STATE OF WISCONSIN

DWD

Department of Workforce Development

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Council Members: Please bring your calendars to schedule future meetings.
Council Web Site: http://dwd.wisconsin.gov/uibola/uiac/

MEETING

Date: February 16, 2017

Time: 10:00 a.m.

Place: Department of Workforce Development
201 E. Washington Avenue
Madison, Wisconsin
GEF -1, Room F305

AGENDA ITEMS AND TENTATIVE SCHEDULE:

1. Call to Order and Introductions
2. Approval of Minutes of the January 17, 2017, Council Meeting
3. Department Update
4. Update - Pre-Employment Drug Testing and Occupational Drug Testing
   - Notice of Public Hearing for Emergency Rule Regarding Pre-Employment Drug Testing
   - U.S. House Joint Resolution 42
5. Discussion of Recent Court Decisions
   - *Easterling v. LIRC & Badger Bus Lines, Inc.*
6. Additional Public Hearing Comments
7. Department Proposals For Agreed Bill
   - D17-01 – Assessment for Employers that Fail to Comply with Adjudication Request (Revised)
   - D17-02 – Fiscal Agent Joint and Several Liability

- D17-03 – Assessment for Failure to Produce Records
- D17-04 – Ineligibility for Concealment of Holiday, Vacation, Termination, or Sick Pay
- D17-05 – Ineligibility for Failure to Provide Information
- D17-06 – Standard of Proof in Unemployment Insurance Law Cases (fiscal estimate)
- D17-07 – Revision of Collections Statutes
- D17-08 – Various Minor and Technical Changes (fiscal estimate)
- D17-09 – Various Administrative Rule Changes

8. Management & Labor Proposals for Agreed Bill
9. Agenda Items for March 16, 2017 Meeting
10. Adjourn

Notice:

- The Council may not address all agenda items or follow the agenda order.
- The Council may take up action items at a time other than that listed.
- The Council may discuss other items, including those on any attached lists.
- Some or all of the Council members may attend the meeting by telephone.
- The employee members and/or the employer members of the Council may convene in closed session at any time during the meeting to deliberate any matter for potential action and/or items posted in this agenda, pursuant to sec. 19.85(1)(ee), Stats. The employee members and/or the employer members of the Council may thereafter reconvene again in open session after completion of the closed session.
- This location is handicap accessible.
- If you have other special needs (such as an interpreter or written materials in large print), please contact Robin Gallagher, Phone: (608) 267-1405, Unemployment Insurance Division, Bureau of Legal Affairs, P.O. Box 8942, Madison, WI 53708. Hearing and speech impaired callers may reach us at the above phone number through WI TRS (or TDD/Voice Relay 1-800-947-3529.).

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

Offices of the State of Wisconsin Department of Workforce Development
201 E. Washington Avenue, GEF 1, Room F305
Madison, WI

January 19, 2017

The department provided public notice of the meeting under Wis. Stat. § 19.84.

Members Present: Janell Knutson (Chair), Scott Manley, Ed Lump, Mike Gotzler, John Mielke, Earl Gustafson, Sally Feistel, Mike Crivello, Terry Hayden, and Mark Reihl.

Department Staff Present: Joe Handrick, Ben Peirce, Andy Rubsam, Lili Crane, Becky Kikkert, Tom McHugh, Mary Jan Rosenak, Pam James, Janet Sausen, Robert Usarek, Jill Moksouphanh, Amy Banicki, Emily Savard, Matthew Aslesen, Karen Schultz, and Robin Gallagher

Members of the Public Present: Chris Reader (Wisconsin Manufacturer & Commerce), Maria Gonzalez Knavel (Labor and Industry Review Commission (LIRC), General Council), Mary Beth George (Rep. Sinicki's Office) Mike Duchek (Legislative Reference Bureau),Staci Duros (Legislative Reference Bureau), Madeline Kasper (Legislative Reference Bureau), Emma Gradian (Legislative Reference Bureau), Shellee Bauknecht (Legislative Audit Bureau). Ryan Horton (Legislative Fiscal Bureau), Victor Forberger (Wisconsin UI Clinic), Brian Dake (Wisconsin Independent Businesses, Inc.), Kevin Magee (Legal Action of Wisconsin) and Erica Strebel (Daily Reporter)

1. Call to Order and Introductions

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) meeting to order at 10:05 a.m. under Wisconsin's Open Meetings law. Council members introduced themselves and Ms. Knutson recognized Mike Duchek, Staci Duros, Madeline Kasper and Emma Gradian of the Legislative Reference Bureau, Ryan Horton of the Fiscal Bureau, Maria Gonzalez Knavel of LIRC, and Shellee Bauknecht of the Legislative Audit Bureau.

Ms. Knutson informed the Council that the department will transition from paper copies of meeting materials to electronic distribution. A complete packet of the Council's meeting materials will be available at 10:00 a.m. at http://www.dwd.wisconsin.gov/uibola/uiac/. Council members and members of the public are invited to access materials in our new format. Materials will be projected at future meetings. A limited number of paper copies of materials will continue to be available at the meetings.

