

**Report of the Committee
to Review the Unemployment Insurance
Statutory Definition of “Employee”**

Submitted to the Wisconsin Unemployment Insurance Advisory Council

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By the Committee:

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INTRODUCTION

Statute: Study the Employee Definition

2007 Wisconsin Act 59 provided that the Unemployment Insurance Advisory Council (the “Council”) “shall appoint a committee to study the definition of ‘employee’ under section 108.02(12) of the statutes for the purpose of considering changes to the definition. The committee shall report its recommendations to the council on unemployment insurance (“UI”) by June 30, 2009.”

Committee to Review the Employee Definition

The Council appointed a committee comprised of Edward Lump, Dennis Penkalski and Daniel LaRocque to review the definition (the “Committee”). The Committee met on seven occasions from February 11 to June 19, 2009 and received comments from various members of the public regarding the UI definition of “employee” and related matters. The Committee also received comments from staff attorneys of the Department of Workforce Development regarding UI law and operations related to the department’s administration of the UI definition in determinations of employee status and benefit eligibility, and regarding exclusions from “employment” in the UI law. The Committee makes the following recommendations to the Council.

RECOMMENDATIONS

Definition of “Employee”

The Committee recommends that:

- I. The Council approve the changes to the definition of “employee”, found in Wis. Stat. §108.02(12), that are recommended by the department. The recommendation, if adopted, would amend section 108.02(12)(bm), the seven-of-ten test for “employee” and section 108.02(12)(c), the exceptions for truckers and loggers, and require the repeal of Wis. Admin. Code chapters 105 (Relationship of Carriers and

Contract Operators) and 107 (Employment Relationships in the Logging Industry). The current seven-of-ten test is contained in Appendix 1 at pages 12 – 13 below. The proposed revised seven-of-ten test is contained in Appendix 2 at pages 14 – 16 below. The recommended changes to the definition of “employee” are contained in their entirety with the department’s explanatory comments in Department Proposal D09-20, Appendix 3 at pages 17 – 34 below.

Definition of “Employment” and Advice to Employers

The Committee acknowledges that the Committee is charged under the statute only to review the definition of “employee” under section 108.02(12) and recommend changes, if any. However, the Committee has considered the related matter of exclusions from “employment” under Wis. Stat. §108.02(15); and discussed suggestions relating to customer service and administration of status issues. The Committee recommends that:

- II. The Council approve the department’s recommended exclusion from “employment”, under Wis. Stat. §108.02(15), of domestic services performed by an individual directly for any person who is family member of such individual. The Committee intends that “family member” include any person who is related to the individual by blood, marriage or adoption or in a domestic partnership with the individual. The exclusion does not extend to services that are provided by the individual through an agency or other person who is an employing unit with respect to such services.
- III. The Council review the issue of whether there is justification to exclude from “employment”, under Wis. Stat. §108.02(15), services performed by mystery shoppers and, if so, under what conditions or limitations.
- IV. The Council review the issue of whether there is justification to exclude from “employment”, under Wis. Stat. §108.02(15), services performed by writers and news reporters and, if so, under what conditions or limitations.

- V. The Council review the feasibility of new or modified administrative processes for advising employers and individuals regarding employee status issues, including the feasibility of a system to register employing units intending to engage individuals as “independent contractors.”

DISCUSSION OF RECOMMENDED ACTIONS

I. The Definition of “Employee”

The purpose of the definition of “employee” in the unemployment insurance law is to determine which individuals ought to be within the scope of the unemployment insurance program. The unemployment law must separate those individuals who will bear the risk of their unemployment (sometimes called “independent contractors”) from those whose risk of unemployment properly belongs with the employing unit (“employees”). In an employee status case in 1983, the Wisconsin Supreme Court affirmed the principle that the underlying policy of the unemployment law is to afford broad coverage of workers who become unemployed through no fault of their own.

A. Amend the Seven-of-Ten Test for “Employee”

Historically, the test for “employee” status in unemployment insurance in most jurisdictions has centered on two fundamental factors: freedom from the control and direction of the employing unit and independently established trade, business or occupation. The meaning of these two factors will inevitably be further defined and subdivided into other factors -- either by statute (as in the department’s proposed amendment to the seven-of-ten test) or by the courts and agencies charged with interpreting the unemployment law. See for example, the case of *Keeler v. LIRC*, 154 Wis. 2d 626, 631 (1990), which subdivided the two-part test into six factors. In 1996 Wisconsin began applying a seven-of-ten factor test for “employee” to services provided to private sector employers other than nonprofits, trucking and logging. The seven-of-ten test reflects (or ought to reflect) the same basic policy purpose of affording broad coverage for unemployed workers.

