

## **Plain Language Summary of Recent Changes to Wisconsin Unemployment Insurance Law**

Governor Walker signed five bills into law during the 2015-2017 biennium that relate to unemployment insurance: 2015 Wis. Act 55, the 2015-2017 budget; 2015 Wis. Act 86, an agreed-upon bill of the Unemployment Insurance Advisory Council regarding certain federal requirements; 2015 Wis. Act 203, regarding franchisor liability for unemployment insurance contributions; 2015 Wis. Act 258, amending the real estate agent exclusion; and 2015 Wis. Act 334, an agreed-upon bill of the Unemployment Insurance Advisory Council with eighteen law changes. Amended administrative rules regarding work search and work registration waivers also became effective in 2015.

### **Benefit Changes**

#### **Drug Testing and Treatment**

2015 Wis. Act 55 created Wis. Stat. § 108.04(8)(b) and 108.133, which require the department, by administrative rule, to create a voluntary program for employers to report the results of a failed or refused pre-employment drug test to the department. A claimant's failed or refused pre-employment drug test is presumed to be a failure to accept suitable work and the department, by rule, must determine a period of ineligibility or requalification requirement, or both, for a claimant who fails or refuses a test. A claimant may overcome the presumption by proving certain facts to the department, as will be determined by administrative rule. A claimant who fails a pre-employment drug test without evidence of a valid prescription for the drug may remain eligible for unemployment insurance benefits if the claimant enrolls in and complies with a drug treatment program and completes a job skills assessment.

Under 2015 Wis. Act 55, the department must also, by administrative rule, create a program for testing certain unemployment insurance benefit applicants. The department will determine whether an applicant's only suitable work is in an occupation that regularly conducts drug testing. If an applicant's only suitable work is in an occupation that regularly conducts drug testing, the department will screen the applicant in order to determine whether there is a reasonable suspicion that the applicant is using controlled substances. If the screening demonstrates that the applicant is using controlled substances, the applicant must take a drug test. A failed or refused drug test under Wis. Stat. § 108.133 will disqualify the claimant from receiving benefits and the department, by rule, must determine a period of ineligibility or requalification requirement, or both, for a claimant who fails or refuses a test. A claimant who fails a drug test under Wis. Stat. § 108.133 without evidence of a valid prescription for the drug may remain eligible for unemployment insurance benefits if the claimant enrolls in and complies with a drug treatment program and completes a job skills assessment.

The department, by administrative rule, will determine the requirements of the drug treatment program and the job skills assessment.

The **effective date** for Wis. Stat. §§ 108.04(8)(b) and 108.133 is the date on which the administrative rules regarding pre-employment drug testing, occupational drug testing, and drug treatment take effect.

### **Concealment Penalty**

2011 Wis. Act 236 created a civil penalty in Wis. Stat. § 108.04(11)(bh) of 15% of the amount of benefits obtained by claimant fraud. 2015 Wis. Act 55 amended Wis. Stat. § 108.04(11)(bh) to increase the civil penalty to 40% of a fraudulent overpayment. The amount of the civil penalty that represents 15% of the overpayment will continue to be deposited into the

Trust Fund and the amount of the penalty that represents 25% of the overpayment will be deposited into the Unemployment Program Integrity Fund.

The **effective date** for the increased civil penalty in Wis. Stat. § 108.04(11)(bh) is October 4, 2015 and the penalty first applies to overpayments established on or after that date.

### **Concealment Definition**

2007 Wis. Act 59 defined “conceal” to mean “to intentionally mislead or defraud the department by withholding or hiding information or making a false statement or misrepresentation.” 2015 Wis. Act 334 amends the definition of “conceal” as follows: “to intentionally mislead the department by withholding or hiding information or making a false statement or misrepresentation.” 2015 Wis. Act 334 creates a duty of care for claimants to “provide an accurate and complete response to each inquiry made by the department in connection with his or her receipt of benefits” and provides a list of factors for the department to consider when making a concealment determination. Finally, 2015 Wis. Act 334 clarifies that the department need not prove that a claimant knew the effect of his or her false answers on their unemployment insurance benefit eligibility in order to find concealment.

The **effective date** for the amended definition of “conceal” in Wis. Stat. § 108.04(11) is April 3, 2016 and the amended definition first applies to determinations issued on or after that date.

