WISCONSIN ACT 197

Amendments

To

Chapter 108

UNEMPLOYMENT

INSURANCE

LAW

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C o n t e n t s

Executive Summary

On April 8, 2004 Governor Doyle signed 2003 Wisconsin Act 197, amending Chapter 108, Wisconsin's Unemployment Insurance law. The Act includes provisions to:

- Increase interest earnings on the State's Unemployment Reserve Fund.
- Facilitate training of unemployed workers.
- Support establishment of new business ventures by making permanent a modified definition of independent contractor.
- Restore statutory language to allow partial transfer of unemployment tax rating factors when a portion of a business is transferred from one employer to another.
- Increase an employee's subsistence allowance when imposing a levy on wages to collect a non-fraudulent benefit overpayment.
- Extend work search waivers to claimants with a history of returning to the same employer.
- Make permanent additional requirements to search for work.

Background

The Unemployment Insurance Advisory Council has a long history of recommending changes to the Unemployment Insurance law. From the beginning, the 1932 Wisconsin law included a provision for an advisory council of both employer and employee representatives to assist the Industrial Commission (a prior name for the Department of Workforce Development) in administering and carrying out the purposes and provisions of unemployment law.

The Industrial Commission appointed the first group of Unemployment Advisory Council members. It consisted of three employer representatives, three labor representatives and a public chairperson from the Commission's own staff. Management and labor representatives were determined the best choices because management and labor are most affected by the council's actions. Management pays the taxes and labor receives the benefits. The new council's first meeting was in March 1932, just two months after the law became effective.

By 1933 the advisory council found itself considering how various provisions of the statute might be clarified, or even improved, in the general public interest. The council recommended many minor clarifications and a one-year delay in the effective date of tax collections and benefit payments. In turn, the Industrial Commission recommended the changes to the legislature, which adopted them.

In 1935 the United States Congress enacted the Social Security Act. After that, the Wisconsin Unemployment Compensation Advisory Council spent the summer preparing suggested law changes to conform Wisconsin law to new federal law. By then it was becoming clear that recommending legislative changes was a primary function of the advisory council.

In 1939 the advisory council asked the legislature to clarify further the relationship of the advisory council to the legislature. The legislature agreed, and the three council duties spelled out in the legislation continue today.

First, the council advises the department in administering the unemployment law. Second, the council reports its views on pending unemployment insurance legislation to appropriate committees of the legislature. Third, the council submits its recommended changes in the unemployment law to each session of the legislature.

Over the years, the legislature increased the council's representatives. There are now five management and five labor representatives. One of the management members must represent small business. And in 1990, non-voting legislative representatives were added to the council as ex-officio members whose functions are to communicate to the legislative bodies the status of deliberations and to report on specific issues raised by the legislature.

Before recommending law changes, the council considers suggestions from many sources. The council receives written comments about proposed changes from legislators, employers, employees, department staff and the general public. The council chairperson acknowledges all communications and shares them with council members.

During each legislative session the council also holds public hearings in four or five locations around the state. All employers, labor organizations and the public in the area of a scheduled hearing are notified and encouraged to attend and present their ideas. For the most recent 2002-2003 bill cycle, hearings were held in Pewaukee, Green Bay, Eau Claire and Madison. While hearings are held in Madison and Milwaukee during every legislative session, the more northern and central locations vary.

In addition, council members hold business meetings eight to ten times each year. Advance public notice of meetings is provided to news media. The meetings are open to the public. Each proposed written comment, received since the previous council meeting, is listed on the agenda.

When the council asks the department to examine an issue more closely, the department staff prepare the history and background of any affected current provision along with any other relevant federal or state laws. The policy and fiscal effects of the proposed change are considered next. And finally the department evaluates the administrative feasibility and impact of the proposal.