2. Approval of Minutes of November 17, 2016

Motion by Ms. Feistel, second by Mr. Lump, to approve the November 17, 2016 meeting minutes. The motion carried unanimously and the Council approved the minutes without correction.

3. Update on Pre-employment & Occupational Drug Testing Emergency & Permanent Rules

Ms. Knutson reported that the emergency rule currently in effect on pre-employment drug testing expires January 30, 2017 and the permanent rule under promulgation will not be effective until May or June. Ms. Knutson requested that the Council approve an emergency rule on pre-employment drug testing that mirrors the final draft of the permanent rule. This emergency rule would be effective on January 30, 2017 in order to prevent a gap in the applicability of the rule.

Motion
Motion by Mr. Manley, second by Mr. Gotzler to approve the emergency rule relating to pre-employment drug testing, substance abuse treatment program and job skills assessment. The motion carried unanimously.

4. Report on the Unemployment Insurance Reserve Fund & Year End Financials

Mr. McHugh provided an update on the UI Reserve Fund Highlights.

Benefits
Benefit payments for calendar year 2016 totaled $457.4 million. Benefit payments for calendar year 2015 totaled $535.3 million (a 15% decrease from 2015 to 2016). Benefit payments have not been this low since 1998.

Tax Receipts

Tax receipts for calendar year 2016 totaled $842.5 million. Tax receipts for calendar year 2015 totaled $1 billion (a 19% decrease from 2015 to 2016). This decrease was anticipated due to the move from Tax Schedule A to Tax Schedule B as well as lower tax rates through experience rating.

Trust Fund Balance

The Trust Fund balance on December 31, 2016 was approximately $1.2 billion. The Trust Fund balance on December 31, 2015 was $742.9 million. This is a 56% increase from 2015 to 2016.

Trust Fund Interest Earned

The interest earned in 2016 was $21.8 million compared to $11.2 million earned in 2015 (a 95% increase).

Tax Rate Tables

There are four tax rate schedules in Wisconsin ranging from Tax Schedule A (raising the largest amount of tax revenue) to Tax Schedule D (raising the lowest amount of tax revenue). Tax Schedule A was in effect from 2010 through 2015, Tax Schedule B was in effect in 2016 and Tax Schedule C is in effect for 2017. Tax rate notices were sent to 135,696 employers for 2017. A total of 11,096 employers will have a zero total tax rate in 2017 and will pay no UI taxes for 2017 payroll. There was a decrease of 22.8% (970 employers) for employers at the maximum 12% total rate in 2017 compared to 2016.

New Employer Rate

The new employer rate is a standard rate assigned to new employers for the first three years. For small employers, the new employer rate will decrease from 3.25% in 2016 to 3.05% in 2017. The large employer rate will decrease from 3.4% in 2016 to 3.25% in 2017. The construction industry has a separate new employer rate. In 2016, for both large and small construction employers, the new employer rate was 6.6%. The 2017 new employer rate in the construction industry will drop to 4.55% for large employers and to 4.4% for small employers.

Mr. Manley requested a breakdown of information for all business sectors showing the amount of taxes paid and the amount of benefit claims paid. Mr. McHugh stated he would provide that information to the Council. Mr. McHugh will also provide information on tax rates for business sectors.

5. Public Hearing Summary

Ms. Knutson reported on the UIAC public hearing held November 17, 2016. A total of 295 people provided 307 comments by letter, e-mail or at the public hearing. The department received the majority of correspondence by letter (158 letters) or through e-mail (123 emails). A total of 51 people attended the public hearing in which 19 people testified, 6 people testified and provided written correspondence and 1 person registered an opinion, but did not speak. A majority of the correspondence was specific to an employer or industry and contained the same text. A tally of the comments showed 246 comments received related to work search waivers for recalled employees. Ms. Knutson recognized Council Members Mr. Reihl, Mr. Griesbach and Mr. Hayden for attending the public hearing in Madison. Mr. Gustafson thanked department staff for the public hearing summary provided at today's meeting and stated that the comments will be read and reviewed.

Ms. Knutson requested Council input on handling comments that continue to be submitted on recommended law changes. Mr. Lump suggested that the department consider these comments and provide a separate summary of those comments to the Council.

6. Correspondence

Correspondence from Senator Erpenbach and Senator Harsdorf are included in the Council materials relating to work search waivers. A copy of Senator Bewley's letter was included in Council materials at the last meeting. Correspondence from Senator Carpenter contained a constituent letter relating to work search waivers.

7. Department Proposals

Ms. Knutson reported that the department is introducing nine proposals for Council consideration and anticipates a small number of additional proposals in the future. Proposals include substantive and technical statutory changes and changes to administrative rules. Changes to administrative rules can be worked on when the agreed bill is finished; however, moving forward with a scope statement allows the department to begin drafting of the rule which will be presented to the Council for consideration.