### **Suitable Work**

2015 Wis. Act 55 created Wis. Stat. § 108.14(27), which directs the department, by administrative rule, to define “suitable work” and to specify levels of suitable work based on the number of weeks that the claimant is unemployed. But 2015 Wis. Act 334 repealed this provision and creates a statutory definition of “suitable work” in Wis. Stat. §§ 108.04(8)(d) and

(dm). During the six-week canvassing period, “suitable work” means work that is not at a lower grade of skill than one of the claimant’s most recent jobs and that pays at least 75% of what the claimant recently earned at one of the claimant’s most recent jobs. This is a 5% reduction in wages from previous department policy. After the canvassing period, the statutory definition of “suitable work” is “any work that the employee is capable of performing, regardless of whether the employee has any relevant experience or training, that pays wages that are above the lowest quartile of wages for similar work in the labor market area in which the work is located, as determined by the department.” This codifies previous department policy.

2015 Wis. Act 334 provides that claimants have “good cause” for refusing to accept suitable work if the refusal is related to the claimant’s personal safety, sincerely held religious beliefs, an unreasonable commuting distance, or another compelling reason that would have made accepting the offer unreasonable.

The **effective date** for the definitions of “suitable work” and “good cause” is May 1, 2016.

### **Social Security Disability Insurance Disqualification**

2013 Wis. Act 36 created a disqualification for unemployment insurance benefit claimants who concurrently receive Social Security Disability payments in Wis. Stat. § 108.04(12)(f). 2015 Wis. Act 334 clarifies that an unemployment insurance claimant who receives a monthly SSDI payment is disqualified from receiving unemployment insurance benefits for each week of that month.

The **effective date** for the amendment to the SSDI disqualification is retroactive to January 5, 2014.

### **Worker's Compensation Disqualification**

Current law, Wis. Stat. § 108.04(12)(e), provides that an individual who receives a temporary total disability worker's compensation payment for any week is disqualified from receiving unemployment insurance benefits for the same week. Current law also provides that worker's compensation payments for temporary total disability or temporary partial disability that are paid for part of a week are treated as wages for the purposes of calculating a claimant's benefit payment. 2015 Wis. Act 334 adds permanent total disability worker's compensation payments as a type of disqualifying payment.

The **effective date** for the amendment to the worker's compensation disqualification is May 1, 2016.

### **Real Estate Agent Exclusion**

Prior law, Wis. Stat. § 108.02(15)(k)7., excluded from the definition of "employment" services performed by an individual as a real estate agent if the services are "performed for remuneration solely by way of commission." 2015 Wis. Act 258 amends the real estate agent exclusion to more closely match the federal real estate agent exclusion. The amended exclusion excludes the services of a real estate "licensee" if 75% or more of the worker's remuneration is directly related to sales or other output, including the performance of services, rather than to the number of hours worked. Additionally, in order to qualify for the amended exclusion, the individual must perform the services under a written contract that provides that the individual will not be treated as an employee with respect to the services for federal tax purposes.

The **effective date** for the amendment to the real estate exclusion is October 1, 2016.

### **Work Share Benefit Formula**

2013 Wis. Act 11 created the work share law, Wis. Stat. § 108.062, which is also known as short-time compensation. Employers with work share programs reduce their employees' hours but employees retain their retirement and health insurance benefits and receive unemployment insurance benefits. Under the old law, employees in a work share program were eligible for unemployment benefits in the amount of the proportionate reduction in hours worked multiplied by the employee's weekly benefit rate or the amount of benefits calculated under the partial wage formula, whichever is greater.

2015 Wis. Act 86 repealed Wis. Stat. § 108.062(7), so employees in a work share program are only eligible for unemployment benefits under the work share benefit formula, not the partial wage formula.

The **effective date** for the amendment to the work share law is December 27, 2015, for work share plans approved on or after that date.

### **Work Search and Work Registration (Administrative Rule Change)**

From 2004 until June 14, 2015, the department, by administrative rule, waived a claimant's work search requirement if certain circumstances applied. Before June 14, 2015, if the claimant was laid off but there was a "reasonable expectation of reemployment of the claimant by that employer," the work search requirement was waived under Wis. Admin. Code § DWD 127.02(2).

As of June 14, 2015, Wisconsin's administrative rule provides for a work search waiver if the claimant "is currently laid off from employment with an employer but there is a reasonable expectation that the claimant will be returning to employment within a period of 8 weeks, which

may be extended an additional 4 weeks but may not exceed a total of 12 weeks.” The rule change also provides an equivalent waiver for work registration.

## **Tax Changes**

### **Administrative and Criminal Penalties for Intentional Misclassification**

2015 Wis. Act 334 creates a **new administrative penalty** in Wis. Stat. § 108.221(1) for construction employers who knowingly and intentionally misclassify workers as independent contractors. The penalty is \$500 per employee intentionally misclassified with a maximum penalty of \$7,500 per employer per incident. The penalty proceeds will be deposited into the Unemployment Program Integrity Fund.