The Committee has heard from the department and others that there are identifiable shortcomings in certain aspects of the seven-of-ten test. The department reviewed the test in detail in a report to the UI Advisory Council in June 2008 and in meetings of the Committee. The test contains deficiencies that undermine public confidence in the department's status and benefit determinations. In some cases the deficiencies will generate determinations that are anomalous and quite arguably inequitable. Also, public comments of some have suggested a need for greater clarity, predictability and simplicity.

The proposed amendment of the seven-of-ten test in section 108.02(12):

- a. Imports several factors (proposed factors 1, 2, 7 and 10) that have been regarded as sound indicators of proper employee classification by the Wisconsin Supreme Court, Court of Appeals and Labor and Industry Review Commission. These factors have been applied to for-profit employers in Wisconsin prior to the creation of the seven-of-ten test and have been part of the longstanding test for nonprofit and government employers.
- b. Eliminates several factors that have diluted the test, made it less effective and encouraged manipulation (current factors 1 and 2) and eliminated or modified factors that have confused the public and the agencies administering the law (current factor 10 and parts of others).
- c. Improves clarity, predictability and fairness, by using simpler and clearer language and eliminating the confusion that has arisen from certain factors in the test that combine evidence of unrelated matters (deleting or amending current factors 1, 2, 3, 4, 6, 7 and 10.)
- d. Restores a balance between the two basic elements of the test for "employee": freedom from control and direction and independently established business (adding proposed factor 1).

- e. Retains in tact three factors that have been observed to be working well and are relatively well understood, as shown by the experience of the department and the decisions of the Commission (factors 5, 8 and 9).
- f. Maintains the flexibility of application that the seven-of-ten percentage allows.

B. Eliminate Special Treatment of Truckers and Loggers

As noted, exceptions to the seven-of-ten test have existed since 1985 for “truckers” and since 1991 for loggers. Certain classes of workers in the trucking and logging industries are determined to be employees by applying the general two-part statutory test of Wis. Stat. §108.02(12)(c) and the rules in DWD 105 and DWD 107, rather than the seven-of-ten test. “Truckers” are defined as “contract operators” – those who own a truck or obtain it by lease and lease the truck to a motor carrier.

The department has questioned the policy of treating truckers and loggers separately. The Committee agrees that the seven-of-ten test, especially as revised, is a fair and appropriate test for truckers and loggers. The Committee has noted the observations and comments by the department that: DWD 105, especially, is unwieldy, unclear and not well constructed. DWD 107, which defines “employee” for services performed by loggers, suffers from some of the same structural flaws. The structure of these rules makes it difficult to know how much weight is to be attached to each factor. The common carrier and logging industries have evolved. While the logging industry has developed in a way that fewer controversies have arisen in recent years, common carriers engaged in short-haul and local delivery services have generated controversies not anticipated when DWD 105 was created in 1985. In a recent decision involving a package delivery business, the Labor and Industry Review Commission found certain truck drivers not to be employees. The divergent interpretations of DWD 105 by the department,

the Commission and employers demonstrate the difficulty in understanding and fairly applying DWD 105.

The Committee recommends amendment of the definition of “employee” to eliminate the exception for truckers and loggers and repeal of the special rules for truckers, chapters DWD 105, and loggers, DWD107.

For the reasons stated by the department in its proposal D09-20 (Appendix 1), especially that the amendment of the test will improve the quality and clarity of the test and the fairness of determinations of employee status, while promoting the fundamental purpose of assuring broad coverage of workers, the Committee recommends the proposed amendments to the definition of “employee.”

II. Exclusions from “employment” for domestic services for family members, mystery shoppers, writers and reporters.

A. Domestic services for family members

Domestic services performed by an individual for a family member are viewed by the Committee as primarily the product of the family relationship rather than the employment relationship in most such cases. The consensus of the Committee is that wages paid for such services should not support benefit eligibility or be subject to state unemployment contributions.¹ For these reasons, the Committee recommends the exclusion of such services from the definition of “employment.” The exclusion does not extend to services that are provided by the individual through an agency or other person who is an employing unit with respect to such services.

The Committee intends that “family member” be defined broadly for purposes of this exclusion: The person performing the services is a family member of the person receiving the services if the two are related by blood (to any degree), marriage (including the extended family of the marital partner) or adoption or if the person performing the services is in a “domestic

partnership” with the person for whom the services are performed. Proposed Wis. Stat. §770.01(2) in 2009 Assembly Bill 75 provides a useful definition of and registration process for “domestic partnership” that, if enacted, will provide an objectively clear limit.