Mr. Rubsam reviewed the following department proposals with the Council:

D17-01 Charging Benefits to Employers that Fail to Comply with Requests for Information

The department proposes a law change that will charge an employer's account for erroneously-paid benefits when an employer fails to comply with the department's request for information when investigating concealment cases. Currently, there is little incentive for an employer to return the weekly wage verification form because the claimant's benefits are not typically charged to the employer's account in cases involving concealment. Mr. Rubsam stated that proposed language and a fiscal estimate will likely be available at the next meeting.

D17-02 Fiscal Agent Joint and Several Liability

This proposed change would align state law with federal law for fiscal agents. The department proposes to adopt statutory language that provides joint and several liability for fiscal agents with respect to the unemployment tax liability of a domestic employer. Individuals who receive long-term support services in their home through government-funded care programs are considered domestic employers under Wisconsin's UI law. Fiscal agents are entities that perform services for these domestic employers and are responsible for reporting employees who provide services for the domestic employers to the department and also for paying UI taxes on behalf of the domestic employer. Currently, domestic employers incur tax liability when fiscal agents fail to file quarterly reports or fail to make tax liability payments. It is difficult to collect delinquent tax from domestic employers who use fiscal agents because the income of domestic employers is typically collection-proof. This proposal will provide an incentive for fiscal agents to correctly report wages for employers and to pay UI tax. In addition, this proposal is expected to have a positive impact on the UI Trust Fund.

D17-03 Assessment for Failure to Produce Records

The department proposes to assess an administrative penalty of $500 for failure to produce subpoenaed records to the department. Under current law, if the department intends to audit an employer's work records, a written notice requesting information is sent. If the employer does not respond to the request, a second written notice is sent to the employer requesting records. If the employer fails to respond to the second request, the department may serve a subpoena with a time and place specified for an employer to produce records. In approximately 40% of the subpoenas served, the employer provides an inadequate response or fails to respond to the subpoena and the department's only remedy is to enforce the subpoena in Circuit Court and request that the employer be held in contempt. Under this proposal, the $500 penalty can be waived if the employer fully complies with the request within 20 calendar days of the issuance of the penalty. This proposal will provide an incentive for employers to provide records and ensure taxes are properly assessed. Any penalties collected under this proposal will be deposited into the Program Integrity Fund.

D17-04 Ineligibility for Concealment of Holiday, Vacation, Termination or Sick Pay

The department proposes an amendment to statute to provide that concealment of holiday pay, vacation pay, sick pay or termination/dismissal pay on a weekly benefit claim results in total ineligibility for the week for which the claimant concealed the pay. Currently, a claimant who conceals wages or a material fact is assessed a penalty in the amount of 40% of the overpayment and is ineligible for future benefits in the amount of two, four or eight times the claimant's weekly benefits rate times the number of concealment. However, concealment of vacation, holiday pay, sick and termination pay, will not necessarily result in total ineligibility for the week that vacation or holiday pay was concealed because the partial wage formula may apply. This proposal provides for the same treatment of claimants who conceal wages as those who conceal other types of pay.

D17-05 Ineligibility for Failure to Provide Information

The department proposes that, for claimants who fail to answer questions relating to their benefit eligibility, the claimants will be ineligible for benefits beginning with the week involving the eligibility issue. Current law makes such claimants ineligible and the amendment clarifies that the department will hold the claimant's benefits until the claimant responds in order to reduce improper payments. When a claimant responds, benefits are retroactively paid beginning the week in which they failed to answer the questions, if otherwise eligible.

D17-06 Standard of Proof in Unemployment Insurance Law Cases

Currently, Wisconsin's UI law does not contain a uniform standard of proof. LIRC applies the clear and convincing standard to concealment cases and cases involving theft misconduct. The department proposes that the preponderance of the evidence standard be applied to all issues of fact in Wisconsin UI cases (other than criminal penalties). A fiscal estimate will be provided at the next meeting.

D17-07 Revision of Collections Statutes

The department proposes several changes to the collections statutes. Some changes are minor and technical in nature, while others are substantive and include:

- Providing an unrecorded lien against any person who owes the department a debt (currently for employers only).
- Creating a provision to confirm that the department's bankruptcy claims for benefit overpayments are treated as secured if a warrant has been filed (currently for employers only).
- Modifying an existing penalty for third parties who refuse to comply with a department levy in order to align the penalty with the Department of Revenue's (DOR) penalty for levy non-compliance.
- Amending the tax personal liability statute to remove the 20% owner requirement for a finding of personal liability, which would align the unemployment law more closely with the laws of the IRS, DOR and the department's divisions of worker's compensation and equal rights.
- Permitting the department to intercept state income tax refunds, lottery payments, state vendor payments and unclaimed property of taxpayers who owe debts to the department. Current law permits the department to intercept such payments for claimants who owe debts to the department. The department may also currently intercept federal income tax refunds to satisfy tax and benefit debts.

