued that drug testing is not a standard eligibility requirement in any occupation unless drug testing is conducted for every single employee in that occupation. The commenter argued that a requirement that all employees in an occupation be drug tested would be consistent with the treatment of employees in virtually all of the other categories in proposed § 620.3 with regard to drug testing.

Department's Response: The Department disagrees that ''a standard eligibility requirement'' necessarily requires that all employers drug test all employees in an occupation in order to include the occupation as among those subject to drug-testing. Such an interpretation is not required by the statute or the Conference Report language cited by the commenter. An occupation that ''regularly'' drug tests, or for which drug testing is ''a standard eligibility requirement,'' need not uniformly require testing under the plain meaning of either term. The plain meaning of ''standard'' does not support the commenter's recommendation. The Merriam-Webster Dictionary defines ''standard'' in the most relevant definition as ''regularly and widely used.'' The Oxford Dictionary in the relevant definition describes ''standard'' as something ''used or accepted as normal or average.'' The Cambridge Dictionary defines ''standard'' as ''usual or expected.'' None of these definitions requires that a practice be universal in order to be ''standard.'' Thus, the Department does not find a ''standard eligibility requirement'' need be universal in order to be standard. To be ''regular'' or ''standard'' it is sufficient that drug testing in an occupation be usual. While the other categories listed in this regulation do cover occupations in which drug testing is required by all employers, that is not the statutory requirement.

Therefore, the Department makes no changes to the final rule in response to this comment.

Comments: Commenters also suggested that the Department consider the reason an occupation regularly tests employees and whether that reasoning has a ''nexus with unemployment in general or with whether the claimant is able and available for work in particular.''

Department's Response: The Department did not make changes in response to the comments suggesting that the standard should connect drug testing to unemployment. The purpose of the standard is to implement the requirements of 42 U.S.C. 503(l). Section 503(l) of 42 U.S.C. does not require a connection between unemployment and drug testing, only that it be established that an occupation regularly conducts drug testing. However, though no such connection is required, if the only suitable work available to an individual is in an occupation that regularly conducts drug testing, there is a strong connection between being able to pass a drug test and being able and available for work as required by 42 U.S.C. 503(a)(12). Under the final rule, the Department intends to give States the flexibility to consider these reasons in their particular circumstances.

Comments: Several commenters expressed a concern that the proposed standard set forth in the NPRM for identifying occupations that regularly conduct drug testing ''is rife with potential for abuse and for inappropriate motives.'' These commenters suggested that the Department should require States to provide more information about the fact-finding conducted than is specified in the proposed rule. In general, these commenters did not specify the abuse or inappropriate motives that would be risked, nor did they recommend an alternative heightened standard for the Department to consider. A few of the commenters elaborated that drug test providers contracted by States might have an inappropriate financial self-interest to encourage broader drug testing by States than is merited by evidence, which could inappropriately influence the decisions of policy makers to authorize broad drug testing.

Department's Response: The Department did not make changes in response to these comments. These assertions are unrelated to the requirements of 42 U.S.C. 503(l), and issues such as these, if they arise, will be addressed administratively by the Department's monitoring and oversight of § 620.3(j).

Comments: Several commenters argued that the proposed rule could lead, in various ways, to discrimination. One commenter argued that the proposed standard could allow States to ''depress equal access to earned benefits,'' and that the Department should take steps to minimize this

possible consequence by ''working with states to make sure working people have fair access to earned benefits.'' However, this commenter did not recommend an alternative standard of evidence. Relatedly, one commenter argued for heightened standards of evidence because drug testing ''should not be permitted as a blanket for all occupations which could lead to discriminatory implementation.'' This commenter also did not specify an alternative standard of evidence. Another commenter argued that ''[t]he degree of flexibility this regulation gives to states has tremendous potential to target occupations that are more likely to employ working people of color.'' Similarly, another commenter argued that it is ''problematic'' that each ''state can decide which professions to routinely drug test,'' because the ''tendency is to administer drug tests to industries which disproportionately employ people of color.'' These commenters also did not recommended a specific alternative standard.

Department's Response: Commenters' concerns relate to a State's implementation of paragraph (j), rather than to the proposed Federal standard for drug testing by States. This particular provision does not provide States with unfettered discretion to drug test UC applicants and it must be viewed in connection with the other requirements of this rule, namely that drug testing of UC applicants in general is not permitted unless the only suitable work for an applicant is in an occupation that regularly conducts drug testing. As discussed above, States' UI programs are subject to sec. 188 of the Workforce Innovation and Opportunity Act, and States are prohibited from discriminating against UC applicants on the bases of the protected characteristics listed above, which include race and color. Also, States will be subject to Department monitoring and oversight of occupations to be drug tested under proposed § 620.3(j). Therefore, the Department made no changes to the final rule in response to these comments.

The Department also asked for comments on any suggested additions, deletions, or edits to the list and descriptions of occupations that regularly conduct drug testing, or on the scope of the latitude accorded to States in the proposed approach.

Comments: The Department received a number of comments that proposed paragraph (j) constitutes an unlawful delegation to the States of the Department's authority to determine which occupations regularly conduct drug testing. In general, commenters advanced two types of arguments toward this conclusion. One was that Federal law prohibits a Federal agency from delegating its authority to an outside entity absent clear Congressional authorization to do so. A second argument was that proposed paragraph (j) is arbitrary and capricious under § 706 of the APA.

In support of the unlawful delegation argument, commenters relied on several court decisions that have held that ''[a]n agency [unlawfully] delegates its authority when it shifts to another party almost the entire determination of whether a specific statutory requirement has been satisfied or where the agency abdicates its final reviewing authority.'' *Fund for Animals* v. *Kempthorne,* 538 F.3d 124, 133 (2d Cir. 2008), citing *U.S. Telecom Ass'n* v. *FCC,* 359 F.3d 554, 567 (D.C. Cir. 2004), *and Nat'l Park & Conservation Ass'n* v. *Stanton,* 54 F.Supp.2d 7, 19 (D.D.C. 1999). According to these commenters, paragraph (j) impermissibly shifts the entire determination of which occupations regularly drug test by allowing each State to identify those occupations within its State that regularly drug test without providing guidance concerning how the States should make such determinations.