Much of the Committee’s discussion centered on the kinds of services needed to provide care for an ill or disabled person in that person’s home, including health care and personal care. In such situations, a variety of ancillary services are commonly provided to support the person or maintain the home of the person for whom the care is provided. The Committee sees no need to differentiate between types of services performed in such situations. Thus, the Committee intends that “domestic services” includes, among others, services such as health care, personal care, companionship, transportation, housekeeping, cleaning, etc. Nor does the Committee recommend limiting the exclusion to employers who are sick or disabled. Nor does it seem necessary to exclude only services in the home of the caregiver or the home of the recipient of the services. The boundaries of “family members” providing “domestic services” seem clear and reasonable.

B. Mystery shoppers

Mystery shoppers earn relatively small amounts of wages. The Council should review whether the definition of “employee” (as written or as proposed here) is properly and fairly classifying these workers and whether services of this type should be excluded from the definition of “employment.”

C. Writers and news reporters

Writers and news reporters in some cases perform their services free from the direction and control of the employing unit and within an independently established business. The Council should review whether the

¹ Services that are not excluded from “employment” for purposes of federal unemployment taxes (FUTA) may be excluded from state unemployment taxes. However, such wages paid for such services will be subject to FUTA tax liability without the benefit of a credit for state tax payments.

definition of “employee” (as written or as proposed here) is working properly and fairly classifying these workers and whether services of this type should be excluded from the definition of “employment.”

III. Advice regarding employee status issues and certification or registration of independent contractors.

The Committee has heard an interest expressed by some in the employer community for greater clarity and predictability of employee status. Some of those commenting in the Committee’s meetings would like to receive services in the nature of advisory opinions. Such opinions, according to suggestions offered, might be afforded to employers in advance of engaging an individual by request of either the employing unit or the worker. The Committee has discussed the notion that such opinions would have some binding effect, including when opinions are offered prospectively.

The department has outlined a set of questions and concerns that it suggests be carefully reviewed before proceeding further with development of a process of non-employee certification.

In addition, the department has discussed with the Committee the broader subject of education of employers and how advice is given by the department on the issue of employee status. The department has confirmed at Committee meetings and in a detailed written discussion of this issue that it is practically feasible and a reasonable objective to improve the department’s communication to employers on the status issue. In particular, the department is committed to displaying on its website a plain language interpretation of the statutory definition of “employee” in the UI law along with improved technical advice on compliance with UI law. The enhanced communications by the department would include explanations of each factor in the ten-point and two-point tests and factor-by-factor illustrations of how to properly apply both the ten-point and the two-point tests. The Committee agrees that the enhanced service is likely to provide useful guidance to employers and workers who are interested in evaluating the circumstances of

particular employment situations. Such information, if effectively communicated – especially in conjunction with an improved definition of “employee” – may go a long way toward ameliorating the public concerns and perceptions about the status of individuals as employees or non-employees.

The department engages employers routinely and by a variety of special outreach and educational efforts regarding the unemployment law and program. The Committee believes that these activities demonstrate that the department is genuinely interested in opportunities to improve its service to its customers, both employers and employees, and to clarify the law for the public. The Committee is confident that the department will increase its focus on the effective communication of technical advice for employers on the employee status issue.

Administration of the unemployment program within limited resources forces many difficult choices and decisions about which kinds of customer service can be efficiently delivered. The Committee recognizes that in an administrative agency these decisions are driven to a large extent by legal requirements beyond the control and discretion of the agency. Indeed, the UI administrative processes are limited by a federal funding mechanism and the program is highly regulated. Therefore, major aspects of the UI program are practically or legally beyond the control of the State to legislate.

Services such as the audit and determination processes are at the core of the department’s function. These legally required services must be carefully designed and coordinated with any new, optional services so that the essential mission of the agency is well-served. Certification of non-employee status will add costs that do not increase funding for the agency. The Committee acknowledges that the circumstances of the department’s administrative constraints and legal requirements ought to be borne in mind by the Council in taking any position on legislation and in consultation regarding administrative processes.

The Committee recommends that the Council review the feasibility of new or modified administrative processes for advising employers and

individuals regarding employee status issues, including the feasibility of a system to register individuals as “independent contractors.”

Appendix 1

to Report of the Committee
to Review the Unemployment Insurance
Statutory Definition of “Employee”

Seven-of-ten test for “employee” – current law

Wis. Stat. 108.02(12)(bm): During the period beginning on January 1, 2000, with respect to contribution requirements, and during the period beginning on April 2, 2000, with respect to benefit eligibility, par. (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that the individual meets 7 or more of the following conditions by contract and in fact:

1. The individual holds or has applied for an identification number with the federal internal revenue service.
2. The individual has filed business or self–employment income tax returns with the federal internal revenue service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed.
3. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.
4. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing such services.
5. The individual incurs the main expenses related to the services that he or she performs under contract.
6. The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.
7. The individual receives compensation for services performed under a contract on a commission or per–job or competitive–bid basis and not on any other basis.
8. The individual may realize a profit or suffer a loss under contracts to perform such services.
9. The individual has recurring business liabilities or obligations.
10. The success or failure of the individual’s business depends on the relationship of business receipts to expenditures.