D17-08 Various and Minor Technical Changes

The department proposes several minor and technical changes to Wis. Stat. Ch. 108. A fiscal estimate for this proposal will be provided at the next meeting.

D17-09 – Various Administrative Rule Changes

The department proposes several administrative rule changes to amend outdated rules, repeal unused rules, correct typographical errors and to amend or repeal rules that are superseded by statutes. The changes to chs. DWD 100 to 150 are minor or technical in nature. If the Council approves this proposal, the department will draft a scope statement for the Council's approval. If the scope statement is approved by the Governor, the department will begin working on the rule changes.

8. LIRC

Ms. Knutson reported that LIRC requested an opportunity for LIRC Chairperson Laurie McCallum to speak to the Council on LIRC's proposed rule. LIRC contacted the department yesterday and withdrew the request. Materials received from LIRC were forwarded to the Council and any questions can be directed to LIRC for response. Chairperson McCallum previously addressed the Worker's Compensation Advisory Council about the rule.

9. Agenda Items for Next Meeting

Ms. Knutson stated items for the next meeting will include department proposals, including any additional proposals from the department.

10. Agreed Bill Time Line

Ms. Knutson reviewed the tentative timeline on the Agreed Bill cycle. The goal is to complete work on the Agreed Bill and submit the Agreed Bill to the legislature in August for introduction in the fall legislative session.

11. Motion to Caucus

Motion by Mr. Manley, second by Mr. Reihl to recess and go into closed session pursuant to Wis. Stat. §19.85(1)(ee), to consider any items on today's agenda at 11:30 a.m. All Council members voted "Aye" and the motion carried unanimously.

12. Report out of Caucus:

The Council reconvened at 1:22 p.m. Mr. Manley reported that Management Members will continue to review department proposals and work on Management proposals for the next meeting.

Mr. Reihl reported that Labor Members will continue to review department proposals, work on Labor proposals, and ask for information as the process continues.

13. Adjourn

Motion by Mr. Reihl, second by Mr. Manley to adjourn at 1:25 p.m. The motion carried unanimously.

State of Wisconsin
Department of Workforce Development

NOTICE OF PUBLIC HEARING

Pre-employment Drug Testing, Substance Abuse Treatment Program and Job Skills Assessment

Ch. DWD 131, Wis. Admin. Code

The Wisconsin Department of Workforce Development (DWD) announces that it will hold a public hearing on the emergency rule relating to pre-employment drug testing, substance abuse treatment program and job skills assessment.

Hearing Information

Date:	Monday, February 27, 2017
Time:	2:00 p.m.
Location:	201 E. Washington Avenue, H306 Madison, WI

Accessibility

Visitors to the DWD building are requested to enter through the left East Washington Avenue door and register with the customer service desk. The entrance is accessible via a ramp from the corner of Webster Street and East Washington Avenue. If you have special needs or circumstances regarding communication or accessibility at the hearing, please call (608) 261-6805 at least 5 days prior to the hearing date. Accommodations such as ASL interpreters, English translators, or materials in audiotape format will be made available on request to the fullest extent possible.

Appearances at the Hearing and Submittal of Written Comments

Interested persons are invited to appear at the hearing and will be afforded the opportunity to make an oral presentation of their positions. Persons making oral presentations are requested to submit their facts, views, and suggested rewording in writing.

Written comments may be submitted to Janell Knutson, Bureau of Legal Affairs Director, Division of Unemployment Insurance, P.O. Box 8942, Madison, WI 53707-8942, or via email to Janell.knutson@dwd.wi.gov. Written comments must be received at or before the public hearing to be held on February 27, 2017 to be included in the record of rule-making proceedings.

The emergency rule may be reviewed and comments made at adminrules.wisconsin.gov no later than the start of the public hearing to be held on February 27, 2017 at 2:00 p.m.

Initial Regulatory Flexibility Analysis
The emergency rule will not have an effect on small businesses, as defined under s. 227.114 (1), Stats.

Agency Small Business Regulatory Coordinator

Karl Dahlen, Chief Legal Counsel
Karl.Dahlen @dwd.wi.gov
(608) 266-9427.

Dated this 1st day of February, 2017.