One commenter noted that ''[w]hile an agency may be able to delegate some amount of 'fact gathering' to an outside party [citing the *U.S. Telecom* court decision above], the grant of authority to States to determine occupations that regularly drug test goes far beyond fact gathering.'' Specifically, the commenter argued that ''[d]etermining how to interpret and define the concept of 'regularly' is the antithesis of fact gathering. It is exercising discretion and policy-making.'' The commenter added—

> [T]he requirement to determine which occupations regularly drug test leaves states with another substantial interpretative task. While ''occupations'' do not drug test, employers drug test and employees are drug tested. Thus, a decision has to be made in interpreting how to determine what to measure. To the extent that this provision can be interpreted to carry out Congressional intent, DOL, not state agencies, must exercise discretion to decide whether an occupation regularly drug tests when measured by the percentage of employers of that occupation drug testing employees in that occupation or when measured by the percentage of employees in that occupation who are drug tested.

Separately, regarding delegation, some commenters asserted that the State UC agencies in their respective States have a pattern of administrative practices that are inconsistent with State and Federal Constitutional requirements. These commenters argued that ''[t]here is no basis whatsoever to assume that state agencies delegated with new administrative authority to deny benefits will use such authority consistent with the U.S. Constitution or the rules and regulations of the Social Security Act.''

Department's Response: The Department disagrees with the comments that the rule improperly shifts to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly determined, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that are regularly drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of § 620.3 allows each State to identify occupations in that State that regularly drug test and relies on each State as a fact-finder with regard to its local circumstances. Furthermore, the Department will review additional occupations identified by the State. Each State will be required to submit for Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement for obtaining or maintaining employment in the State, and the factual bases on which it relied. Thus, contrary to the commenters' assertions, this rule does not abdicate the Department's responsibility to determine the occupations that regularly drug test. It simply allows each State to identify factual bases for finding that additional occupations regularly conduct drug testing in that particular State. Such a grant of limited discretion is lawful, particularly as the Department will retain reviewing authority over the States' identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne,* 538 F.3d 124 (finding that the Fish and Wildlife Service did not abdicate its authority to regulate the takings of migratory birds when it granted limited discretion to state agencies to determine whether the killing of a migratory bird in the agency's State was necessary to prevent the depredation of fish, wildlife, plants, and their habitats in the State's local area); *see also Stanton,* 54 F.Supp.2d at 19 (finding that ''[t]he relevant inquiry'' is whether the Federal agency ''retained

sufficient final reviewing authority'' over the subordinate's actions.)

Finally, regarding some commenters' assertions that a State UC agency might not administer the program consistent with State or Federal Constitutional requirements if given discretion, the Department monitors and exercises oversight of all aspects of all States' UC administration, and works with States to address deficiencies of conformity or substantial compliance with Federal law requirements. Just as with all aspects of oversight of State UC, the Department will monitor States to ensure conformity and substantial compliance with this rule and take appropriate action as necessary.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Separately from the above arguments regarding improper delegation, many commenters asserted that proposed § 620.3(j) is arbitrary and capricious under the APA. One commenter in particular elaborated in detail this argument. This commenter argued that the Department:

> was arbitrary and capricious in adding section 620.3(j) of the NPRM after determining in its 2016 Final Rule that (1) ''whether an occupation is subject to 'regular' drug testing was not chosen as a standard here it would be very difficult to implement in a consistent manner'' and (2) ''we are unable to reliably and consistently determine which occupations require 'regular' drug testing where not required by law.''

See 81 FR 50300 (August 1, 2016).

The commenter continued that the proposed rule provides ''no specific explanation of its change in position on those two statements in the preamble to the 2016 Final Rule,'' as required by law. The commenter made four additional assertions arguing the proposed rule is arbitrary and capricious in its delegation of authority. First, the commenter argued that it is arbitrary and capricious ''to assign responsibility for determining which occupations regularly drug test to States.'' Second, the commenter argued that it is arbitrary and capricious ''to allow States to have inconsistent determinations of which occupations drug test in the face of a Congressional provision clearly calling for one uniform determination on that issue by specifically assigning that responsibility to DOL.'' Third, the commenter argued that it is arbitrary and capricious ''to allow States to individually determine how to interpret the concepts of 'regular' and 'standard eligibility requirement' without [the Department] explaining why . . . [such an approach] was consistent with the statutory requirement that occupations that regularly drug test be determined under regulations issued by DOL and why a uniform application of the drug testing requirements for unemployment compensation applications is not required.'' Fourth, the commenter argued that it is arbitrary and capricious ''to allow States to gather facts concerning which occupations drug test without detailed quality standards setting forth how that fact gathering should be conducted.''

Some commenters argued that the Department failed to set out with any specificity what would constitute a sufficient factual basis for identifying occupations that regularly drug test. These commenters stated that ''[r]eports by trade and professional organizations may reflect initiatives that do not comport with the narrow strictures of [Sec. 303(l)(1)(A)(ii), SSA] and may not establish a 'factual basis' for testing. In addition, allowing 'other studies' provides so little guidance that it is rendered essentially meaningless.'' Commenters added, ''Congress clearly assigned to the DOL, in the plain language of the authorizing statute, the responsibility to define which occupations are covered.''

The commenters argued that sec. 303(l), SSA, was drafted as it was in order ''to limit inappropriate influence in the determination of which working people could be required to take drug tests as a condition of receiving UI.'' Another commenter suggested that proposed § 602.3(j) was subject to potential inappropriate influence, that ''[d]epending on the experience rating system in a state, employers could also be incentivized to adopt new drug testing regimes solely for the purpose of minimizing their liability for unemployment benefits.''

Department's Response: The Department has considered the various assertions that the proposed rule is arbitrary and capricious in violation of the APA and, for the following reasons, disagrees.

First, the assertion that the 2016 final rule has any bearing on this proposal is inconsistent with the CRA. 5 U.S.C. 801(f) provides that ''[a]ny rule that takes effect and later is made of no force or effect by enactment of a joint resolution under sec. 802 shall be treated as though such rule had never taken effect.'' Public Law 115–17 invalidated the 2016 final rule, stating that the rule ''shall have no force or effect.'' As this rule is not an amendment to the prior, rescinded final rule, it is not necessary under the APA to explain the rationale for taking a different approach in this rule than was taken in the 2016 rule.