The **effective date** for the worker misclassification administrative penalty is October 2, 2016, for violations committed on or after that date.

Current law, Wis. Stat. § 108.24(2m), provides for a criminal fine of \$25,000 for construction employers who willfully misclassify workers. 2015 Wis. Act 334 amends that law and provides for a criminal fine against construction employers that knowingly and intentionally provide false information in order to misclassify workers after being assessed a civil misclassification penalty under Wis. Stat. § 108.221(1). Under the new law, the department must assess the civil penalty before the employer can be charged for the criminal fine. The criminal fine is \$1,000 per employee misclassified with a maximum fine of \$25,000 per employer per incident.

The **effective date** for the amended **worker misclassification criminal fine** is October 2, 2016, for violations committed on or after that date.

### **Administrative Penalty for Coercion**

2015 Wis. Act 334 creates a new administrative penalty in Wis. Stat. § 108.221(2) 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. The penalty proceeds will be deposited into the program integrity account.

The **effective date** for the coercion penalty is October 2, 2016, for violations committed on that date.

### **Recovery of Tax Debts under the Treasury Offset Program**

2009 Wis. Act 287 created Wis. Stat. § 108.22(8)(b)1.d., which permits the department to recover unemployment insurance overpayment debts that resulted from fraud by intercepting claimants' federal income tax refunds. 2015 Wis. Act 86 creates Wis. Stat. § 108.22(1r), which permits the department to intercept federal income tax refunds in order to recover tax debts from employers and personally liable individuals.

The **effective date** for the statute that permits intercepting federal income tax refunds in order to recover tax debts is November 15, 2015.

### **Personal Liability Assessments for LLP Partners**

Under current law, Wis. Stat. § 108.22(9), permits the department to hold officers, members or managers with at least 20% ownership interest of a corporation or LLC personally liable for unpaid UI contributions. 2015 Wis. Act 334 adds partners and other responsible persons to the list of those who may be held personally liable if they have at least a 20% ownership interest in the employer.

The **effective date** for the amendment to the personal liability law is April 3, 2016, for determinations issued on or after that date.



### **Reimbursable Employer ID Theft Charging**

Under current law, reimbursable employer accounts (public employers, nonprofits and tribes) are charged for benefits erroneously paid due to identity theft fraud unless the department recovers the overpayments from the identity thief. For contribution employers, identity theft charges are credited to the employer's account and the charges are transferred to the balancing account. 2015 Wis. Act 334 creates Wis. Stat. § 108.155, which sets aside \$2 million in the balancing account for accounting purposes in order to credit reimbursable employer charges due to identity theft. Each year, the department will determine the amount of interest accrued on the funds set aside and the total charges for identity theft against reimbursable employer accounts. When there is only \$100,000 remaining, all reimbursable employers will be assessed for identity theft charges. The department will report to the Unemployment Insurance Advisory Council annually on the set aside amount remaining.

The **effective date** for the reimbursable employer identity theft charging law is October 2, 2016.

### **Program Integrity Assessment**

The department previously assessed contribution employers a 0.01% administrative assessment in order to fund information technology modernization projects. That assessment resulted in no additional tax because there was a corresponding reduction in employers' solvency tax. 2015 Wis. Act 334 creates a new program integrity assessment under Wis. Stat. § 108.19(1f) that assesses contribution employers a 0.01% assessment with a corresponding reduction in the solvency tax. The proceeds of this assessment will be deposited into the Unemployment Program Integrity Fund. The new law requires the department's Secretary to

consider the balance in the trust fund and to consult with the Unemployment Insurance Advisory Council before the department may levy the assessment.

The **effective date** for the program integrity assessment is April 3, 2016.

### **Franchisor Exclusion**

Current law, Wis. Stat. § 108.065(1e), provides the framework for determining which employing unit is the employer of an employee if more than one employing unit has an employment relationship with the employee. 2015 Wis. Act 203 adds a new exclusion for franchisors. First, the department applies the current law for determination of employer. Second, if the department determines that a franchisor is the employer of a franchisee or the franchisee's employees, the department applies the new Wis. Stat. § 108.065(4).

New Wis. Stat. § 108.065(4) provides that a franchisor is not an employer of a franchisee or a franchisee's employees unless the franchisor agrees in writing to be the employer or the franchisor "exercised a type or degree of control over the franchisee or the franchisee's employees that is not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand." If, after applying subsection (4), the department determines that the franchisor is not the employer, the franchisee is the employer of the employee.