STATE OF WISCONSIN,
DEPARTMENT OF WORKFORCE
DEVELOPMENT

By _____
Karl Dahlen, Chief Legal Counsel
(Authorized Designee for Ray Allen, Secretary)

115TH CONGRESS
1ST SESSION

H. J. RES. 42

Disapproving the rule submitted by the Department of Labor relating to drug testing of unemployment compensation applicants.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 30, 2017

Mr. BRADY of Texas (for himself, Ms. JENKINS of Kansas, Mr. FARENTHOLD, Mrs. WALORSKI, Mr. SMITH of Nebraska, Mr. SMITH of Missouri, Mr. CARTER of Georgia, Mr. MARCHANT, Mr. BISHOP of Michigan, Mr. KELLY of Pennsylvania, Mr. HOLDING, Mr. RICE of South Carolina, Mr. SAM JOHNSON of Texas, Mrs. BLACK, Mr. SESSIONS, Mr. REED, Mr. SCHWEIKERT, Mr. FLORES, Mr. GOHMERT, and Mr. CARTER of Texas) submitted the following joint resolution; which was referred to the Committee on Ways and Means

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JOINT RESOLUTION

Disapproving the rule submitted by the Department of Labor relating to drug testing of unemployment compensation applicants.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Labor relating to ''Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemploy-

ment Compensation Applicants'' (published at 81 Fed. Reg. 50298 (August 1, 2016)), and such rule shall have no force or effect.

○

To: Unemployment Insurance Advisory Council

From: Andy Rubsam

Date: February 16, 2017

Re: *Easterling v. LIRC* Court of Appeals decision

Paulina Easterling drove a van for special needs people. One of Easterling's duties included securing passengers' wheelchairs so that the wheelchairs would not tip over while they rode in the van. Easterling signed her employer's wheelchair tip policy that directed her to properly secure wheelchairs. On one occasion, Easterling failed to properly fasten a passenger's wheelchair and the passenger tipped over during the trip. Easterling was busy with many passengers at the time and, in her haste, did not secure the wheelchair. The employer terminated Easterling because she failed to secure the wheelchair.

Easterling applied for unemployment insurance benefits but the department denied benefits on the grounds that Easterling was terminated for substantial fault. Easterling appealed. The appeal tribunal (ALJ) determined that Easterling was terminated for misconduct, not substantial fault. Easterling appealed again. LIRC found that Easterling mistakenly forgot to secure the wheelchair and was terminated for substantial fault. Easterling appealed LIRC's decision. The Circuit Court affirmed LIRC's decision.

Easterling appealed to the Court of Appeals, which reversed LIRC's decision and awarded benefits. The Court of Appeals held that Easterling's failure to secure the wheelchair was unintentional and an inadvertent error.

COURT OF APPEALS
DECISION
DATED AND FILED

February 2, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP190 **Cir. Ct. No. 2014CV3228**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

PAULINA S. EASTERLING,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

BADGER BUS LINES, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: JAMES R. TROUPIS, Judge. *Reversed and cause remanded for further proceedings.*

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Paulina S. Easterling appeals a circuit court order that affirmed the decision of the Labor and Industry Review Commission (LIRC) denying Easterling's claim for unemployment benefits on the basis of substantial fault. As pertinent to our resolution of this appeal, LIRC based its decision on a finding that the conduct of Easterling that resulted in her termination was intentional, and not an "inadvertent error[]," as that phrase is used in WIS. STAT. § 108.04(5g) (2015-16).[1] For the reasons discussed below, we reverse the order of the circuit court and remand for further proceedings.

BACKGROUND

¶2 In June 2014, Easterling was employed by Badger Bus Lines, Inc., as the driver of a van that transported individuals with special needs. Badger Bus Lines had a written "Wheelchair Tip Policy," which provided in relevant part:

> This policy seeks to inform all drivers about the serious matter of properly securing wheelchairs. Failure to properly secure wheelchairs can result in a wheelchair tipping during transport .... When a driver is providing service that transports wheelchair passengers and a wheelchair on that driver's vehicle tips ... management will perform an investigation into the cause of the incident. If it is determined that the cause of the tipping was due to the driver not fully securing the wheelchair in the vehicle, it will result in termination of the driver's employment....

In August 2013, Easterling signed a statement indicating that she understood the "Wheelchair Tip Policy," and that she had been informed that a violation of the policy would result in the termination of her employment.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 On June 22, 2014, Easterling was responsible for transporting a group of elderly passengers, one of whom was in a wheelchair. Easterling failed to secure that passenger's wheelchair to the floor of the van and, while Easterling was driving, the wheelchair tipped over. The following day, Easterling was informed that her employment was terminated because she had violated her employer's Wheelchair Tip Policy. We reference further details below in discussing LIRC's factual determinations.

¶4 Following the termination of her employment, Easterling applied to the Department of Workforce Development (DWD) for unemployment benefits. DWD determined that Easterling was ineligible for benefits because she was discharged from her employment for substantial fault. *See* WIS. STAT. § 108.04(5g). An administrative law judge (ALJ) affirmed DWD's decision to deny Easterling unemployment benefits, but the ALJ did so on a different basis. The ALJ determined that Easterling was discharged for misconduct, *see* § 108.04(5), and did not address the issue of substantial fault.

¶5 Easterling petitioned LIRC for review of the ALJ's decision. LIRC determined that Easterling's employment had not been terminated for misconduct. However, LIRC determined that Easterling had been discharged from her employment for substantial fault and was, on that basis, ineligible for unemployment benefits.

