

Report of Activities of the Unemployment Insurance Advisory Council

2007 - 2008

Report prepared for the Governor and Legislature,
pursuant to s. 16.48, Wisconsin Statutes

Roberta Gassman, Secretary
Department of Workforce Development
February 2009
UCD-16480-P (R. 01/2009)

CONTENTS

	Page
INTRODUCTION.....	2
BACKGROUND ON THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL	2
MEMBERSHIP OF THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL.....	3
PROCEDURES	5
BUSINESS MEETINGS	5
PUBLIC HEARINGS.....	6
ISSUES RESOLVED IN THIS REPORTING PERIOD	7
Major Provisions of 2005 Wisconsin Act 86	7
Strengthening the Reserve Fund.....	7
Benefits.....	8
Taxes/Employer Status	9
Equity and Fairness.....	10
Program Administration.....	11
Administrative Rules Changes	12
Pending Administrative Rules Changes	16

INTRODUCTION

This report is a summary of the deliberations of the Unemployment Insurance Advisory Council and the position of the Council on the proposed changes in the unemployment insurance laws during the most recent two-year period, 2007 to 2008. The report is prepared by the Secretary of the Department of Workforce Development and provided to the Governor and Legislative leaders in January of each odd-numbered year, in accordance with Wisconsin Statutes §16.48(1)(b).

BACKGROUND ON THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

For over 75 years, modifications of Wisconsin's Unemployment Insurance (UI) Law have been a direct result of the joint efforts of the Unemployment Insurance Advisory Council and the Legislature. The Council's statutory responsibility is to: (1) advise the Department of Workforce Development (Department) in its administration of the UI law; (2) report its views on pending legislation affecting UI to committees of the Legislature; and (3) submit its recommended changes in the UI law to each session of the Legislature.

As in other states, the existence of the Council represents the Legislature's longstanding recognition that a strong advisory body of labor and management representatives is essential to the UI program. Management and labor interests have a stake in the policy and operation of the UI program that is unique: employers fund the UI program, the burdens of unemployment fall directly on unemployed persons and their families and UI benefits are indispensable.

Changes to the unemployment law arise biennially from negotiations between management and labor members of the Council. The Council meets several times each year and studies potential law changes on a continuous basis. Over time the negotiated recommendations for changes to the unemployment law represent a balance of interests between management and labor.

The Legislature has attached great weight to the Council's recommended changes in UI law, consistently passing the Council's proposed changes. Strong legislative support for the Council process has stabilized Wisconsin's UI program. The Council is recognized as essential and integral to the legislative process. As a result, controversial issues and the foremost policy concerns are addressed effectively by the Council. Council deliberations and negotiations resolve difficult and complex issues and tend to fairly and efficiently balance the interests of employers and employees.

The legislation recommended reflects the Council's concerns about the solvency of the unemployment fund, as well as the interests of those who pay for the program and those who receive its benefits.

The experience and knowledge of Council members assures that proposed changes to the UI law are reviewed with attention to sound policy considerations. The Council process largely assures clarity and internal consistency of the UI law and conformity of Wisconsin's UI law with a complex body of federal statutory requirements for state UI laws. Conformity enables Wisconsin employers to reduce or eliminate their obligation to pay federal unemployment tax (FUTA). Conformity also assures that Wisconsin receives its federal funding for administration of the UI program, approximately \$61.4 million for 2008.

The Council recognizes its duty to communicate with the Legislature concerning its deliberations, and about specific issues raised by members of the Legislature. The Council sends its meeting agenda and minutes to all legislators. The Council also invites the chairs of the Senate and Assembly labor committees to attend its meetings and to provide input to the Council on matters of interest to the Legislature. By this report and other communications, the Council seeks to advance the Legislature's awareness of its work in the UI program.

MEMBERSHIP OF THE UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

By statute, the 11-person Council consists of five members representing employers, including one member who represents small businesses; five members representing employees; and a nonvoting chairperson who is a permanent classified employee of the Department. Voting Council members are appointed by the Secretary of the Department of Workforce Development to serve staggered 6-year terms. The Chair is appointed by the Secretary to serve as long as the Secretary desires. The Chair is Daniel J. LaRocque, appointed in 2006. Labor membership has changed since the last report. Labor member Michael Bolton was replaced by Sally Feistel, Sub-District Director, United Steel Workers District 2; Red Platz was replaced by Anthony Rainey, President, UAW Local 469 Oak Creek, Wisconsin. Management member Earl Gustafson was re-appointed for another 6-year term in July of 2007. The voting Council members, their affiliation and the dates their terms expire are noted below.