After studying possible law changes, management and labor members of the council prepare separate lists of changes each group would like to see in the final bill. Now the two groups are ready to negotiate which proposed law changes will be included in the bill they recommend for the current session of the legislature. Management and labor need to give and take on the issues before them to achieve mutual satisfaction of both interests. This negotiating process is intended to promote smoothly functioning labor markets while balancing the cost of taxes to employers and the need for benefits paid to employees.

This booklet describes changes the council recommended to the legislature for the 2002-2003 legislative session. It also includes appendices for reference. Appendix A is a topical index. Appendix B lists changes in order of their statute numbers. Appendix C contains a list of council members with their addresses and telephone numbers.

Adapting to Labor Market Changes

Every day in the news media and in advertising we hear about new products, medicine, foods, computer chips and other inventions. Frequent change is the American way of life and the driving force behind the economic factors that keep our nation progressing.

When there are new products and materials for manufacturing products, workers frequently need training to produce the new product effectively. Sometimes training is provided on the job by the employer. But workers who are permanently laid off or displaced by foreign competition may need to receive training from another source in order to have contemporary skills that hiring employers are seeking.

Act 197 makes the following changes to address current labor market conditions. The first group of changes involves the statutes affecting benefits paid while workers receive training. The remaining changes concern searching for new work.

- Facilitate training of the Wisconsin workforce.

  1. Temporarily lift benefit suspensions during approved training.

A Court of Appeals decision required that the department lift temporarily the suspension of benefits and imposition of requalifying requirements when a claimant enters training for dislocated workers covered by the Workforce Investment Act. When the training is completed, the department re-imposes the suspensions and requalifying requirements if any are still outstanding.

Act 197 codifies the Court of Appeals decision. To avoid repeated litigation on the same basic issue in a variety of situations that differ in their particulars, Act 197 also extends the lifting and re-imposition of suspensions to similar, closely related but less frequent situations.

2. Allow claimants to leave suitable work and receive benefits when training commences under the Trade Readjustment Act (TRA).

When substantial numbers of workers in a given industry are laid off due to competition from imports, they may be given opportunities to receive training funded by the federal government. Some find other work while they waiting for the training to start or waiting to receive federal training funds. If such individuals quit suitable work when the training started, he or she could have been disqualified under prior law. Under Act 197 the individual is allowed benefits while in training.

3. Charge the balancing account for benefits paid during the temporary lift of suspensions described in (1.) and (2.) above.

Act 197 transfers benefit charges from employer accounts to the balancing account for claimants whose disqualifications are suspended while participating in approved training. The Act transfers charges only with respect to benefits paid after the department issues a formal decision under applicable sections of law in items (1.) and (2.) immediately above.

4. Limit benefit disqualification's during certain training courses authorized by the Department of Workforce Development.

Prior law did not consider training programs authorized by the Department of Workforce Development for unemployed workers as approved training if the training was part time. Act 197 protects claimants from being disqualified when their participation is authorized by the department in either full or part time training programs currently available and not designed for primary and secondary school students under 18 years of age.

5. Clarify statutory language that applies only to dislocated workers.

Prior state law on approved training for dislocated workers cited a federal law that authorized training for a wide variety of workers. The intent of the Wisconsin law is that it applies only to dislocated workers. The change makes it clear that Wisconsin law on approved training for dislocated workers applies only to dislocated workers, not other groups of workers mentioned in the cited federal law.

6. Clarify statutory language to prevent possible program abuse.

Act 197 clarifies language in the approved training statutes to assure that no one may use this section of the law to claim benefits while refusing to provide the department with a social security number. Although it is unlikely this would happen, the former law was written in such a way that it could happen.

- Make permanent the requirement that individuals claiming unemployment benefits must engage in at least two activities each week to help them find work.

Prior to 1999, the law required that claimants perform one job seeking activity in each week they claimed unemployment benefits. Act 15 in 1999 initiated a trial for two years during which claimants had to engage in two or more job seeking activities each week. Act 197 makes the two work search actions per week permanent for claimants who are not returning to the employers that laid them off.