¶6 Easterling sought review of LIRC's decision by the circuit court. The circuit court affirmed LIRC's decision. Easterling appeals.

DISCUSSION

¶7 Easterling contends that the circuit court erred in affirming LIRC's determination that she was ineligible to receive unemployment benefits because her employment had been terminated for "substantial fault" under a new provision in the law. *See* WIS. STAT. § 108.04(5g). We agree with Easterling, based on our conclusion that there is not credible and substantial evidence in the record on which reasonable persons could rely to make a decision that the alleged conduct by Easterling was intentional, and not an "inadvertent error[] made by the employee." *See* § 108.04(5g)(a)2 ("substantial fault" does not include "[o]ne or more inadvertent errors"). That is, relying without objection from LIRC on this court's prior definition of what "inadvertent error[]" means in this context, we reverse based on LIRC's findings of fact.

¶8 We review the decision of the administrative agency, rather than the decision of the circuit court. ***Hilton v. DNR***, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166.

¶9 Whether Easterling was disqualified from receiving unemployment benefits under WIS. STAT. § 108.04(5g) presents a mixed question of fact and law. We will uphold LIRC's factual findings "'if there is credible and substantial evidence in the record on which reasonable persons could rely to make the same findings.'" ***deBoer Transp., Inc. v. Swenson***, 2011 WI 64, ¶30, 335 Wis. 2d 599, 804 N.W.2d 658 (quoted source omitted).

¶10 Whether the facts give rise to substantial fault under WIS. STAT. § 108.04(5g) presents a question of law. Ordinarily, questions of law are reviewed de novo. *See* ***id.***, ¶31. However, when our review is of an agency's interpretation of a statute, we afford the agency's interpretation one of three level's of deference:

no deference; due weight deference, or great weight deference. ***Id.***, ¶¶31-35 (explaining the levels of deference and when they are applied).

¶11 As should become clear from our discussion below, the standard of review that we apply to LIRC's interpretation of WIS. STAT. § 108.04(5g) does not matter in this appeal, because we do not resolve this appeal based on a dispute about the meaning of any pertinent term in the statute. Instead, on the issue that we conclude is dispositive, the parties dispute whether there is credible and substantial evidence in the record on which reasonable persons could rely to decide that Easterling's failure to secure the wheelchair was an inadvertent error as opposed to an intentional act.

¶12 An individual seeking to claim unemployment benefits is presumed eligible for benefits, and the burden rests on the party resisting the payment of benefits to prove that the individual is disqualified from receiving benefits. *See* ***Operton v. LIRC***, 2016 WI App 37, ¶21, 369 Wis. 2d 166, 880 N.W.2d 169 (Lundsten, J., concurring), *review granted*, 2016 WI 82, 371 Wis. 2d 616, 888 N.W.2d 236; *see also* ***id.***, ¶¶32, 42-45 (concluding that LIRC erred in its construction and application of "substantial fault" to the facts presented).[2] Badger Bus Lines asserted, and LIRC agreed, that Easterling was ineligible under WIS.

[2] We would hold our decision pending our supreme court's decision if it appeared likely that that decision would provide direction in this appeal. However, that appears unlikely. As stated in our discussion below, we are guided by the definition of one statutory term, "inadvertent errors," provided by the court of appeals in ***Operton v. LIRC***, 2016 WI App 37, 369 Wis. 2d 166, 880 N.W.2d 169 (Lundsten, J., concurring). *See infra* ¶17. However, the dispute in ***Operton*** is whether a "series of even inadvertent failures in their cumulative effect at some point goes beyond inadvertence to substantial fault." ***Id.***, ¶39 (Lundsten, J., concurring). In ***Operton***, LIRC "does not seriously dispute that Operton's errors, viewed individually, were all "inadvertent errors.'" *See* ***id.***, ¶38 (Lundsten, J., concurring). In contrast, whether Easterling's one individual error was an "inadvertent error[]" is precisely the dispute here.

STAT. § 108.04(5g) for benefits. Section 108.04(5g), which was enacted in 2013, provides:

> (a) An employee whose work is terminated by an employing unit for substantial fault by the employee connected with the employee's work is ineligible to receive benefits until .... For purposes of this paragraph, "substantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does not include any of the following:
>
> 1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction.
>
> 2. One or more inadvertent errors made by the employee.
>
> 3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

¶13 Under the new substantial fault provision, WIS. STAT. § 108.04(5g), an employee is now ineligible for unemployment benefits based on substantial fault only if all five of the following conditions are met: (1) the employee was discharged for an act or omission over which the employee exercised reasonable control; (2) the act or omission violated a reasonable requirement of the employer; (3) the act or omission was not a "minor infraction[]" of a rule or rules that was repeated after the employee had been warned by his or her employer about the "infraction"; (4) the act or omission was not an "inadvertent error[]"; and (5) the employee's failure to perform work was due to insufficient skill, ability, or equipment. *See* ***Operton***, 369 Wis. 2d 166, ¶¶34-37 (Lundsten, J., concurring).