Employer Representatives

James Buchen, Vice President/Government Relations, Wisconsin Manufacturers and Commerce, Madison, WI: term expires July 1, 2009.

Earl Gustafson, Energy and Projects Manager, Wisconsin Paper Council, Neenah, WI: term expires July 1, 2013.

Edward Lump, President and CEO, Wisconsin Restaurant Association, Madison, WI: term expires July 1, 2011 (Small Business Representative)

Susan Haine, Owner, Susan Haine Business Consulting, LLC, Middleton, WI: term expires April 1, 2012.

Daniel Peterson, Vice President of Finance, J.H. Findorff & Sons, Inc., Madison, WI: term expires July 1, 2009.

Employee Representatives

Sally Feistel, Sub-District Director, United Steel Workers District 2: term expires June 1, 2014.

Phillip Neuenfeldt, Secretary/Treasurer, Wisconsin State AFL-CIO, Milwaukee, WI: term expires July 1, 2009.

Dennis Penkalski, Former Business Manager, Milwaukee & Southeast District Council of Carpenters (retired), Representing Construction Unions, Milwaukee, WI: term expires July 1, 2011.

Anthony Rainey, President, UAW Local 469, Oak Creek, WI: term expires November, 2014.

Patricia Yunk, Director of Public Policy, Council 48 AFSCME, AFL-CIO, 3417 West St. Paul Avenue, Milwaukee, WI: term expires April 1, 2012.

PROCEDURES

Business Meetings

The Council generally meets every five to six weeks. Meeting agenda and materials are mailed to Council members about one week prior to the meeting. Public notice is given. The Council receives and discusses written comments and suggestions about the UI law from legislators, employers, employees and the general public. Presentations at Council meetings are allowed at the Council's discretion. By law, seven votes out of ten are required for the Council to approve proposed law changes. Council meetings are digitally recorded and minutes of each meeting are prepared. During this reporting period, the Council conducted twenty business meetings (in addition to five public hearings listed below).

When correspondence to the Council is received by the Council or the Department suggesting a change to UI law, the Chair sends a response advising the writer that the letter will be shared with the Council. Each Council member is provided with a copy of such correspondence. Meeting agenda routinely include time for discussion of letters. This provides a formal opportunity for the Council to address the suggestion and to request further study by the Department. Letters are sent to law change suggestors informing them of the Council's intended action regarding their proposal.

The Council receives from Department staff detailed written analyses of all suggested law changes. The analysis typically includes a description of the suggested law change, the reasons for it, the history and background of any current provision, any federal or state law issues relevant to the proposal, the policy and fiscal effects of the proposed change, and the administrative feasibility and impact of the proposal. Law change proposals ordinarily receive thorough discussion among Council members, Department staff, and other interested parties in attendance at Council meetings. Often the discussion results in further study and information gathering or redrafting by Department staff prior to the Council's action on the proposal.

Council meetings are subject to the Open Meetings Law and advance public notice of each meeting is provided. The Open Meetings Law does, however, provide an exemption for the Council, which allows labor and management to hold separate, closed caucuses to discuss potential law changes.

Public Hearings

The Council held the following public hearings during this reporting period:

Madison	--	May 20, 2008
Green Bay	--	June 5, 2008
Milwaukee	--	July 25, 2008
Wausau	--	September 9, 2008
Spooner	--	October 2, 2008

ISSUES RESOLVED IN THIS REPORTING PERIOD

The Council receives numerous suggestions for changes in the UI law from the Department, legislators, employers, employees and others concerned about the UI program. The Council selects proposed law changes for Department analysis and further consideration. The following is a synopsis of the proposed law changes that were adopted by the Council, recommended to the Legislature and enacted by 2007 Wisconsin Act 59.

Major Provisions of 2007 Wisconsin Act 59

Strengthening the Reserve Fund

Increase the unemployment insurance taxable wage base.