Second, even if the Department was required to explain why it had changed its earlier position, the argument that the Department did not give an adequate rationale for departing from the rescinded 2016 final rule is inaccurate. By rescinding the previous rule, Congress rejected the approach in the 2016 rule of limiting the standard to occupations drug tested as a condition of employment under State or Federal law. Given the CRA's prohibition on republishing the 2016 rule in substantially the same form and the requirement that the Department promulgate a regulation to implement sec. 303(l) of the SSA, the Department was legally required to adopt a different regulatory approach. The rescinded final rule noted that it rejected the regularity of drug testing in private employment as a standard because it would be very difficult to implement in a consistent manner and that the Department determined that it would be unable to reliably and consistently determine which occupations regularly require drug testing beyond those required by law. In developing its new proposal, the Department, for the reasons explaining proposed § 602.3(j) in the preamble to the NPRM, adopted a standard that overcomes the issues identified by the commenter by utilizing States' expertise to research and identify which occupations drug test regularly in their own States.

Regarding other arguments that the proposed rule is ''arbitrary and capricious,'' first, the proposed rule does not assign responsibility for determining which occupations regularly drug test to States. Rather, under the proposed rule, the Department is leveraging the expertise of the States to identify occupations in which employers regularly drug test in their States, while the Department retains authority to review, monitor, and oversee States' identification of those occupations and the factual bases for their identification. Second, 42 U.S.C. 503(l), by its terms, does not require a determination of occupations which regularly test for drugs in all States; it simply prohibits the Department from interfering with State requirements for drug testing of an applicant in an occupation that regularly conducts drug testing. As mentioned above, the proposed rule is consistent with the rescinded final rule, which also allowed differences across States based on the occupations each State's law required to be drug-tested as a condition of employment. The proposed rule departs from the rescinded final rule, not in

allowing ''inconsistent'' choices of occupations across States, but in whether drug testing must be a State law requirement to consider the occupation one in which drug testing is a regular requirement for employment. Third, it is inaccurate to describe the proposed rule as deferring to States the interpretation of what constitutes ''regular'' drug testing and what constitutes a ''standard eligibility requirement.'' Rather, the proposed rule articulates a Federal standard—the *Secretary's* interpretation of those statutory terms, not the *States'* interpretations—under which States make factual findings, *i.e.,* as the NPRM preamble clearly states, the proposed rule requires States to have a factual basis for identifying additional occupations that regularly conduct drug testing, which is subject to the Department's review. Further, the Department has never required a ''uniform application of the drug testing requirements'' across the States. As noted above, the rescinded final rule also permitted States to drug test different occupations based on what occupations must be drug-tested as a condition of employment under different States' laws. Fourth, there is no requirement that regulations contain specific ''quality standards'' for fact-gathering by States, nor is it arbitrary or capricious for the proposed rule to let the ''factual basis'' standard be fleshed out through Department review of States' particular findings. Rather, this flexible approach is consistent with case law discussed above, and with the Federal-State UC partnership, by which the Department is responsible for monitoring and overseeing broad requirements that States must meet to receive administrative grants, and for employers in a State to receive credits against their Federal unemployment taxes.

Regarding assertions that the proposed rule is arbitrary and capricious because it lacks specificity, and that the Department has deferred the decision-making regarding which occupations regularly conduct drug testing to States, proposed § 620.3(j) does not remove the Department from exercising independent judgment in the determination of occupations. Rather, the NPRM made clear that any ''factual basis'' by a State for identifying an occupation that regularly conducts drug testing is subject to Departmental review. The Department retains authority to find that a State lacks sufficient factual basis to include an occupation it wishes to drug test. Therefore, the Department retains independent judgment.

Finally, regarding incentives to drug test, it is highly unlikely that employers in an occupation will adopt drug testing based upon the distant potential that other employers will adopt testing to result in the occupation being one which regularly requires drug testing in order to reduce their experience rating. Further, as a number of commenters pointed out, Federal funding for administration of the UI program is currently low, and States will have a strong incentive to control the cost of drug testing because they will receive no additional Federal funding for those costs. Thus, these objections are unsupported, and are not a basis to find proposed § 620.3(j) to be arbitrary or capricious.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comment: One commenter expressed that States should be permitted to drug test for occupations that are potentially dangerous or those that regularly involve drug testing, and another commenter stated that drug testing should be limited to those positions with legitimate safety concerns and proper justification for what the commenter characterized as invasive testing.

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Safety concerns can be a reason why drug testing is regularly conducted for some occupations. However, limiting those occupations for which a UC applicant may be tested for drugs to only those where there are safety concerns is inconsistent with the statutory language permitting drug testing where an occupation regularly conducts such testing.

Congress disapproved the earlier regulation implementing 42 U.S.C. 503(l)(1)(A)(ii), which limited testing to those positions or occupations where there are certain safety concerns or where drug testing is required by Federal or State law. Thus, it is clear Congress intended the regulation to reflect a broader interpretation of ''occupations that regularly drug test,'' not a narrower one. As a result, the Department makes no changes to the rule based on this comment.

The Department likewise sought comments on its conclusion that it is impracticable to develop a nationally uniform list of occupations that regularly drug test, given the wide variations in regional economies, employer practices, and in State law.

Comments: One commenter stated that creating a uniform list of occupations that drug test is impractical, and the Secretary, in the alternative, should provide national guidelines for categories of positons for which States may drug test.

Several commenters made statements of support for the promulgation of a nationally uniform list of occupations that regularly drug test, stating that, by not creating one, the Department was not adhering to the authorizing statute or the will of Congress. Commenters stated that the Department was avoiding its responsibility by allowing flexibility, and did not explain how it reached its interpretation of Congressional intent. Commenters asked for these occupations to be defined narrowly, because the occupation must be the only viable option available for the applicant to find new employment. In the absence of a nationally uniform list, one commenter suggested, the Department should keep a list of nationally applicable occupations.

One commenter stated the Department suffered a lack of will to exhaustively catalogue all employment-related drug testing requirements under State laws, and to do so for the benefit of this rulemaking is not beyond the Department's capabilities. The commenter asserted that the Department lacked any ''robust'' evidence to support the asserted impracticality of creating such a list.