Appendix 2

to Report of the Committee
to Review the Unemployment Insurance
Statutory Definition of “Employee”

Revised seven-of-ten test for “employee”

(a part of Department Proposal 09-20 – Improve Definition of “Employee”)

The Department’s proposed changes to the definition of employee include revision of the seven-of-ten factor test for “employee” in Wis. Stat. §108.02(12)(bm). As revised, the seven-of-ten test would provide:

(bm) During the period beginning on January 1, 2000, with respect to contribution requirements, and during the period beginning on April 2, 2000, with respect to benefit eligibility, par. (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization if the employing unit satisfies the department that by contract and in fact:

1. The services of the individual were performed free from control or direction by the employing unit. In determining whether the services of the individual were performed free from control or direction the following nonexclusive factors may be considered:
 - a. Whether the individual was required to comply with instructions concerning how to perform the work;
 - b. Whether the individual received training from the employing unit with respect to the services performed;
 - c. Whether the individual was required to personally perform the services;
 - d. Whether the services of the individual were required to be performed at times or in a particular order or sequence established by the employing unit;
 - e. Whether the individual was required to make oral or written reports to the employing unit on a regular basis; and

The individual meets six or more of the following conditions:

2. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
3. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual, and uses his or her own equipment or materials in performing the services.
4. The individual operates under multiple contracts with one or more employing units to perform specific services.
5. The individual incurs the main expenses related to the services that he or she performs under contract.
6. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
7. The services performed by the individual do not directly relate to the activities conducted by the employing unit retaining the services.
8. The individual may realize a profit or suffer a loss under contracts to perform such services.
9. The individual has recurring business liabilities or obligations.
10. The individual is not economically dependent on a particular employing unit with respect to the services at issue.

Appendix 3

to Report of the Committee
to Review the Unemployment Insurance
Statutory Definition of “Employee”

Department Proposal 09-20 – Improve Definition of “Employee”

General Comment on Definition of “Employee”:

It is important to bear in mind that the purpose of the definition of “employee” in the unemployment insurance law is simply to determine which individuals ought to be within the scope of the unemployment insurance program. The unemployment law must separate those individuals who will bear the risk of their unemployment (sometimes called “independent contractors”) from those whose risk of unemployment properly belongs with the employing unit (“employees”).

In each case in which the status of “employee” is raised as an issue (in regard to either a claim for unemployment benefits or an employing unit’s potential liability for unemployment contributions), the issue of whether an individual is an “employee” is resolved based on an examination of the circumstances surrounding the services that have been performed.

In most jurisdictions the determination of employee status has rested on one version or another of this test: (1) Is the individual free of control and direction by the employing unit over the performance of the services? and (2) Has the individual performed the services in an independently established trade, business or profession in which the individual is customarily engaged? Wisconsin law has evolved to the use of this two-part test for nonprofit, government employers, truckers and loggers (with additional special rules for truckers and loggers, which are discussed below). Wis. Stat. §108.02(12)(c).

Private sector employers in Wisconsin, other than nonprofits and those employing truckers and loggers, are currently governed by a seven-of-ten factor test for “employee” found in Wis. Stat. §108.02(12)(bm). As in the two-part test, the ten factors in paragraph (12)(bm) also are designed to test for freedom from control and direction and independently established business. However, as is evident from a reading of (12)(bm), the ten parts are more specific than the two-part test for “employee”.

Wis. Stat. §108.02(12(a) defines “Employee” as “any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (b), (bm), (c), (d), (dm) or (dn).”

The Department’s proposed changes to the definition of “employee” would amend the exceptions to paragraph (a) in paragraphs (12)(bm) and (c). The proposed changes are enumerated below (items A to D). Comments regarding each proposed change are provided below.

The scope of coverage under the unemployment law is also determined by certain exclusions from the definition of “employment” specified by Wis. Stat. §108.02(15)(k). The effect of the exclusions it to remove (for most purposes in the unemployment law) certain types of services performed by employees from the determination of unemployment benefits and contributions. The Department proposes to add an exclusion to the definition of “employment” for domestic services performed by an individual directly for a member of his or her family (see item E below).