Beginning in calendar year 2009, each employer will pay unemployment insurance taxes on the first \$12,000 of wages it pays each employee. The wage base increases to \$13,000 in calendar year 2011 and \$14,000 in calendar year 2013.

Decrease basic rates for employers and increase the corresponding solvency rates by the same amount.

Beginning in January of 2009 employers with positive account balances will have a decrease of 0.2% (two-tenths of one percent) in their basic tax rate and an increase of 0.2% their solvency tax rate. Employers with overdrawn account balances will have a decrease of 0.4% (four-tenths of one percent) in their basic tax rate and an increase 0.4% in their solvency tax rate.

Require additional wages to qualify for unemployment insurance benefits.

Beginning with UI benefit years that begin April 6, 2008, Act 59 requires that in order to qualify for UI benefits, a claimant must have at least 35 times his/her weekly benefit rate in total base period wages. Former law required 30 times the weekly benefit rate.

The fiscal effects of these changes to the statute are noted in the Secretary's 2009 Financial Outlook for the Wisconsin Unemployment Insurance Program, submitted to the Governor and Legislative leaders on or about January 15, 2009.

Benefits

Increase the maximum weekly benefit rate by \$8 in 2009.

As of January 4, 2009, the maximum weekly benefit rate will increase from \$355 per week to \$363 per week.

Change criteria for determining when a claimant is unable to work or unavailable for work.

A claimant must be able to perform suitable work and available for suitable work to be eligible for unemployment benefits. Under revised Wisconsin Administrative Code Chapter DWD 128, a claimant is considered able to work if he or she has the physical and psychological ability to perform suitable work, and a claimant is considered available for work if he or she maintains an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market. Former rules required that claimants be able and available for specific percentages of suitable jobs in the labor market to be eligible for benefits.

Provide consistent treatment for claimants who are unable or unavailable to perform work with a current employer or who separate from an employer because they are unable or unavailable for their work.

A claimant who is partially unemployed receives reduced benefits if the earnings exceed \$30. If the claimant is unable or unavailable to perform all scheduled work with the employer during a week, the claimant will not be eligible for any benefits that week if more than 16 hours of scheduled work is missed. If 16 or less hours are missed, the Department will calculate a reduction of benefits for the wages that could have been earned and wages earned. Under former law the department engaged in complex benefit calculations for small amounts of benefits where more than 16 hours of scheduled work in a week was missed.

If an employee is terminated by an employer or employment is suspended because the employee is unable or unavailable for work with the employer or if the employee is on a leave of absence, the able and available test will be applied to determine whether the employee is eligible for benefits. If the employee is not able to perform suitable work and available for suitable work in the employee's labor market, he or she generally will not be eligible. However, in the first week of the separation, if 16 or less hours are missed, the claimant may be eligible for benefits. Eligibility varied under former law for employees suspended, terminated or on leave of absence.

Clarify statutory language regarding unemployment insurance disqualifications following discharge for (1) failure to notify an employer of absence from work or (2) misconduct.

Act 59 reinforces the interpretation of the attendance disqualification provision that when attendance issues are involved in a discharge, a misconduct disqualification may be applied if the attendance provision does not result in disqualification. It also removes a sunset date and makes the disqualification for absenteeism and tardiness a permanent part of the statutes.

Make permanent the provision that benefits remain paid when payment results from employer fault when an employer or employer agent fails to provide the Department with correct and complete information; and Department records are prima facie evidence of failure to respond.

In the 2005-2006 session of the Legislature, benefits granted due to employer fault were expanded. That change reduced instances of employers or employer agents not providing complete, timely and correct information when requested by the Department during fact-finding investigations prior to eligibility determinations. Act 59 makes the change permanent and specifies that Department records about the failure to respond may be admitted as prima facie evidence of that failure in appeals decisions on employer fault.

Taxes and Employer Status

Require all employer agents and certain large employers to pay taxes electronically.

Beginning with payments made in 2009, all employer agents who make payments on behalf of their clients will be required to pay taxes electronically. Also, any employer with a tax liability of at least \$10,000 for any twelve month period ending on June 30 will be required to make all future tax payments electronically beginning January 1 of the next calendar year. The penalty for failing to pay properly is the greater of \$50 or one-half of 1% of the amount due.