- Remove the 12-week limit on the work search waiver for workers who have a history of returning to the same employer.

Some employers in the state have a history of laying off workers temporarily while they wait for new orders or supplies to arrive. They are unable to give their workers a specific date for returning to work.

Prior to Act 197, the department could provide a claimant with a work search waiver when there was a specific return date or a reasonable expectation of reemployment with the same layoff employer within the next 12 weeks. If reemployment was going to be more than 12 weeks away, the claimant had to *ask* the department to consider a longer waiver. Then the department would investigate the circumstances with the employer and make a decision on whether to extend the waiver. Many claimants were not aware of what they had to do to obtain the longer waiver from the department.

Act 197 makes it easier for a claimant to obtain a work search waiver if the claimant reports a history of returning to work for the same employer. In such cases, the department will request that the claimant's employer verify the claimant's employment status and shall consider the employer's history of layoffs and reemployment in determining whether the claimant's work search will be waived.

Tax Changes

- Restore partial successorship provisions in effect prior to 2001 Wisconsin Act 35.

Sometimes businesses sell a portion of their business to another employer. Unemployment statutes determine how the transferor's rating factors (the unemployment insurance account balance and taxable payroll) are handled.

Prior law stated that a transferee related to a transferor assumed the rating factors of the transferor only if one hundred percent of the business was transferred or the transferor's unemployment insurance account balance is overdrawn. In all other cases, the transferee received a new employer tax rate or, if already in business, treated the new workers as if newly hired into an existing business.

Act 197 returns the successorship statutes to the following procedures:

1. All business transfers between related parties require the transferee to assume the unemployment tax rating factors of the transferor.
2. When at least twenty-five per cent of a business is transferred from one unrelated employer to another, the transferee has an option, under certain circumstances, to assume the factors used in determining the unemployment insurance tax rate of the transferor.
3. If the transferee does not choose to become a successor to the rating factors of the transferor, one of two other options occurs. If the transferee is a new entity, it will start with the new employer tax rate. Or, if the transferee is already in business, it will treat the new workers for unemployment insurance tax purposes as if they were newly hired in the existing business.

- Treat limited liability companies (LLCs) for unemployment tax and benefit purposes in accordance with the form of business organization (sole proprietorship, partnership, or corporation) elected under federal law.

Wisconsin's LLC law became effective in 1994 and is now the most widely used form of organization for new businesses. Over the years the department has seen an increase in the number of issues relating to the unemployment tax status and benefit eligibility of LLC members. As originally written, the statutes were inadequate for resolving many issues.

In general, the department will now treat a limited liability company for unemployment insurance tax and benefits purposes consistent with the manner in which the LLC is treated for federal tax purposes. Act 197 makes the following changes to clarify statutory language:

1. An LLC that wishes to be treated like a corporation for Wisconsin unemployment tax and benefit purposes must provide proof to the department that it has elected to be treated as a corporation for federal tax purposes. Proof must be a copy of the federal form that the LLC filed with the Internal Revenue Service indicating the LLC wishes to be a corporation for federal tax purposes. Its members will be treated like corporate officers.

2. A partnership is an association of 2 or more persons to carry on as co-owners a business for profit. A partnership includes a registered limited liability partnership and a foreign registered limited liability partnership.

   If an LLC with at least two members has elected to be treated like a partnership for federal tax purposes, it will be treated like a partnership for Wisconsin unemployment tax and benefit purposes. LLC's with at least two members, who have made no election as to their treatment for federal tax purposes, will also be treated like a partnership for Wisconsin unemployment tax and benefit purposes. The members of these LLC's will be treated as partners in a partnership and not as employees of the partnership.

3. An LLC with a single member who has elected to be treated as a sole proprietorship for federal tax purpose will be treated like a sole proprietorship for Wisconsin unemployment tax and benefit purposes. LLCs with a single member who has made no election as to its treatment for federal tax purposes will also be treated like sole proprietorships. The sole member of these LLCs will not be considered an employee of his or her sole proprietorship.