Department's Response: The Department considered these comments and maintains that the creation of a nationally uniform list is impractical and will not provide the flexibility needed by States to implement the will of Congress. The Department disagrees with the comments that it improperly shifted to the States the determination of which occupations regularly conduct drug testing. The proposed rule explicitly identified, in paragraphs (a) through (g) of proposed § 620.3, specific occupations that may be drug-tested, thus directly determining many occupations that may be drug tested. Similarly, paragraphs (h) and (i) specify that States may drug test for occupations in which employees are required by Federal or State law to be drug tested. Paragraph (j) of proposed § 620.3 provides States with fact-finding authority to identify occupations that regularly drug test in their own State and relies on each State as a fact-finder with regard to its own localized context. Furthermore, the Department will review any occupations the State identifies and the facts presented to substantiate adding them. Each State will be required to submit for

Departmental review and oversight the occupations that the State finds regularly conduct drug testing as a standard eligibility requirement in the State, and will require the State to submit the factual bases it relied on. Thus, contrary to the commenters' assertions, this rule does not abdicate the Department's responsibility to determine the occupations that regularly drug test. It simply grants States fact-finding authority to find factual bases for identifying additional occupations that regularly conduct drug testing in their own States. Such a grant of fact-finding authority is lawful, particularly as the Department will retain reviewing authority over the States' identification of occupations that regularly conduct drug testing, as well as the authority to take action to ensure conformity and substantial compliance with Federal law requirements. *See Kempthorne,* 538 F.3d 124; *see also Stanton,* 54 F.Supp.2d at 19.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Several commenters expressed support for the Department's determination, stating that it recognized the value and importance of giving flexibility to individual States to identify what type of oversight system is most appropriate for employers and employees, and that State governments and officials are more familiar with the industries and occupations of a State. This will alleviate arbitrary determinations, stated one commenter, by recognizing State officials' power to develop policies pertinent to drug testing in the State. Flexible standards based on State-specific economies, one commenter put forth, means the regulations States enact will ensure effectiveness and consistency within the State. These commenters stated that it would be poor public policy to apply the same standards to vastly different economies. Standards for a State with a large manufacturing base may not be appropriate for a State with a primarily rural economy, stated one of these commenters.

Department's Response: The Department considered these comments and will be maintaining the policies and approaches noted in the commenters' supportive statements.

Finally, the Department asked for comments on its planned approach of using submissions through ETA's Form MA 8–7 as the method for reviewing States' factual bases for finding that employers conduct pre-employment or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in the identified occupation.

Comments: Some commenters asserted that the ETA Form MA 8–7 ''requires too little analysis on the part of the States.'' These commenters stated that the form should require reasoned analysis of attached supporting documentation to address the rationale for drug testing in specific occupations and whether that reasoning should extend to prevent deserving claimants from receiving UC.

Department's Response: Form MA 8–7 is not intended to be a stand-alone tool for analyzing materials submitted by States. Rather, it is the form used by the Department to collect the necessary information, authorized under section 303(a)(6), SSA and 20 CFR 601.3, to ensure State laws, regulations, and policies conform to and comply with Federal law. The Department has an established methodology in place to identify and review all changes to States' UI programs. By reviewing materials submitted with ETA Form MA 8–7, which States are already required to use for all changes in law, regulations, policies, and procedures, the Department will analyze a State's factual basis for identifying an occupation as one in which employers conduct pre- or post-employment drug testing as a standard eligibility requirement for obtaining or maintaining employment. As provided in 20 CFR 601.3, the Secretary of Labor requires States to submit State laws and plans of operation for implementing those laws. The Department implements this provision through ETA FORM MA 8–7 which requires States to submit ''all relevant state materials.'' Plans of operation in this context includes states' factual bases for identifying any additional occupations that regularly conduct drug testing pursuant to the Rule. In addition, the Department retains oversight authority and will conduct routine monitoring of State administration of the UI program, including state implementation of the drug testing provisions of 42 U.S.C. 503(l)(1)(A) and this final rule. As a result, the Department makes no changes to the final rule.

Comments Regarding: § 620.4 Testing of Unemployment Compensation Applicants for the Unlawful Use of a Controlled Substance

Consistent with 42 U.S.C. 503(l), § 620.4 provides that a State may require applicants to take and pass a test for the illegal use of controlled substances as a condition of initial eligibility for UC under specified conditions, and that applicants may be denied UC based on the results of these tests. States are not required to drug test as a condition of UC eligibility based on any of the occupations set out under this final rule. States may choose to do so based on some or all of the identified occupations; however, States may not, except as permitted by 42 U.S.C. 503(l)(1)(A)(i) (governing drug testing of individuals terminated for the unlawful use of a controlled substance), conduct drug testing based on any occupation that does not meet the definition in § 620.3 for purposes of determining UC eligibility.

Paragraph (a) provides that an applicant, as defined in § 620.2, may be tested for the unlawful use of one or more controlled substances—also defined in § 620.2—as an eligibility condition for UC, if the individual is one for whom suitable work, as defined by that State's UC law, is only available in an occupation that regularly conducts drug testing, as determined under § 620.3. As discussed in the Summary of the proposed rule, the term ''applicant'' means an individual who is filing an initial UC claim, not a claimant filing a continued claim. Thus, States may only subject applicants to drug testing.

Paragraph (b) provides that a State choosing to require drug testing as a condition of UC eligibility may apply drug testing based on one or more of the occupations under § 620.3. This flexibility is consistent with the statute, which permits, but does not require, drug testing, and the partnership nature of the Federal-State UC system.

Paragraph (c) provides that no State would be required to drug test UC applicants under this part. This provision was not in the 2016 final rule, but again reflects the partnership nature of the Federal-State UC system and the Department's understanding that the Act permits, but does not require, States to drug test UC applicants under the identified circumstances.

Comment: In response to the NPRM's broader, more flexible approach for identifying occupations that regularly drug test, one commenter raised a concern that such an approach ''risks conflicting with statutory protections mandated by the [Americans with Disabilities Act] ADA,'' and noted that ''[t]he Equal Employment Opportunity Commission has been aggressively challenging employers whose drug screens lead to denial of a job without an individualized assessment to determine whether the person's lawful use of prescription drugs may be considered a disability.'' However, the commenter never explained how the

proposed rule risks a conflict with the ADA.