A. Wis. Admin. Code Chapter DWD 105 (special rules for truckers) is repealed.

Comment on Department’s proposed repeal of DWD 105: *The Department proposes repeal of rules chapter DWD 105. DWD 105 is a set of rules for truck drivers who are “contract operators” – those who own a truck or obtain it by lease and lease the truck to a motor carrier. The general two-part statutory test of Wis. Stat. §108.02(12)(c) and the rules in DWD 105 determine truckers’ status as employees rather than the seven-of-ten test in §108.02(12)(bm).*

The policy for treating truckers separately is doubtful, in the view of the Department staff who have worked with the rules since the rules were created. DWD 105 is unwieldy, unclear and not well constructed. It is difficult to know how much weight is to be attached to each factor. As the

trucking industry has evolved, the difficulties with DWD 105 have become clearer. In a recent decision involving a package delivery business, Dunham Express, the Labor and Industry Review Commission found certain truck drivers not to be employees. The Dunham decision and the divergent interpretations of DWD 105 by the parties demonstrate the difficulty in understanding and fairly applying DWD 105.

B. Wis. Admin. Code Chapter DWD 107 (special rules for loggers) is repealed.

Comment on Department's proposed repeal of DWD 107: *The Department proposes repeal of rules chapter DWD 107. The general two-part statutory test of Wis. Stat. §108.02(12)(c) and DWD 107, a set of rules for individuals engaged in logging operations, determine employee status for loggers.*

Issues involving loggers have been extremely few in recent years. The Department believes the rules contained in DWD 107 suffer from some of the same flaws that have been significant problems, in the Department's view, in DWD 105. As in DWD 105, DWD 107 requires application of multiple factors in a tiered structure that is difficult to interpret and apply. The weight to be applied to certain factors is unstated and the rationale for the rule's design is unclear. The policy for treating truckers separately is doubtful.

The Department proposes that employee status for both truckers and loggers be determined by the ten-part test applicable to other services performed in for-profit industries. The Department would apply Wis. Stat. §108.02(12)(bm), rather than by application of (12)(c) and DWD 105 and DWD 107, to determine employee status of truckers and loggers.

C. Paragraph (c) of Wis. Stat. §108.02(12) is amended to read:

(c) Paragraph (a) does not apply to an individual performing services for a government unit or nonprofit organization, ~~or for any other employing unit in a capacity as a logger or trucker~~ if the employing unit satisfies the department:

1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact; and
2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

In determining whether the services of the individual were performed free from control or direction the following nonexclusive factors may be considered:

- f. Whether the individual was required to comply with instructions concerning how to perform the work;
- g. Whether the individual received training from the employing unit with respect to the services performed;
- h. Whether the individual was required to personally perform the services;
- i. Whether the services of the individual were required to be performed at times or in a particular order or sequence established by the employing unit;
- j. Whether the individual was required to make oral or written reports to the employing unit on a regular basis.

Comment on proposed amendment to paragraph (c) of Section 108.02 (12): Paragraph (12)(c) is the test for "employee" where services are performed for nonprofit or government employers or as truckers and loggers. As discussed above, the Department proposes to repeal the

special rules for truckers and loggers. The determination of employee status in services performed for private, for-profit entities other than truckers and loggers is governed by the seven-of-ten factor test in Wis. Stat. §108.02(12)(bm). The Department believes that there is no policy basis to treat truckers and loggers differently than employees in other private industries and, therefore, would determine their employee status by application of (12)(bm) rather than by (12)(c) and DWD 105 and DWD 107.

As in the case of for-profit employers, which are governed by paragraph (12)(bm)1., paragraph (12)(c)1. requires that the individual performed services for a nonprofit or government employer "free of the employing unit's control and direction." The Department proposes that this determination for nonprofit and government employing units be made by applying the same five factors, (a.) – (e.), used to make that determination under paragraph (12)(bm)(1). The intent of the Department is that the determinations made under the two provisions, paragraphs (12)(bm)1. and (12)(c)1., be identical.

The Department's formulation does not limit the range of factors to be considered but clearly directs the inquiry to focus on five important factors in determining whether an individual performs services free from control or direction. Some of the five factors ought to bear more weight in certain cases, while some of the five would be emphasized or given more weight in other cases. The Department considers it important that there be a degree of flexibility in selecting and applying the factors to determine control or direction. The Department believes that in subparagraphs (a.) – (e.) it has identified the most important of the many factors that might be considered in determining freedom from control and direction.

D. Paragraph (b) of Wis. Stat. §108.02(12) is repealed.

Comment on repeal of Paragraph (b) of Section 108.02 (12):

Paragraph (12)(b) applied to contribution requirements until December 31, 1999. Paragraph (12)(b) no longer has any practical effect and should be repealed for clarity of the statute.