- <u>Make permanent the definition of independent contractor that would otherwise sunset in April 2004.</u>

In the recent two decades, Wisconsin and the nation have seen a tremendous growth in the number of independent contractors providing a wide range of services to other businesses and the public. One example is the growth of the information technology industry. When an employer needs a worker but not a permanent employee, the employer will frequently make use of an independent contractor.

The Department of Workforce Development recognized that these new independent contractor businesses have a favorable impact on the state's overall economy. Therefore, when employers were having trouble determining who was an employee and who was an independent contractor for paying their quarterly unemployment taxes, the department was interested in working to clarify the definition.

In 1996 the department identified ten factors that frequently applied to independent contractors. To be independent, two factors were required in all situations, plus another six of the eight remaining factors. The new definition had a four-year trial period to determine if it solved the problem of distinguishing between employees and independent contractors.

Long-established independent contractors readily met the required number of test factors. However, new contractors, just starting their business in that calendar year, were often unable to meet both of the two required tests, one of which required a self-employment federal tax return from the previous year.

Therefore, the definition was modified again in 2000. This change required all independent contractors to meet any seven of the ten test factors from the previous definition. Another four-year trial period and a sunset clause allowed the department to test the definition again.

The modified definition requiring compliance with any seven of the ten factors worked well during the trial period. Therefore, Act 197 removes the sunset clause and the definition becomes permanent, allowing the Department to continue using the following ten factors in determining who is an independent contractor.

1. The independent contractor must have filed a business or self-employment tax return for the previous year.
2. The contractor must have or have made application for the federal employer identification number that is used for tax purposes.
3. The individual must maintain a separate business with an office, equipment, materials and other facilities.
4. The individual must operate under contracts to perform specific services or work for specific amounts of money and under these contracts the independent contractor controls the means and methods of performing the services or work.
5. The individual must incur the main expenses related to the services or work that he or she performs under contract.

6. The independent contractor must be responsible for the satisfactory completion of work or services that he or she contracts to perform and be liable for a failure to complete the work or services.
7. He or she must receive compensation for work or services performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
8. The individual must have opportunity to realize a profit or suffer a loss under contracts to perform work or services.
9. The individual must have continuing or recurring business liabilities or obligations.
10. The individual must have the success or failures of their business as an independent contractor depend on the relationship between business receipts and expenditures.

Enhancement of Collections

- Provide an administrative method for collecting overpayments and penalties imposed on imposters.

In 1999, Act 15 allowed the department to set up overpayments and impose administrative penalties on any claimant who used the identity of another person to collect the other person's weekly unemployment benefits. However, the statute did not provide a means of collecting either the overpayment or the administrative penalty from the imposter other than referring each case to a district attorney. Act 197 makes overpayments to imposters and related penalties collectible not only through referral to a district attorney but also by using the same administrative procedures used to collect other overpayments and penalties.

- Extend offset procedures for benefits obtained through misrepresentation.

Prior law allowed the department to withhold benefits due when used to offset benefits previously received through misrepresentation. Current law changes the term "offset future benefits" to "recoup future benefits".

The change updates the statutes to correspond to rulings in various bankruptcy courts around the country regarding applicability of the bankruptcy stay. When an

individual files for bankruptcy, the Bankruptcy Code provides for an automatic prohibition of any collection action. Offsetting an overpayment against future benefits would require the department to go into court to get relief from this bankruptcy stay. However, several bankruptcy courts have allowed recovery of overpayments from future benefits when benefit fraud is involved. They do this by terming what is being done in that situation "recoupment" rather than "offset". The reasoning is that the recovery of the benefits is part of the same quasi-contractual transaction of claiming benefits as is the payment of future benefits. By changing the language, the department will be more able to use the reasoning of the bankruptcy courts to allow recovery of overpaid benefits which it might not otherwise be able to recover.