Department's Response: Section 620.3 of the NPRM sets forth a proposed list of occupations for which drug testing is regularly conducted. Proposed paragraph (j) of this section embodied the Department's new, more flexible, approach to identifying the occupations which regularly drug test, by allowing each State to identify additional occupations in that State where employers require pre-hire or post-hire drug testing as a standard eligibility requirement provided that the State has a factual basis for doing so. As explained in the NPRM, factual bases may include, but are not limited to: Labor market surveys; reports of trade and professional organizations; and academic, government, or other studies, and would be reviewed by the Department. *See* 83 FR 55311, 55315 (Nov. 5, 2018).

Section 303(l)(1), SSA, permits States to drug test applicants whose only suitable employment is in an occupation that regularly conducts drug testing or who were terminated from employment with their most recent employer because of the unlawful use of a controlled substance; this rule does not authorize States to engage in conduct that would violate Federal disability non-discrimination laws, including the ADA. Indeed, States must continue to adhere to Federal disability non-discrimination law as a condition of receiving UC administrative grants under Title III of the SSA, and the annual unemployment insurance funding agreements between the Department and each State includes this requirement. Accordingly, the Department makes no changes to the final rule in response to this commenter's concern.

Comments: A number of commenters stated that there is no evidence that unemployed workers are more likely to use drugs, while one commenter stated that there is no evidence suggesting that drug testing deters drug use. Several commenters raised concerns that drug testing UC applicants would do nothing to help people struggling with addiction, or to identify individuals in need of treatment.

Department's Response: These regulations, which implement 42 U.S.C. 503(l)(1)(A)(ii), specifically address drug testing of UC applicants for whom suitable work is only available in an occupation that regularly conducts drug testing.

While the Department is without authority to use this rule to mandate drug treatment, UC applicants who fail drug tests may be encouraged to confront and overcome the challenges associated with substance use disorder by getting treatment, and to successfully return to the workforce.

States may not pay those costs, including costs of providing information on substance use disorder or the cost of treatment, from Federal UI administrative grant funds. However, nothing in this rule prevents States from providing brochures or other information, paid for from other sources, on the availability of drug treatment to UC applicants who have failed a drug test. Moreover, as noted below, the Department has made funds available to States to address the effects of the opioid crisis on the economy.

In March 2018, the Department announced a National Health Emergency demonstration project through Training and Employment Letter (TEGL) No. 12–17, to identify, develop, and test innovative approaches to address the economic and workforce-related impacts of the opioid epidemic. In July 2018, the Department approved six grant awards, totaling more than $22 million, to the following states: Alaska ($1,263,194), Maryland ($1,975,085), New Hampshire ($5,000,000), Pennsylvania ($4,997,287), Rhode Island ($3,894,875), and Washington State ($4,892,659).

In September, 2018, the Department issued TEGL No. 4–18 to describe how the National Dislocated Worker Grant (Disaster Recovery DWG) Program's disaster grants apply to the unique challenges of the opioid crisis. All states, outlying areas, and appropriate tribal entities are eligible to apply for Disaster Recovery DWG assistance as described in TEGL No. 4–18. Eligible applicants use Disaster Recovery DWGs to create disaster-relief employment to alleviate the effects of the opioid crisis in affected communities, as well as provide employment and training activities, including supportive services, to address economic and workforce impacts related to widespread opioid use, addiction, and overdose.

Therefore, the Department makes no changes to the final rule in response to these comments.

Comments: Numerous commenters expressed concern over the possibility of positive test results that could occur because an applicant was taking prescription medication or over-the-counter medication. One commenter addressed drug testing of individuals who are enrolled in medication-assisted treatment for opioid addiction, noting that some drug tests can detect methadone and buprenorphine. A commenter noted that ''conventional urinalysis testing methods are prone to false positives,'' and that urinalysis indicates only the presence of a drug or metabolites in the body. One commenter stated that drug testing of chemically treated hair, or hair that is dark in color, ''can be especially susceptible to external contamination.''

Department's Response: This rulemaking is limited to implementing the statutory requirement to identify occupations that regularly conduct drug testing. These comments regarding potential false positives are outside the scope of this rule, therefore, the Department makes no changes to the regulatory text in response to these comments.

Comment: Another commenter asserted that drug testing UC applicants is a waste of tax dollars, and the ''only ones who will win in this case will be the companies billing the State after the test has been administered.''

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing. Thus, whether and to what extent a State's activities may benefit drug testing companies is unrelated to the purpose of this regulation. The Department makes no changes to the final rule as a result of this comment.

Comments: A number of commenters expressed that drug testing of UC applicants undermines the purpose of the UC program. These commenters stated that making it more difficult for unemployed workers to access benefits blunts the UC program's capacity as a counter-cyclical economic tool and weakens the safety net.

Department's Response: The purpose of this regulation is to implement the provision in 42 U.S.C. 503(l)(1)(A)(ii) permitting States to drug test UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing. The regulation does not require States to implement a drug testing program, and the basic eligibility requirements for UC are unchanged. To be eligible for UC, claimants must be able and available to accept suitable work. This rule allows States to implement drug testing as a means for ensuring that UC applicants for whom the only suitable work is in an occupation that regularly conducts drug testing can demonstrate that they are able and available to accept suitable work by passing a drug test. We also note that the drug testing provisions in 42 U.S.C. 503(l)(1)(A)(ii) are narrowly drawn. There will be minimal effect on the UC program's role in minimizing

economic impacts in an economic downturn.

Therefore, the Department makes no changes to the final rule in response to these comments.

IV. Administrative Information

Paperwork Reduction Act

The Department has determined that any use of the existing form MA 8–7 under this rule is already approved under OMB control number 1205–0222.

Plain Language

The Department drafted this rule in plain language.

Regulatory Flexibility Act/Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act (RFA), at 5 U.S.C. 603(a), requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis, which describes the impact of this final rule on small entities. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities. This rule does not affect small entities as defined in the RFA. Therefore, the rule will not have a significant economic impact on a substantial number of these small entities. The Department has certified this to the Chief Counsel for Advocacy, Small Business Administration, pursuant to the RFA.

Executive Order 13771

Comments: The Department received one comment asserting that the proposed rule did not comply with Executive Order (E.O.) 13771 (Reducing Regulations and Controlling Regulatory Costs).

Department's Response: This final rule is not subject to E.O. 13771 because the cost is *de minimis*. The drug testing of UC applicants as a condition of UC eligibility is entirely voluntary on the part of the States, and because permissible drug testing is limited under the statute and this rule, the Department believes only a small number of States will establish a testing program for a limited number of applicants for unemployment compensation benefits.