E. Paragraph (bm) of Wis. Stat. §108.02(12) is amended to read:

(bm) During the period beginning on January 1, 2000, with respect to contribution requirements, and during the period beginning on April 2, 2000, with respect to benefit eligibility, par. (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization ~~in a capacity other than as a logger or trucker,~~ if the employing unit satisfies the department that ~~the individual meets 7 or more of the following conditions~~ by contract and in fact:

- ~~1. The individual holds or has applied for an identification number with the federal internal revenue service.~~
- ~~2. The individual has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed.~~

Comment on Department's proposed deletion of factor number 1, application for an FEIN, in Section 108.02 (bm): *Under the current law, the ten factors in §108.02(12)(bm) are given equal weight. However, in the Department's view inclusion of certain of the factors in the list of ten exaggerates their importance. The first of the ten factors used to establish*

that an individual is not an “employee” is application for a Federal Employer Identification Number (“FEIN”). In many cases, merely obtaining an FEIN is not proof of an independently established business. Many independently established businesses have no need or intent to be employers. Even to the extent that an individual’s application for an FEIN is some evidence in some cases that the individual is not an employee, the factor is not a sufficiently strong indicator of independently established business to warrant including it as one of the ten factors in the test for “employee.”.

Another concern is the undesired effect on the test that this factor will have in certain circumstances. For various reasons (varying with the circumstances that each case can present), use of the application for an FEIN as a factor has been justifiably criticized by employees, employers and the Department. A worker who applies for an FEIN is not necessarily showing he or she has an “independently established business.”

*Application for an FEIN can be coaxed or required by an employing unit. Exercise of such control or direction by an employing unit ought to count **for “employee” status, not against it.** On the other hand, the employing unit that engages an otherwise independently established business and fails the criterion in factor 1 is, in effect, subjected to a tougher test overall than the employing unit that exerts its control or influence over the individual to cause him or her to apply for an FEIN. The test would be improved for both employers (in some cases) and employees (in some cases) by removing application for the FEIN as a factor.*

For all of the foregoing reasons, the Department believes that application for an FEIN does not effectively identify who should or should not be included for coverage within the scope of the unemployment program and should not be a factor listed in the statute.

Comment on Department's proposed deletion of factor number 2, filing of a self-employment tax return, in Section 108.02 (bm): *The Department's view of factor number 2, the filing of a self-employment income tax return, is similar to the filing for an FEIN. Typically the self-employment tax filing is a Schedule C, for reporting profit or loss in operation of a business on the 1040 personal income tax return. An individual is motivated to file a schedule C in many circumstances that are not necessarily concurrent with the existence of an independently established business. Filing a Schedule C may be simply a convenient means to effectively shelter income by taking deductions for "expenses" on the Schedule C. It may be a casual response to the employing unit's issuing a 1099 in stead of a W-2, which avoids payment of FICA tax withholdings. Filing a self-employment tax return is most often a voluntary act. But, as in the case of the FEIN, such a filing will in some cases be coerced or required by an employing unit. For all of these reasons, the individual's action to file a self-employment tax return tends to indicate little, in and of itself, about whether the individual is engaged in an independently established business.*

1. The services of the individual were performed free from control or direction by the employing unit. In determining whether the services of the individual were performed free from control or direction the following nonexclusive factors may be considered:
 - k. Whether the individual was required to comply with instructions concerning how to perform the work;
 - l. Whether the individual received training from the employing unit with respect to the services performed;
 - m. Whether the individual was required to personally perform the services;

- n. Whether the services of the individual were required to be performed at times or in a particular order or sequence established by the employing unit;
- o. Whether the individual was required to make oral or written reports to the employing unit on a regular basis; and

Comment on Department's proposed addition of factor 1 re whether the services of the individual were performed free from control or direction in Section 108.02 (bm): *Freedom from control and direction of the employer is a factor in virtually all legal tests for "employee" in many areas, and certainly for unemployment. The current ten-point test embeds consideration of control and direction in the test a way that makes it largely ineffective. See §108.02(12)(bm)4. The Department's formulation does not limit the range of factors to be considered but clearly directs the inquiry to focus on five important factors in determining whether an individual performs services free from control or direction. Some of the five factors ought to bear more weight in certain cases, while some of the five would be emphasized or given more weight in other cases. The Department it important that there be a degree of flexibility in selecting and applying the factors for determining control or direction and therefore subparagraphs (a.) to (e.) are nonexclusive and none of them are essential in every case. Yet the Department's proposal makes freedom from control or direction an essential criterion to determining that an individual is not an employee. The Department believes its formulation of this factor is consistent with the soundest approaches to the issue found in other jurisdictions. In subparagraphs (a.) to (e.) the Department has identified the most important of the many factors that might be considered in determining freedom from control and direction.*

