Worker Classification

UNEMPLOYMENT INSURANCE

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Wisconsin’s Unemployment Insurance Program

• Unemployment Insurance (UI) is financed by federal and state taxes paid by employers who are subject to federal and state UI laws.

• The UI program primary roles are to provide:
  • Temporary economic assistance to individuals who are out of work through no fault of their own while they look for employment.
  • Economic stability in the state during periods of economic downturn.

• WI was the first state to enact UI legislation in 1932 to help stabilize the effects of the Great Depression.
Worker misclassification negatively impacts the UI program through:

- **The loss of UI tax revenue** from employers who misclassify workers;

- **The creation of an unfair business climate** that places those who follow the law at a competitive disadvantage; and

- **Denying workers access to the UI benefits** they may have been eligible for if properly classified.
Worker Misclassification Task Force (2009)

- **Established in 2008** by DWD Secretary and chaired by the UI Division Administrator.

- **Charged with** examining the problems relating to misclassifying workers and recommending administrative and legislative steps to address those problems.

- **Members included** individuals representing the interest of workers and business communities from industries impacted by misclassification.

- Also included personnel from **DWD, DOR, and Wisconsin Department of Commerce**.
Recommendations of the Task Force

- **Recommendation 1:** Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- **Recommendation 2:** Increase information sharing among state agencies.

- **Recommendation 3:** Support the operations of the Department of Commerce Builder Contractor Registration (BCR) program.

- **Recommendation 4:** Establish a "hotline" to facilitate reports from workers, contractors, and the general public about misclassification abuses.
Recommendations of the Task Force

• **Recommendation 5:** Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.

• **Recommendation 6:** Withhold 2% on form 1099 from payments made by contractors to subcontractors, including individuals operating as independent contractors.

• **Recommendation 7:** Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

• **Recommendation 8:** Conduct additional study of other policy options designed to combat worker misclassification.
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

**Recommendation 1:** Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- **DWD drafted legislation** with input from stakeholders impacted by worker misclassification.

- **2009 Wis. Act 292** became effective January 1, 2011 and required DWD to:
  - Educate employers, employees, nonemployees, and the public about the proper classification of employees and nonemployees.
  - Receive and investigate complaints alleging misclassified workers or investigate any alleged violations on its own initiative and referring these complaints to other appropriate agencies.
Recommendation 1: Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

2009 Wis. Act 292 further authorized DWD to:

- Cooperate with other state or local agencies in the investigation and enforcement of laws whose enforcement depends on the proper classification of employees.

- Issue a “stop work” order at the work site if an employer fails to demonstrate compliance with any requirements.

- An employer that does not comply with a stop work order may be assessed a forfeiture of $250 per day until the employer either stops work or complied with the requirements.
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

**Recommendation 1:** Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- Initial efforts by UI Division:
  - One BOLA staff hired in May 2010
  - Investigative policy was created
  - Website was created to inform employers on how to properly classify workers as employees or independent contractors
Recommendation 1: Create an Office of Worker Misclassification; empower the Office to issue stop work orders.

- Creation of the Worker Classification Section
  - DWD initially financed the worker misclassification initiative almost exclusively through federal grants.
  - In 2018, a formal Worker Classification Section was officially created in BOLA.
  - Team consists of seasoned investigators with extensive experience in white collar and economic crime investigations.
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

Recommendation 2: Increase information sharing among state agencies.

- Referrals from other Divisions within DWD (e.g., Workers Compensation and Equal Rights)
- Referrals with other WI state agencies (DOR, DOJ, law enforcement, etc.)
- In 2014, DWD signed MOU with USDOL to share information and coordinate law enforcement efforts to reduce employee misclassification
- Collaboration with OSHA on referrals and joint investigative operations with OSHA inspectors
Recommendation 4: Establish a “hotline” to facilitate reports from workers, contractors, and the general public about misclassification abuses.

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Recommendation 5: Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.


- Two informational videos were added to the website in 2016
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

**Recommendation 5:** Undertake an aggressive campaign to educate contractors and the general public about misclassification issues.

- UI supplements the educational value of the website through education & outreach efforts such as:
  - Providing speakers to employers and trade unions;
  - Presenting at construction industry events, labor union meetings and other public forums;
  - Holding meetings with individual contractors;
  - Forums such as Labor Law Clinics and Friday Fundamental webinars;
  - Radio Public Service Announcements; and
  - Annual Rate Notice Newsletter.
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

**Recommendation 7:** Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

- **2009 Wis. Act 28 (2009-2011 state budget):** provided that any employer engaged in construction projects who willfully misclassified a worker as an independent contractor with intent to evade any requirement of workers compensation, fair employment or UI law would be subject to a **fine of $25,000 for each violation.**

- The provision relating to penalties for willful misclassification was later amended by **2009 Wis. Act 288** to include employers engaged in painting or drywall finishing of buildings/other structures.
Recommendation 7: Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

  - Any construction employer who knowingly and intentionally misclassifies workers is subject to a **civil penalty of $500 per employee** intentionally misclassified with a maximum penalty of **$7,500 per employer per incident**.
  - A new administrative penalty was created for construction employers who coerce individuals to adopt independent contractor status.
    - The penalty is **$1,000 per employee coerced** with a maximum penalty of **$10,000 per employer per year**.
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

**Recommendation 7:** Provide significant penalties for contractors actively seeking to subvert and avoid proper classification of workers.

  - A construction employer who knowingly and intentionally provides false information in order to misclassify workers, after having been assessed an administrative penalty, is subject to a **criminal fine of $1,000 per misclassified worker up to $25,000** for each violation.

  - Criminal penalties for intentional worker misclassification are prosecuted by the DOJ or local district attorneys.
Recommendation 8: Conduct additional study of other policy options designed to combat worker misclassification.

- **2007 UIAC agreed bill (2007 Wis. Act 59)** required that the UIAC appoint a committee to study the definition of "employee" under UI law.
- UIAC approved the study committee's recommendations and included the proposed changes in the **2009 UIAC agreed bill (2009 Wis. Act 287)**.
  - 2009 Wis. Act 287 changed the test for determining employee status under UI law.
  - A worker must meet the criteria of a **two-part test to be considered an independent contractor for UI purposes under Wis. Stat. § 108.02(12)(bm)**.
    1. The worker must perform services free from direction or control of the employing unit, and
    2. Be engaged in an independently established trade, business or profession (meets 6 of 9 conditions).

The Report of the Study Committee to Review the Unemployment Insurance Statutory Definition of "Employee" can be found at the link below:
DWD UI’s Efforts in Response to 2009 Task Force Recommendations

• Ongoing efforts of the Worker Classification Section:
  • The UIAC receives regular reports on the activities of the Worker Classification Section
  • The UI Division works with the UIAC to examine best practices utilized by other UI programs
  • Continued efforts to educate employers on proper worker classification
    • Achieved success bringing select Wisconsin industries into compliance
Questions?

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