Executive Orders 12866 and 13563: Regulatory Planning and Review

Comment: The Commenter argues that the Department's cost and benefits analysis was ''cursory and unrigorous;'' the argument relies on the Department's admission that it lacked data to quantify administrative costs.

Department's Response: E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. For a ''significant regulatory action,'' E.O. 12866 asks agencies to describe the need for the regulatory action and explain how the regulatory action will meet that need, as well as assess the costs and benefits of the regulation.[1]

This regulation is necessary because of the statutory requirement contained in 42 U.S.C. 503(l)(1)(A)(ii), which requires the Secretary to determine the occupations that regularly conduct drug testing for the purpose of determining which applicants may be drug tested when applying for unemployment compensation. This rule is a ''significant regulatory action,'' as defined in sec. 3(f) of E.O. 12866, because it raises novel legal or policy issues arising out of legal mandates. Before the amendment of Federal law to add the new 42 U.S.C. 503(l)(1), Federal law did not permit drug testing of applicants for UC as a condition of eligibility.

The decision to conduct drug testing for any of the occupations identified in the final rule is entirely voluntary on the part of the States (see § 620.4). To date, only three States (Mississippi, Texas, and Wisconsin) have enacted laws to permit drug testing of UC applicants under the circumstances addressed by this rule. These States, however, have not yet begun testing because the prior rule was rescinded, and this rule was not yet published. As a result, the Department does not have sufficient information to determine how many States will establish a drug testing program, and what the costs and benefits of such a program might be to States. Before the enactment of the Federal law in 2012, States were not permitted to condition eligibility for UC on drug testing. Due to variations among States' laws, and in the number of UC applicants, level of benefits, and prevalence of drug use in a State, the Department is unable to estimate the extent to which States' costs in administering drug testing would be offset by savings in their UC programs.

The Department requested comments on the costs of establishing and administering a State-wide testing program; the number of applicants for unemployment compensation that fit the criteria established in the law; estimates of the number of individuals who would subsequently be denied unemployment compensation due to a failed drug test; and the offsetting savings that could result. The Department received comments, discussed below, on the costs of establishing and administering a testing program and the cost of drug tests. However, no other comments were received providing specific information on the other issues on which the Department requested comment.

Comments: One commenter wrote that Ohio had a 4.3 percent unemployment rate as of May 2018, which equates to approximately 530,000 unemployed workers in Ohio. At an average cost of $30 per drug test, it would cost $18 million to test UC applicants. The commenter stated that that money could instead be allocated for improving infrastructure issues, drug treatment programs, education programs, and job training programs.

A number of commenters wrote that States would spend much more to implement a drug testing program than it would be worth in savings to the UI trust funds. These commenters stated that when 13 States spent $1.6 million collectively to drug test Temporary Assistance for Needy Families (TANF) applicants in 2016, only 369 people tested positive out of approximately 250,000. The commenters argued that because States are experiencing record-low administrative funding, they cannot afford additional administrative burdens, particularly when few people tested positive.

Only three States have enacted laws to pursue drug testing of UC applicants under this statutory provision to date, and they have not yet begun testing. There are limited data on which to base estimates of the cost associated with establishing a testing program, or the offsetting savings that a testing program could realize. Only one of the three States that enacted conforming drug testing laws issued a fiscal estimate. That State, Texas, estimated that the 5-year cost of administering the program would be $1,175,954, taking into account both one-time technology personnel services to program the system and ongoing administrative costs for personnel. The Department has not evaluated the methodology of Texas' estimate. Separately, it would be inappropriate to extrapolate the Texas cost analysis to all States, in part

[1] Exec. Order No. 12866, section 6(a)(3)(B).

because of differences between Texas law and the laws of other States, and because of the variations in States' programs noted above. Therefore, the Department cites this information only for the purpose of disclosing the minimal information available for review.

One commenter wrote that drug tests can be expensive and that funds could be reappropriated for initiatives such as rehabilitation, common-sense drug education, and overdose first aid. The commenter also stated that it is not the States' duty to drug test unemployed workers; rather, it is a potential employer's duty to test applicants if the employer wishes.

Several commenters wrote that the cost of drug testing would be an unnecessary drain on resources that should be made available to workers affected by reductions in force. The commenters argued that the financial costs would far outweigh any savings from drug testing UC applicants and would place further stress on State budgets, especially when the Federal grants that States principally rely on to administer their programs have been reduced significantly. Simply put, these commenters concluded that drug testing is not a good use of scarce resources.

One commenter wrote that studies have shown that the vast majority of individuals receiving public assistance do not use drugs. The commenter supports a policy orientation in favor of an exercise of this authority, if at all, only for occupations in which the rationale for drug testing is truly compelling.

Two commenters wrote that Michigan has unsuccessfully attempted to test recipients of cash assistance. In 2000, a Michigan law providing for random testing of welfare recipients was declared unconstitutional by a federal court. In 2016, Michigan administered a pilot program of suspicion-based drug testing, but no recipients or applicants were tested. The commenters argued that these programs did not save money or reveal any undeserving claimants—they merely increased administrative costs. These commenters asserted that States may be pressured by this final rule to use already-limited UI funding to establish and administer a testing program.

Department's response: The Department carefully reviewed the comments and concluded that they did not adequately provide reliable information on the costs of establishing and administering a State-wide testing program; the number of applicants for UC who would be tested; and individuals who would subsequently be denied UC due to a failed drug test. In the absence of such data, the Department is unable to quantify the administrative costs States would incur if they choose to implement drug testing pursuant to this final rule.

As explained above, nothing in the Act amending section 303, SSA, or in this regulation requires States to establish a drug testing program. *See* § 620.4 of this final rule. States may choose to enact legislation to permit drug testing of UC applicants consistent with Federal law. In doing so, States will make that decision based on many factors, including the costs and benefits of a drug testing program that is limited to only those UC applicants specifically permitted to be drug tested as a condition of UC eligibility in the Act.