The individual meets six or more of the following conditions:

2. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

Comment on Department's proposed addition of factor 2 re

“advertising and holding out”: *This factor is not very evident in the current 10-point test. However, the courts and the Commission have specifically recognized advertising and holding out as one of five important factors in the statutory test for “employee” applicable to government and nonprofit employers. The Department considers advertising and holding out to be an effective and fair criterion that tends to demonstrate independence by the individual.*

3. The individual maintains ~~a separate business with~~ his or her own office, ~~or performs most of the services in a facility or location chosen by the individual, and uses his or her own~~ equipment, ~~or~~ materials ~~and other facilities in performing the services.~~

Comment on Department's proposed change to factor 3: *The*

*Department considers it important to remove the language “separate business” from factor 3. The fundamental concern is that **the test as a whole** is designed to determine whether the individual is engaged in an independently established business, essentially a “separate business.” As unemployment administrative law judges and attorneys have commented, to including the ultimate issue of “separate business” as one factor distorts the test. In other words, if factor 3 is satisfied, the entire test should be considered satisfied – so why bother with the remaining factors. Or in other words, if factor 3 is satisfied, but the employing unit still fails to prove 7 of 10, the test is perhaps a defective test.*

The ultimate conclusion on the issue of separate business will be determined by application of the entire ten-point test. Housing the ultimate

issue in one of ten factors, while testing for all ten, is not rational and is difficult to defend to the public. This confusion is at the root of decisions by the Commission and administrative law judges that have been unclear as to exactly how to establish that an individual had a “separate business.”

For these reasons, the Department would remove “separate business” from this factor and, in stead, propose that factor 3 focus on particular facts related to office, facility, equipment and materials.

Another issue with factor 3 is this: The Department and the UI Advisory Council have heard criticism by employers that the requirement of an office is too narrow a concept for many workers, particularly consultants, writers, programmers and others who are very mobile and do not maintain their own office. In some cases they do not perform their services in an office (even if they have one for administration of business). Some of these individuals determine for themselves where they will perform their services for the employing unit. Case examples include writers and consultants who serve their customers through the internet, with little more than a computer and phone, while stationed in a library or coffee shop or while traveling from one client’s location to another. Individuals who decide where to perform the services appear to be no less independent by the fact that they do not maintain their “own office.” To that extent the current version of factor 3 seems unfair. The Department suggests that factor 3 be revised, as indicated above, to account for these circumstances. Under the proposed revision, those who do not maintain their own office but perform most of their services at locations that they select would satisfy factor 3.

4. The individual operates under multiple contracts with one or more employing units to perform specific services for specific amounts of money and under which the individual controls the means and methods of performing such services.

Comment on Department’s proposed change to factor 4: *“Multiple contracts with one or more employing units” is not a truly change. That language merely reflects the current interpretation given by the Commission to factor 4. Some employers have complained that it is difficult to prove the facts necessary to show the individual has contracts with other employing units because the evidence is under the control of the individual. It is true that witnesses are often reluctant and the Department recognizes that the employer will encounter challenges in proving an individual had more than one employing unit case. However, the Department believes that having more than one customer is an indication of an independently established business that belongs in the test and that the burden of proof properly belongs with the employing unit.*

The Department has questioned the wisdom of including within a single criterion two subparts that are quite unrelated to one another. Multiple contracts, the first subcriteria, tends to show that the individual is engaged in a “separate business,” while “control of the means and methods” is less concerned, if at all, with the separateness of the business than with the direction and control of the performance of services. Combining two unrelated factors is confusing and tends to distort the way the test overall operates. However, because “controls the means and methods” is an important factor to include within the test, the Department proposes to add a new criteria 1 (see factor 1 above) regarding freedom from control and direction. The proposed factor 1 would alleviate the need for “controls the means and methods” in factor 4.

5. The individual incurs the main expenses related to the services that he or she performs under contract.

Comment: The Department proposes no change to factor 5. Factor 5 is a useful element in determining employee status and its wording and interpretation have posed no significant difficulties.

6. The individual is ~~responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.~~ obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.

Comment on Department's proposed change to factor 6: The Department considers factor 6 a useful criteria. However, current language invites controversy over the proper interpretation of "liable for failure to satisfactorily complete the services." Is it enough that the individual has an agreement that the individual will redo any unsatisfactory work for no additional compensation? Or must the individual also incur a monetary penalty for not correcting work? Or must the individual be liable to the employer for costs of rework? The Department's proposal best reflects the decisions by the Commission and limits the range of doubt and controversy in the future.