- Extend the length of a levy until a debt is paid in full.

Since the Wisconsin levy law was enacted in 1989, the department has used it to collect delinquent unemployment insurance taxes and overpaid benefits by obtaining property of a debtor which is held by a third party, such as an employer, bank or insurance company. The levy is in effect until the debt is satisfied or one year passes from the date of issue, whichever comes first. Frequently, installment levies on wages must be extended beyond one year in order to assure repayment in full.

Under old law, when the department had to set up a new levy because the year ended, notices were sent to the debtor and the third party. Frequently, the notices caused confusion because the notice recipients thought they were being served with a levy for a second unrelated debt. The second levy caused telephone calls and additional paperwork for department staff and county courts. And the department had to pay a separate fee for each act of filing.

New law removes the phrase that limits the levy to one year. It leaves the levy in place until fully satisfied.

- Update periodically the subsistence allowance exempt from levy.

To collect benefit overpayments after a claimant returns to work, the law allows the department to impose a levy on the debtor's wages. However, it also requires the department to exempt from the levy some or all of the debtor's earnings that may be needed for current living expenses.

In prior law weekly wages exempt from levy were the greater of either: 30 times the

federal minimum wage or 75 percent of the debtor's disposable earnings for the week. New law exempts the greater of: a weekly amount derived from the annual federal administrative poverty guideline for the debtor's household size or 80 percent of the debtor's disposable earnings for the week.

Under Act 197 the department allows the debtor to retain somewhat more in wages and repay the debt more slowly. The department retains the discretion to impose a higher levy in cases of fraud.

- Pay court fees more efficiently.

When needed, the department places a lien on the property of a debtor. This happens most often with employers who have not paid their unemployment insurance taxes timely.

Each lien results in two fees. The first, a filing fee, is charged when a warrant is issued to place the lien on the property. The second fee is a satisfaction fee paid when the entire debt is paid in full.

Under prior law each circuit court accumulated all of the filing fees for six months and billed the department semiannually. In contrast, each court billed the department immediately each time a satisfaction fee was due.

The change allows the satisfaction fees to cumulate semiannually and be paid at one time like the initial fees to file a lien. This change makes the fee paying process more efficient for the department.

Administrative Changes

- Maximize interest earned on the Unemployment Reserve Fund.

Under federal law states must deposit unemployment tax receipts in the federal Unemployment Trust Fund. States also contract with local banks to provide banking services like receiving tax deposits and writing weekly benefit checks for claimants. Typically states pay for bank service fees from interest earned on the short term balances that result from their banks' activities.

In recent years the interest rate paid by banks on short term balances has been

declining. In the second calendar quarter of 2003 the bank interest rate applied to Wisconsin unemployment reserves on deposit locally was 1.12%. In the meantime, the interest rate applied to unemployment reserves in the federal trust fund was 5.98% for the second calendar quarter of 2003.

In comparing the two interest rates of 1.12% and 5.98%, department staff realized the trust fund would earn more income if compensating balances in the local bank were reduced. They also compared annual bank fees of $800,000 with additional interest earnings of approximately $4,300,000 annually.

Act 197 authorizes the department to pay the bank service fees with federal funds available for administration of the unemployment insurance program. Because interest rates change, Act 197 also gives the department the option each quarter to pay for bank costs with either program administration funds or by maintaining compensating balances in a local bank account.

Each quarter the department will compare estimated earnings from the federal trust fund and the local bank account. It will then pay bank costs using the option that is estimated to result in the highest net interest earnings.

- Finance the redesign and development of unemployment insurance information technology systems.

The information technology systems underlying unemployment insurance tax collections and benefit payments are more than 20 years old. In 1998 a project, now nearing completion, was initiated to redesign the tax system to provide better service to Wisconsin employers. At this time, changes are needed to the systems used in paying benefits and resolving disputes between employers and claimants.