The Department reiterates that States will voluntarily make their own determination whether to establish a testing program. States may determine that current funding for the administration of State UC programs is insufficient to support the additional costs of establishing and administering a drug testing program, which would include the cost of the drug tests, staff for administration of the drug testing function, and technology to track drug testing outcomes. States would also incur ramp-up costs to implement the processes necessary for determining whether an applicant is one for whom drug testing is legally permissible; referring and tracking applicants for drug testing; and conducting and processing the drug tests. States would also have to factor in the increased costs of adjudication and appeals of both the determination that an individual is subject to drug testing and resulting determinations of benefit eligibility based on the test results. However, these costs could vary widely across States, and the Department has no ability to develop an estimate that could be relevant across multiple States.

The benefits of the rule are equally difficult to quantify. As explained above, the Texas analysis estimated a potential savings to the Unemployment Trust Fund of $13,700,580 over the 5-year period, resulting in a net savings of approximately $12.5 million. However, due to differences in State laws, the number of claims, benefit levels, and the prevalence of substance use disorder in a State, the Department is unable to use the savings anticipated by Texas as a national norm. In addition, as previously discussed, permissible drug testing is limited under the statute and this rule; the Department expects only a small number of UC applicants will be tested. As such, the Department makes no changes as a result of these comments.

Executive Order 13132: Federalism

Comment: The specific comment regarding noncompliance with E.O. 13132 is that the rule would permit drug testing of UC applicants when testing is required under Federal law, and that the rule would have a substantial effect on States by compelling them to provide a factual basis for imposing a drug-testing requirement using ETA form MA 8–7.

Department's Response: Section 6 of E.O. 13132 requires Federal agencies to consult with State entities when a regulation or policy may have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, within the meaning of the E.O. Sec. 3(b) of the E.O. further provides that Federal agencies must implement regulations that have a substantial direct effect only if statutory authority permits the regulation and it is of national significance.

E.O. 13132, sec. 3, establishes Federalism Policymaking Criteria that agencies must follow when formulating and implementing policies with Federalism implications. Those criteria include:

- That agencies consider statutory authority for any action that would limit State policymaking discretion;
- That the national government grant States maximum administrative discretion possible; and
- That agencies encourage States to develop their own policies to achieve program objectives and, where possible, defer to States to develop standards.

This rule accomplishes each of the requirements set out above. First, the Department is required by 42 U.S.C. 503(l)(1)(A)(ii) to identify in regulation the occupations that regularly conduct drug testing. State UC agencies are permitted to drug test UC applicants for whom the only suitable work is in an occupation that regularly drug tests. Thus, the Department has statutory authority to issue this regulation.

Second, this rule gives States significant flexibility to identify additional occupations in their State that regularly drug test job applicants, either pre-hire or post-hire based on a factual analysis. See sections 620.3 and 620.4 of this final rule.

Third, this rule encourages States that choose to enact drug testing legislation as permitted by 42 U.S.C. 503(l)(1)(A)(ii) to develop policies and establish standards to achieve the program objectives, consistent with Federal law.

The Department retains oversight responsibility to ensure State law conforms to, and the State is in compliance with, Federal UC law.

Thus, this rule does not have a substantial direct effect on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government within the meaning of the E.O. because drug testing authorized by the regulation remains voluntary on the part of the State—it is not required.

Unfunded Mandates Reform Act of 1995

Comment: The commenter states that the Department incorrectly concluded that the Unfunded Mandates Reform Act of 1995 does not apply to this rule. The commenter's reasoning is that required drug testing under other federal laws would be required of a State that enacts a drug testing law consistent with 42 U.S.C. 503(l)(1)(A), and that the State UC agency would have unfunded mandates conditioned on designating some occupations for drug testing.

Department's Response: The Unfunded Mandates Reform Act of 1995 defines ''Federal Intergovernmental Mandate'' to mean ''any provision in legislation, statute, or regulation that (i) would impose an enforceable duty upon a State..... ''

This regulation does not impose any duty on States; rather, it permits States, consistent with the statutory authority in 42 U.S.C. 503(l)(1)(A) to enact legislation to test UC applicants for drugs under the limited circumstances set out in the statute. The requirement that States submit the factual basis for identifying an occupation under § 620.3(j) of the regulation using ETA form MA 8–7 is consistent with long-standing procedures by which States must inform the Department of changes in State law.

Effect on Family Life

Comment: The commenter referred to at the beginning of this discussion of compliance with several E.O.s and statutory requirements questions the Department's certification that this rule does not impact family well-being. The commenter cites the requirement in section 654(c) of the Treasury and General Government Appropriations Act that agencies must determine whether the action increases or decreases disposable income or poverty of families and children and determine whether the proposed benefits of the action justify the financial impact on the family.

Department's Response: This regulation has no impact on family well-being because it merely affords States an option that they must independently choose. Allowing States to drug test UC applicants in the very limited circumstances set out in 42 U.S.C. 503(l)(1)(A)(ii) does not, in and of itself, increase or decrease disposable income or poverty, or otherwise affect family well-being.

Based on available data (or lack thereof), it is impossible for the Department to predict the number of States that will exercise this option or how broadly they will implement any drug testing in their State. Similarly, there is no existing data or way to predict, positively or negatively, what impact, if any, such State drug testing may have on family well-being. This regulation only implements the provision in 42 U.S.C. 503(l)(1)(A)(ii) that States may drug test applicants for UC for whom the only suitable work is in an occupation that regularly conducts drug testing.

Thus, the Department makes no change to its certifications that the rule complies with each of the Executive Orders and other provisions discussed above.

List of Subjects in 20 CFR Part 620

Unemployment compensation.

■ For the reasons stated in the preamble, the Department amends 20 CFR chapter V by adding part 620 to read as follows:

PART 620—DRUG TESTING FOR STATE UNEMPLOYMENT COMPENSATION ELIGIBILITY DETERMINATION PURPOSES

Sec.

Authority: 42 U.S.C. 1302(a); 42 U.S.C. 503(l)(1)(A)(ii).

§ 620.1 Purpose.

The regulations in this part implement 42 U.S.C. 503(l). 42 U.S.C. 503(l) permits States to enact legislation to provide for State-conducted testing of an unemployment compensation applicant for the unlawful use of controlled substances, as a condition of unemployment compensation eligibility, if the applicant was discharged for unlawful use of controlled substances by his or her most recent employer, or if suitable work (as defined under the State unemployment compensation law) is only available in an occupation for which drug testing is regularly conducted (as determined under this part). 42 U.S.C. 503(l)(1)(A)(ii) provides that the occupations that regularly conduct drug testing will be determined under regulations issued by the Secretary of Labor.