Expand use of electronic filing for wage and tax reports.

Beginning with tax and wage reports due for the 3rd quarter 2008,

- employers with 25 or more employees are required to file tax and wage reports electronically in the manner and form required by the Department,
- the penalty for filing wage reports incorrectly increases from \$10 to \$15 per employee, and
- the penalty for late wage reports is the same for all employers.

Beginning with reports due for the 3rd quarter 2009, the penalty for filing wage reports incorrectly increases from \$15 to \$20 per employee.

Change the due date for payments and tax and wage reports.

Previously, all tax and wage reports and payments were timely if they were postmarked no later than the due date, or the department received the report or payment no later than three days after the due date. With the new law, beginning with reports and payments due for the 3rd quarter 2008, reports and payments are timely if received by the Department on or before the last day of the month following the end of each calendar quarter. Due dates are: April 30, July 31, October 31, and January 31. Penalties are assessed on the employer for late wage reports; interest is assessed on late tax payments.

Equity and Fairness

Increase penalties for claimants and employers that commit fraud by concealing information.

Act 59 defines concealment as intentionally misleading or defrauding the Department by withholding or hiding information or making a false statement or misrepresentation in connection with a benefit claim. When concealment is discovered for the first time, the Department will issue an appealable determination notifying the claimant that the claimant will forfeit future benefits in an amount equal to one times his or her weekly benefit rate for each act of concealment described in the determination. The penalty for acts of concealment occurring after the first forfeiture determination will be increased to 3 times the weekly benefit rate for each act. The penalty for acts of concealment occurring after the first determination at the 3 times level will be increased to 5 times the weekly benefit rate for each act.

Penalties are assessed in a similar manner to employers that aid and abet claimants to commit fraud. The penalty levels are:

Level 1 - \$500 for each act

Level 2 - \$1,000 for each act

Level 3 - \$1,500 for each act

In addition to the increased forfeiture penalties, Act 59 makes the claimant ineligible for benefits for any week in which the claimant concealed wages. Under the former law a claimant was in some cases eligible for partial unemployment benefits for a week in which wages were concealed.

Remove benefit reduction for parents who are employees in their child's business.

Act 59 allows full unemployment benefit entitlement to parents who are employed in their child's family owned corporation, partnership or limited liability corporation but by themselves or in conjunction with their children have limited or no ownership interest in the business. Former law reduced benefits for parents that had limited or no ownership in their child's business in the same way former and current law reduces benefits for owners. Owners control their own employment and unemployment. But parents that have little or no ownership will now be treated as regular employees and allowed full entitlement. Adult children who are over the age of 18, are employed by their parents, and have little or no ownership in their parents' business have always been allowed full benefit entitlement when laid off from work.

Reduce from \$5,000 to \$1,000 the threshold for employers for deferring payments of first quarter tax liability.

Beginning with the first quarter 2009, employers with a first quarter tax liability of \$1,000 or more may defer up to 60 percent of the tax due for the first quarter. Act 59 specifies that employers taking advantage of the deferral must notify the Department electronically of their intent to defer and must file all quarterly contribution, employment and wage reports electronically in the manner and form prescribed by the Department. The threshold formerly was \$5,000.

Program Administration

Extend for two years the current administrative fee for upgrading technology to operate the unemployment insurance program.

Assessed at one hundredth of one percent of taxable wages, this fee will continue until June 30, 2010, unless extended by law. The fee is offset by an equal reduction in the employer's solvency tax rate. The fee is not charged to employers with zero solvency tax rates.

Use of Reed Act funds.

Act 59 permits use of up to \$1 million in Reed Act funds for unemployment administration, if needed, in each of federal fiscal years 2008 and 2009 (October 2007 – September 30, 2009). The Department received legislative authorization to use Reed Act funds for administration during the previous biennium but did not expend any of the funds.

Appoint a committee to study the definition of employee and independent contractor.

Act 59 directs the Unemployment Insurance Advisory Council to appoint a committee to study the definition of “employee” in the unemployment statute, §108.02(12) for possible changes and to provide any recommendations by June 30, 2009.