7. ~~The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis.~~ The services performed by the individual do not directly relate to the activities conducted by the employing unit retaining the services

Comment on Department's proposed change to factor 7: Commission payment is the most common case satisfying factor 7. The Department believes that payment on a commission, per-job or competitive bid basis does not strongly indicate the existence of an independently established business. The current factor 7 should be eliminated as a criterion.

The Department proposes to add “integration” as a factor: “The services performed by the individual do not directly relate to the activities conducted by the employing unit retaining the services.” Integration has been a factor in the ten-point test only to the extent it is contained within other factors. An indication that integration belongs as one of the ten factors is the fact that it is one of five factors the courts and Commission have applied to determine “employee” status for government and nonprofit employers and is used by other states. Integration was at one time a factor in Wisconsin’s primary test. In Keeler v. LIRC, 154 Wis. 2d 626, 631 (1990), the Wisconsin Court of Appeals illustrated the integration concept by the example of a tinsmith called upon to repair the gutters of a company engaged in a business unrelated to either repair or manufacture of gutters. Because the tinsmith’s activities were totally unrelated to the business activity conducted by the company retaining his services, the services performed by the tinsmith “do not directly relate to the activities conducted by the employing unit retaining the services” and the services were therefore not integrated into the alleged employer’s business.

8. The individual may realize a profit or suffer a loss under contracts to perform such services.

Comment: *The Department proposes no change to factor 8. Factor 8 is a useful element in determining employee status and its wording and interpretation have posed no significant difficulties.*

9. The individual has recurring business liabilities or obligations.

Comment: *The Department proposes no change to factor 9. Factor 9 is a useful element in determining employee status and its wording and interpretation have posed no significant difficulties.*

10. The success or failure of the individual's business depends on the relationship of business receipts to expenditures. The individual is not economically dependent on a particular employing unit with respect to the services at issue.

Comment on Department's proposed change to factor 10: *It is hard to decipher the true meaning of factor 10. It is difficult to imagine many endeavors where success or failure would not be determined by the relationship of business receipts to expenditures. Some decisions have held that this factor involves, at least in part, the notion of economic independence. That is, was the worker performing similar services for other employing units besides the employing unit at issue during the time period in question? Some decisions have held that where the individual performed for only one employing unit the criteria was not satisfied because the relationship of business receipts to expenditures was less important than the individual maintaining a relationship with the particular employing unit. Other decisions have held that this factor is concerned with a broad overview of the enterprise in question to determine whether the individual faces any realistic prospect of a significant period of time during which he or she would necessarily have expenditures but not receipts. Similarly, other decisions have held that this criteria is concerned with whether the endeavor involves a significant investment which is at risk thereby creating the potential for real success if the investment proves profitable or real failure if the investment is lost. Factor 10 is not satisfied if the individual is performing the services more as a hobby than as a business, on the rationale that the individual is not interested, at least primarily, in receipts versus expenditures.*

Employers have difficulty accepting decisions that the employee's business fails the test of "success or failure of the individual's business depends on the relationship of business receipts to expenditures." UI lawyers and administrative law judges are puzzled by what exactly was intended by this

factor. While, as noted above, there are decisions which give meaning to this criterion, it can be difficult to justify the decisions under this language.

The Department proposes that factor 10 focus on economic independence. For many years, economic independence has been acknowledged by the Commission and the courts as an important factor in the test applicable to government and nonprofit employers. The Commission has held that an individual is economically dependent if the services that individual is performing for the particular employing unit are a majority of that type that the individual performed for all employing units combined that have retained such services from that individual. The Department believes this is a common sense and highly relevant criterion and should be included in the test. The proposed wording is more clearly stated than the current factor 10 and thus more understandable.

- F. **Wis. Stat. §108.02(15)(k) is amended to exclude from the definition of “employment” domestic services performed by an individual for his or her family members.**

Comment on exclusion from the definition of “employment” domestic services performed by an individual for his or her family members:

The Department would exclude domestic services, including personal care, companionship, housekeeping, etc., from covered employment, where performed directly for a resident in a home by a family member of the resident. The statutory definition of “employment” is “any service . . . performed by an individual for pay.” The statute contains several exclusions. Exclusion of domestic services performed by an individual for his or her family members would be a new exclusion under Wis. Stat. §108.02(15)(k). The Department’s rationale for the change is essentially that the services performed by an individual to a family member are typically driven by the family relationship more than by the pay or other attributes of employment. The proposal would eliminate unemployment contributions

and benefits for individuals providing care and other domestic services directly to the individual's family member.