The **effective date** for the franchisor exclusion is March 3, 2016, for work performed on or after that date.

### **Technical Changes**

#### **Appeals Modernization**

2015 Wis. Act 334 allows the department to deliver hearing notices and decisions by electronic means. It also permits an appeal tribunal to issue a decision regarding a party's failure

to appear at a hearing based on the parties' written submissions instead of holding a formal hearing on that issue.

The **effective date** for the appeals modernization provisions in Wis. Stat. § 108.09 is April 3, 2016.

### **Judicial Review**

Currently, the statute that provides the procedures for appeal of LIRC decisions in unemployment insurance cases to circuit court is contained in Wis. Stat. § 102.23, which is in the worker's compensation law. 2015 Wis. Act 334 amends Wis. Stat. § 108.09(7) to incorporate the judicial review process for unemployment insurance cases into the unemployment insurance law. 2015 Wis. Act 334 also modifies certain appellate procedures, including: the department is not required to exhaust its administrative remedies before filing an action for judicial review, that the department is a party to judicial review actions of benefit issues, and LIRC must transmit the appeal record to circuit court within 60 days. Also, the action must be filed in the county where the plaintiff resides. If the department is the plaintiff, the action should be filed in the county where a defendant that is not LIRC resides.

The **effective date** for the judicial review provisions is August 1, 2016, for circuit court actions filed on or after that date.

### **Able and Available Decisions**

Currently, the department issues one determination regarding a claimant's job separation, availability for work and ability to work. 2015 Wis. Act 334 amends certain statutes so that the department will issue two separate determinations: one regarding the separation and one regarding the claimant's availability for work and the ability to work.

The **effective date** for the able and available amendments is April 3, 2016, for determinations issued on or after that date.

### **Definition of “Employer” Regarding Fiscal Agents**

2015 Wis. Act 55 created a provision, Wis. Stat. § 46.272(7)(e), that permits fiscal agents to act on behalf of children who receive long-term community support services. This new law is similar to existing laws related to fiscal agents acting on behalf of elderly individuals who receive long-term community support services. Under existing law, Wis. Stat. § 108.02(13)(k), the definition of “employer” in the unemployment insurance law excludes fiscal agents for certain individuals who receive long-term support services. 2015 Wis. Act 334 amends the definition of “employer” to also exclude fiscal agents acting on behalf of children receiving long-term support services.

The **effective date** for the amendment to the definition of “employer” is April 3, 2016.

### **Transfer of SAFI Funds**

Under current law, Wis. Stat. § 108.19(1m), employers paid special assessments for interest (“SAFIs”) in order to pay the interest on the money borrowed from the federal government for the Trust Fund during the recession. 2015 Wis. Act 334 permits the department to transfer SAFI funds that exist after the repayment of the interest on the federal loans to the balancing account, the Unemployment Program Integrity Fund or both.

The **effective date** for the law permitting the transfer of SAFI funds is April 3, 2016.

### **Repeal of Unemployment Program Integrity Fund Sunset**

Under current law, the Unemployment Program Integrity Fund is scheduled to sunset (expire) on January 1, 2034. 2015 Wis. Act 334 provides that the sunset of the program integrity

fund will be repealed. This is necessary due to the new assessments and penalties that will be deposited into the Unemployment Program Integrity Fund.

The **effective date** for the repeal of the Unemployment Program Integrity Fund sunset is April 3, 2016.

### **Elimination of Statutory Benefit Tables**

Current law, Wis. Stat. § 108.05(1)(r), provides a formula for calculating the amount of weekly benefits to which a benefit claimant is entitled. The statutory chart following paragraph (r) provides that a claimant's minimum weekly benefit rate is \$54 and the maximum weekly benefit rate is \$370. 2015 Wis. Act 334 amends the law to provide that the weekly benefit rate will be calculated by a formula in the statute and that the charts will be deleted from the statutes. This amendment does not change claimants' weekly benefit rates. The tables will continue to be published on the department's website.

The **effective date** for the elimination of the benefit tables is April 3, 2016.

### **Combined Wage Claims**

A combined wage claim exists if a claimant has base period wages in more than one state. Pursuant to federal requirements, 2015 Wis. Act 86 creates Wis. Stat. § 108.04(13)(g), which permits the department to issue determinations to an out-of-state employer if that employer is at fault for the erroneous payment of benefits under a combined wage claim.

The **effective date** for the combined wage claim law change is November 15, 2015.