Funds for upgrading the benefits and appeals systems come from three sources. The first is penalties and interest charged to employers and claimants owing money to the department beyond the time it is due. The second is money returned to the state from the federal unemployment tax that employers pay with their federal income taxes. The third is an administrative fee.

As in funding the new tax system, the administrative fee will be assessed at one hundredth of one per cent of taxable wages. This fee will continue to be offset by an equal reduction in the employer's solvency tax rate. For example, a two hundredths of one per cent solvency rate would become one hundredth of one percent. The fee is not charged to employers whose infrequent layoffs result in a zero solvency tax rate.

Technical Changes

- Clarify the late appeals statute.

Claimants and employers have 14 days to appeal an initial decision to pay or not pay unemployment benefits. After that period, an appellant may file a late appeal by stating the reason for filing beyond the 14 days.

Former law did not specify the circumstances under which a hearing on a late appeal would be held. New law states that an administrative law judge may dismiss the appeal without a hearing if the reasons for being late, when considered most favorably to the appellant, were not beyond the party's control.

- Expand the definition of "child" to include stepchildren.

Formerly, unemployment law did not include stepchildren in the definition of "child". Act 197 includes stepchildren so that unemployment law applies equally to all children in a family unit.

One effect of the change is to permit a parent who quits a job in certain circumstances to receive unemployment benefits without first having to wait four weeks and earn at least a prescribed amount of wages. This situation occasionally occurs when both parents need to work to support their family. The parents avoid the additional expense of child care by working different shifts leaving one parent at home at all times. Employers whose operation requires employees on different shifts seek and hire workers for a specific shift. Occasionally an employer hires a parent for a specific shift and later transfers that parent from the original shift to a different shift. If the shifted parent can not work the new shift hours because he or she is required to provide care for minor children at that time, the parent may quit the employer. If otherwise eligible for unemployment benefits, the parent may be paid benefits immediately as long as the parent is able to work, remains available for work on the same shift previously worked and makes two or more job searches each week.

A second effect is also a quit exception that permits an eligible person to receive unemployment benefits without waiting in the following domestic abuse circumstances. First, the claimant obtains a restraining order before quitting. Second, the claimant voluntarily terminates employment because of domestic abuse, concerns about personal safety, or harassment of his or her children. Third, the

claimant demonstrates to the Department that the restraining order has been or is reasonably likely to be violated.

A third effect of including stepchildren in the definition of children involves business transfers between business owners and their stepchildren. Under the new law a business transferred to a stepchild will be considered the same entity as it was prior to the transfer.

Fourth, as in the case with other close relatives, limits are placed on benefits payable to a claimant when the claimant is employed for a business owned by a stepchild. The benefit limit is four times the individual's weekly benefit amount based solely on that employment.

And last, wages of stepchildren of a nonresident alien who has nonimmigrant status are not subject to unemployment taxes. Moreover, the stepchild may not claim unemployment benefits.

- Replace the word "an" in the educational employee statute with the word "any".

The educational employee statute denies unemployment benefits to school year employees during breaks and between school year terms when the employees have reasonable assurance of subsequent term employment. Former law used the word "an" employer when referring to future educational employment.

"An" was sometimes interpreted to mean that only employment with the former school year employer was reasonable assurance of future work. Replacing "an" with "any" reinforces the intention of federal law that future employment with any educational employer is reasonable assurance.

- Modify wording of the Social Security pension offset change to conform to federal request.

The United States Department of Labor has requested additional wording in the statute exempting unemployment benefits from reduction when a claimant receives Social Security benefits. The department included this language in Act 197. There is no change in policy.

- Remove requirements for administrative rules on labor disputes and absenteeism.

The Unemployment Insurance Advisory Council recommended including in 2001 Act 35 a review of labor disputes and absenteeism and, pending completion of that review, development of administrative rules. After further consideration, the council agreed that alternative approaches would better serve their needs and recommended removing the requirements to create rules.

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