§ 620.2 Definitions.

As used in this part—

Applicant means an individual who files an initial claim for unemployment compensation under State law. Applicant excludes an individual already found initially eligible and filing a continued claim.

Controlled substance means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of 21 U.S.C. 801 *et seq.,* as defined in Sec. 102 of the Controlled Substances Act (21 U.S.C. 802). The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Occupation means a position or class of positions with similar functions and duties. Federal and State laws governing drug testing refer to classes of positions that are required to be drug tested. Other taxonomies of occupations, such as those in the Standard Occupational Classification (SOC) system, may be used by States in determining the boundaries of a position or class of positions with similar functions and duties under § 620.3. Use of the SOC codes, however, is not required, and States may use other taxonomies to identify a position or class of positions with similar functions and duties.

Suitable work means suitable work as defined by the unemployment compensation law of a State against which the claim is filed. It must be the same definition the State law otherwise uses for determining the type of work an individual must seek, given the individual's education, experience, and previous level of remuneration.

Unemployment compensation means any cash benefits payable to an individual with respect to the individual's unemployment under the State law (including amounts payable under an agreement under a Federal unemployment compensation law).

§ 620.3 Occupations that regularly conduct drug testing for purposes of determining which applicants may be drug tested when applying for State unemployment compensation.

In electing to test applicants for unemployment compensation under this part, States may enact legislation to require drug testing for applicants for whom the only suitable work is in one or more of the following occupations that regularly conduct drug testing, for purposes of § 620.4:

(a) An occupation that requires the employee to carry a firearm;

(b) An occupation identified in 14 CFR 120.105 by the Federal Aviation Administration, in which the employee must be tested;

(c) An occupation identified in 49 CFR 382.103 by the Federal Motor Carrier Safety Administration, in which the employee must be tested;

(d) An occupation identified in 49 CFR 219.3 by the Federal Railroad Administration, in which the employee must be tested;

(e) An occupation identified in 49 CFR 655.3 by the Federal Transit Administration, in which the employee must be tested;

(f) An occupation identified in 49 CFR 199.2 by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested;

(g) An occupation identified in 46 CFR 16.201 by the United States Coast Guard, in which the employee must be tested;

(h) An occupation specifically identified in Federal law as requiring an employee to be tested for controlled substances;

(i) An occupation specifically identified in the State law of that State as requiring an employee to be tested for controlled substances; and

(j) 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 for obtaining or maintaining employment in the occupation.

§ 620.4 Testing of unemployment compensation applicants for the unlawful use of a controlled substance.

(a) States may require drug testing for unemployment compensation applicants, as defined in § 620.2, for the unlawful use of one or more controlled substances, as defined in § 620.2, as a condition of eligibility for unemployment compensation, if the individual is one for whom suitable work, as defined in State law, as defined in § 620.2, is only available in an occupation that regularly conducts drug testing as identified under § 620.3.

(b) A State conducting drug testing as a condition of unemployment compensation eligibility, as provided in paragraph (a) of this section, may only elect to require drug testing of applicants for whom the only suitable work is available in one or more of the occupations listed under § 620.3. States are not required to apply drug testing to any applicants for whom the only suitable work is available in any or all of the occupations listed.

(c) No State is required to drug test UC applicants under this part 620.

§ 620.5 Conformity and substantial compliance.

(a) *In general.* A State law implementing the drug testing of applicants for unemployment compensation must conform with—and the law's administration must substantially comply with—the requirements of this part 620 for purposes of certification under 42 U.S.C. 502(a), governing State eligibility to receive Federal grants for the administration of its UC program.

(b) *Resolving issues of conformity and substantial compliance.* For the purposes of resolving issues of conformity and substantial compliance with the requirements of this part 620, the provisions of 20 CFR 601.5 apply.

John P. Pallasch,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2019–21227 Filed 10–3–19; 8:45 am]
BILLING CODE 4510–FW–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9866]

RIN 1545–BO54; 1545–BO62

Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits

Correction

In rule document C1–2019–12437, appearing on page 44223 in the issue of Friday, August 23, 2019 make the following corrections in § 1.951–1:

§ 1.951–1 [Corrected]

1. In the center column, in instruction 2, on the second line, ''(b)(2)(vi)(B)(1)'' should read ''(b)(2)(vi)(B)(*1*)''.

2. In the same column, in the same instruction, the table heading ''TABLE 1 TO PARAGRAPH (b)(2)(vi)(B)(1)'' should read ''TABLE 1 TO PARAGRAPH (b)(2)(vi)(B)(*1*)''.

[FR Doc. C2–2019–12437 Filed 10–3–19; 8:45 am]
BILLING CODE 1300–01–D

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Rules of Procedure; Corrections

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Correcting amendments.

SUMMARY: This document makes technical amendments to the final rule published by the Occupational Safety and Health Review Commission in the **Federal Register** on April 10, 2019 and corrected on August 30, 2019. That rule revised the procedural rules governing practice before the Occupational Safety and Health Review Commission.

DATES: Effective on October 4, 2019.

FOR FURTHER INFORMATION CONTACT: Ron Bailey, Attorney-Advisor, Office of the General Counsel, by telephone at (202) 606–5410, by email at *rbailey@oshrc.gov,* or by mail at: 1120 20th Street NW, Ninth Floor, Washington, DC 20036–3457.

SUPPLEMENTARY INFORMATION: OSHRC published revisions to its rules of procedure in the **Federal Register** on April 10, 2019 (84 FR 14554) and published corrections on August 30, 2019 (84 FR 45654). This document makes further technical amendments to the final rule.

List of Subjects in 29 CFR Part 2200

Administrative practice and procedure, Hearing and appeal procedures.

Accordingly, 29 CFR part 2200 is amended by making the following correcting amendments:

PART 2200—RULES OF PROCEDURE

■ 1. The authority citation for part 2200 continues to read as follows:

Authority: 29 U.S.C. 661(g), unless otherwise noted.

Section 2200.96 is also issued under 28 U.S.C. 2112(a).

■ 2. Amend § 2200.7 by revising paragraph (k)(1)(ii) to read as follows:

§ 2200.7 Service, notice, and posting.

* * * * *

(k) * * *

(1) * * *