Administrative Rules Changes

The Council continues to work on revising UI rules and creating new rules. In 2007 and 2008, thirteen chapters of the Wisconsin Administrative Code on unemployment insurance were affected by changes presented to the Legislature.

- DWD 105, Relationships of carriers and contract operators**
- DWD 107, Employment relationships in the logging industry**
- DWD 120, Notices as to benefits**
- DWD 145, Active processing seasons**

Section 108.02 (15) (k) 14., Stats., as repealed by 2005 Wisconsin Act 86, provided that for the purpose of the UI program “employment” does not include service by an individual for an employer that was engaged in the processing of fresh perishable fruits or vegetables if the individual was employed solely during the active processing season, unless certain exceptions applied. 2005 Wisconsin Act 86 repealed this coverage exclusion, and claimants are now eligible to claim UI benefits based upon service processing fresh perishable fruits and vegetables. Chapter DWD 145, which specified the active processing seasons for fresh perishable fruits and vegetables, and s. DWD 120.02, which required an employer engaged in the processing of fresh perishable fruits and vegetables to give special notice to any employee who work during the active processing season that wages earned in processing employment may be excluded in determining his or her eligibility for unemployment insurance, were repealed.

Section 108.02 (12), Stats., defines “employee” for the purpose of the unemployment insurance program. In order to be eligible to claim benefits, an individual must, in addition to other requirements, be an “employee” under this definition and not be performing services as an independent contractor. 1995 Wisconsin Act 118 renumbered the test for independent contractor status that existed at s. 108.02 (12) (b), 1993-94, Stats., to s. 108.02 (12) (c), Stats., and limited it to truckers and loggers. A new test of independent contractor status that applies in all other cases was created at s. 108.02 (12) (b), Stats. Chapter DWD 105, on the relationship of carriers and contract operators, and Chapter DWD 107, on employment relationships in the

logging industry, were updated to reflect the renumbering of s. 108.02 (12) (b), Stats., to s. 108.02 (12) (c), Stats.

DWD 123, Reports as to Benefits
DWD 111, Quarterly Wage Reporting Procedures

Chapter DWD 123 requires that certain reports must be filed by employers to assist the department in determining a claimant's benefit claim and prescribes filing procedures for the reports. The rule was updated regarding department filing procedures. The requirements for two obsolete reports were repealed: the Work Record Report and Final Work Record Report. The three current reports were required: Separation Notice, Wage Verification/Eligibility Report, and Urgent Request for Wages. DWD 111.07(4), which provided for the Urgent Request for Wages report, was repealed because that report was now required in DWD 123.

DWD 128, Ability to work and availability for work

Chapter DWD 128 was amended to eliminate the requirement that a claimant be "able" to work 15% of the opportunities for suitable work in the claimant's labor market area. Able to work now means that the claimant has the physical and psychological ability to perform suitable work. During any week, a claimant is not able to work if the claimant is unable to perform suitable work due to a physical or psychological condition. In making the determination whether the claimant is able to perform suitable work, the department must consider all factors relevant to the circumstances of the case, which may include factors listed in the rule.

The rule also was amended to eliminate the requirement that a claimant be "available" for work 50% of the full-time opportunities for suitable work in the claimant's labor market area and the requirement that first shift full-time work governs the availability standard for most jobs. Available for work now means that the claimant maintains an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market area. During any week, a claimant is not available for suitable work if he or she has withdrawn from the labor market due to restrictions on his or her availability for work. In determining whether a claimant has withdrawn from the labor market, the department must consider one or more of the factors listed in the rule.

The amended rule presumes that a claimant is able and available to work if the claimant is registered to work and does the required work search. The rule helps the Department determine whether a claimant is "able and available" for work by methods that are more transparent than

the previously required percentage standards and are more understandable to claimants and employers. The rule also was amended to delete the provision that overpayments will not be collected for benefits erroneously paid before issuance of an eligibility determination for a given week, clarify the difference between refusal of work and availability for work, incorporate the federal standard for proof of alien status, and delete the grace period for claimants with uncontrollable restrictions as unnecessary in light of the new definition of able to work.