¶14 We will assume without deciding that the first two conditions are met, and that Easterling's failure to secure the wheelchair was not a minor rule infraction and did not result from insufficient skill, ability, or equipment. This

leaves the question of whether Easterling's failure to secure the wheelchair constituted an inadvertent error. We conclude that, based on the evidence in the record, Easterling's employment was not terminated for substantial fault because her failure to secure the wheelchair to the van was an inadvertent error.

¶15 In ***Operton***, we stated that "[t]he term 'inadvertent' means 'failing to act carefully or considerately, inattentive; resulting from heedless action, unintentional.'" ***Id.***, ¶25 (quoting *Inadvertent*, COLLINS ENGLISH DICTIONARY (12th ed. 2014)). Neither party contests this definition, with its potentially multiple shades of meanings.

¶16 We now return to the facts, as LIRC found them. LIRC found that Easterling "mistakenly failed to secure [a] passenger's wheelchair into place on the floor of the van." Along the same lines, LIRC found that Easterling "made sure that the passenger's wheelchair was positioned properly and that the wheelchair's brakes were applied, but in her haste to tend to other passengers, she forgot to secure the straps from the floor mounts of the van to the wheelchair." LIRC found that contributing factors to Easterling's failure to secure the wheelchair to the floor of the van was a lack of an experienced volunteer who was usually there to assist passengers into the van, the presence of three extra passengers whom Easterling had not expected, and a feeling of pressure to hurry because passengers were eager to get on the van and the van was parked at a crosswalk. Moreover, LIRC did not find that there was any evidence that Easterling had intentionally or willfully disregarded Badger Bus Line's wheelchair policy. *See generally* ***id.***, ¶27.

¶17 Based on all these findings, LIRC concedes on appeal that its findings "support a conclusion of inadvertence." LIRC appropriately explains

that, given this concession, the decision by the agency is "inconsistent with previous commission decisions, such that no deference should be afforded the commission's legal conclusion of substantial fault in the instant case."

¶18 Nevertheless, LIRC argues that particular evidence that was presented at the hearing before the ALJ supports LIRC's conclusion that Easterling's failure to secure the wheelchair to the van floor was not an inadvertent error. Those facts are the following: after a volunteer put the wheelchair user on the bus, Easterling "made sure that his wheelchair was positioned properly and that the wheelchair's brakes were applied," and thereafter Easterling failed to secure the wheelchair. LIRC argues that the fact that Easterling ensured that the wheelchair was properly positioned and the brakes were applied establishes that her failure to secure the wheelchair thereafter was "not inadvertence."

¶19 We fail to see how these additional facts constitute substantial evidence on which reasonable persons could rely to support a finding that Easterling—to borrow the definitional terms stated in ***Operton***—did not fail to act carefully or considerately, that she was not inattentive or took a heedless action, in sum, that she did not act unintentionally. The fact that she ensured that the wheelchair was properly positioned and the brakes were applied certainly provides a context in which she *could have* decided not to secure the wheelchair. But they add only a weak inference at best that she did make that decision, an inference that is contradicted by all other evidence. LIRC points to no pattern of conduct, no admission or action inconsistent with inadvertence, or other substantial evidence that could support a finding that Easterling acted intentionally.

¶20 In an attempt to shore up this argument, LIRC asserts that Easterling's testimony at the hearing before the ALJ shows that Easterling "affirmatively chose to leave [the wheelchair passenger] with his wheelchair unsecured." However, the portion of Easterling's testimony that LIRC now cites only undermines LIRC's assertion. Easterling testified at the administrative hearing as follows:

> [Question] ... did you secure [the] wheelchair?
>
> [Easterling] No, I didn't.
>
> [Question] ... Why not?
>
> [Easterling] Because I was completely overwhelmed with the amount of people that [were] getting on. I got so .... I'm not going to even say distracted, but it was—four of [the passengers getting on the van] have hip problems. And it was to a point where, I got a little bit overwhelmed, and I decided to help the ladies get on, and ... [an individual] put [the wheelchair passenger] onto the lift and got [the passenger] on board. But I was trying to help the other [passengers] get on, because we [were] pressed for time. And plus we[] [were] [parked] in ... front of the church, where the crosswalk is and people needed to get past.

This testimony strongly supports the inference that her failure to secure the wheelchair was not an affirmative decision, that is to say intentional, but rather was the result of "heedless action" and "unintentional."

¶21 To repeat, LIRC found that Easterling "*mistakenly* failed to secure ... [the] wheelchair" and that Easterling "*forgot*" to secure the wheelchair. LIRC does not challenge these findings as clearly erroneous and LIRC concedes that they support a conclusion that Easterling's failure to secure the wheelchair to the van was an inadvertent error. LIRC's argument that it is unreasonable to conclude that Easterling's failure to secure the wheelchair was an inadvertent error is not

supported by the record. Accordingly, we reverse the circuit court's order affirming LIRC's decision and remand for further proceedings consistent with this opinion.[3]

CONCLUSION

¶22 For the reasons discussed above, we reverse and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Recommended for publication in the official reports.