DWD 130, Wages for Benefit Purposes

Chapter DWD 130 describes the department's treatment of tips, the value of room or meals, and payments under supplemental unemployment benefit plans, in determining wages for benefit purposes. DWD 130.03, which contained obsolete terms and cross-references and inaccurately stated that there is a different treatment of tips for contribution purposes and benefit purposes, was repealed. The current treatment of tips is governed solely by Wis. Stat. §108.02(26)(b)3., which provides that "wages" includes the value of tips that are received while performing services which constitute employment, and that are included in a written statement furnished to an employer under 26 USC §6053(a).

DWD 130.05 was amended to correct an obsolete cross-reference and clarify language in the section relating to the value of room or meals. DWD 130.07, which contained an obsolete and incorrect cross-reference relating to supplemental unemployment benefit plans, was repealed.

DWD 130.07 was recreated to provide that when Wis. Stats. §108.02(26) or the Federal Unemployment Tax Act require that a payment meet the requirements of a particular section of the internal revenue code not to be considered wages, the employer must demonstrate to the satisfaction of the department that the payment meets such requirements. This standard also applies to the determination of whether supplemental unemployment benefit plans are considered wages, as well as other issues raised under Wis. Stats. §108.02(26) or FUTA. DWD 130.01 also defines the purpose of the rule and clarifies why the definition of wages may differ from that in 26 USC §3306(b), similar to the purpose statement in DWD 101.01 relating to wages for contribution purposes.

DWD 133, Temporary Help Employers

For the purpose of unemployment insurance, an employment relationship normally ends when an employee is laid off without a definite return-to-work date, even if recall is anticipated. If a

subsequent offer is refused, it is considered a refusal of new work under s. 108.04 (8), Stats. The employment relationship between a temporary help agency and its employees does not follow the patterns that apply to most other employment relationships. In the temporary help industry, it is common for employees to be assigned to a series of assignments at different locations with different duties, wages, and other conditions. It is also common for these assignments to end with little or no notice to either the employee or the employer. While the parties may fully intend to continue the relationship, the short notice that an assignment has ended may require that a short period of time pass before the employer is able to send the employee to the next assignment. This new rule establishes standards for determining whether the employment relationship continues or is terminated for the purpose of unemployment insurance benefit eligibility.

Chapter 108, Stats., provides that an employee is ineligible for unemployment insurance if the employee voluntarily separated from the employment, unless certain exceptions apply. Under the new rule, the employment relationship between a temporary help employer and the employee is considered to be voluntarily separated by the employee when any of certain specified events occur. If an employment relationship does not continue, the employment is considered separated by the employer unless the employee has voluntarily separated from the employment under the rule or any other provision of Chapter 108, Stats. When the employment relationship terminates, the employee's application for employment expires. If the employee returns to work for the employer, a new application for employment is required for this chapter to be applicable. If the employee agrees in writing, the original application may be treated as a new application for employment.

DWD 136, Wages exempt from levy

This new rule was required by and prescribes the methodology for application of s. 108.225 (16), Stats., as well as the application of 15 USC 1673, for a third party employer to determine an individual's wages exempt from levy by the department. The rule expresses the calculations necessary to determine the amount of wages excluded from department levy and the maximum amount that may levied by the department to recover benefit overpayments and forfeitures. The calculations ensure that the individual's wages are protected as required by state and federal law. The rule also defines relevant terms and directs the department to use the poverty guidelines adopted by the judicial conference annually under s. 812.34(3), Stats., or a comparable table.

DWD 100, Definitions

DWD 140, Unemployment insurance appeals

DWD 149, Disclosure of unemployment insurance records

The U.S. Department of Labor issued a final rule *Federal-State Unemployment Compensation (UC) Program; Confidentiality and Disclosure Requirements of State UC Information* on September 27, 2006. (71 Fed. Reg. 56830; codified at 20 CFR Part 603), requiring that states amend their laws, rules, procedures, and existing agreements to comply with the federal rule on confidential unemployment records by October 27, 2008. Wisconsin met this deadline and the rule changes to DWD 149 to conform to the federal confidentiality rule became effective August 1, 2008. The present and former rules governing confidentiality of unemployment insurance information provide comprehensive legal protection from disclosure of information obtained from employers and employees in regard to their unemployment accounts and transactions with the Department.

Pending Administrative Rules Changes

The department filed scope statements for possible changes to the following rules: DWD 128, 129.