[3] Because we conclude that the only reasonable finding available to LIRC based on the record is that Easterling's failure to secure the wheelchair was an inadvertent error, we do not address other issues raised by the parties and addressed at length in their appellate briefs. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).

Unemployment Ins. Advisory Council, 01/16/2017

I feel the changes in unemployment benefits re: job search is unfair to those of us who work seasonal jobs such as construction like myself. I am a 19 year veteran of seasonal construction work. Myself along with my coworkers feel these changes forcing us to job search results in time, money (which we don't have) wasted. It also is unfair to our employer who has time in training, education, and much more in us. Also if we are forced to accept lower paying positions we are preventing others who would benefit from these jobs. We are also wasting new employers time and money filling out applications and conducting interviews to us who will leave in 3-4 months and return to our employers. This is simply a total waste of resources to satisfy government bureaucracy. I know there is always a portion of people who cheat the system, but punishing the rest of us is not right. I believe it would very simple to flag those of us who return to our same employers each year and stop wasting money and time job searching for something that will not last. Please get this right. Change the job search requirement for those of us who return to our employer on a regular basis. WE cannot make Wisconsin great unless we work together.

Thank you for your time,

Sincerely, Patrick Hyden

Patrick E Hyden
210 Bayne St W
Hilltown WI
54858

Milwaukee POLICE Association
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President
Michael V. Crivello

January 20, 2017

Patrick E. Hyden
210 Bering St. W,
Middleton, WI 54058

RE: your correspondence to: Unemployment Ins. Advisory Council [addressed to me]

Dear Mr. Hyden,

I have received your correspondence via US Mail; thank you for your professional expression of concern.

Patrick your letter will be shared appropriately to other members of the DWD/UIAC.

Our next scheduled meeting date is: February 16, 2017

Sincerely,

**responding as UIAC member*

Michael V. Crivello
President/ Milwaukee Police Association
Local# 21, IUPA, AFL-CIO

D17-01 (Revised)
Assessment for Employers that Fail to Comply with Adjudication Requests

Date: February 16, 2017
Proposed by: DWD
Prepared by: Andy Rubsam

ANALYSIS OF PROPOSED UI LAW CHANGE
Assessment for Employers that Fail to Comply with Adjudication Requests

1. Description of Proposed Change

The department experiences difficulty in investigating concealment cases when employers fail to cooperate in providing necessary information. For example, an employer may fail to report the claimant's weekly wages for weeks that the department believes the claimant is concealing work. If the employer does not provide the requested information, the department must make a determination based on the best evidence available. There is often little incentive for an employer to return the weekly wage verification form because the claimant's benefits are usually not charged to their account. And, there is no civil penalty for failing to return the wage verification form.[1]

Currently, if the department erroneously pays benefits from one employer's account because a claimant has concealed work for another employer, the department credits the benefits paid to the first employer's account and charges the benefits paid to the balancing account.[2] The claimant is "at fault" for the overpayment because the claimant committed an act of concealment.[3]

The department proposes a law change to assess a penalty of $100.00 for an employer or employer agent that fails to comply with the department's request for information during an adjudication. The penalty would be deposited into the program integrity fund. The department

[1] A criminal statute provides a fine of $100 to $500 and imprisonment up to 90 days for anyone who "knowingly refuses or fails to keep any records or to furnish any reports or information duly required by the department…."
[2] Wis. Stat. § 108.16(3).
[3] Wis. Stat. § 108.04(13)(f).

may waive the penalty if the department, in its sole discretion, finds that the report was late for a reason beyond the control of the employer or employer agent.

The department also proposes to add the weekly earnings audit report as a type of required report in Wis. Admin. Code § DWD 123.03. The department would make this rule change along with the other proposed rule changes in D17-09.

2. Proposed Statutory Changes

108.22 (1) (g) of the statutes is created to read:

The department may assess a person or employer agent that fails to file a timely weekly earnings audit report or an urgent request for wages report a penalty in the amount of $100. Assessments under this paragraph shall be deposited in the unemployment program integrity fund. The department may waive the penalty under this paragraph if the person or employer agent later files the report and the department, in its sole discretion, finds that the report was tardy due to circumstances beyond the employer's control.

108.19 (1s) (a) 5. of the statutes is created to read:

Assessments under s. 108.22 (1) (g).

3. Effects of Proposed Change

a. Policy. The proposed change will incentivize employers to provide the department with complete and accurate information regarding their employees, leading to more accurate adjudication and payment of benefits.

b. Administrative. This proposal will require training of benefits staff.

c. Fiscal. A fiscal estimate is attached.

4. State and Federal Issues

There are no known federal conformity issues with this proposal. The Department recommends that any changes to the unemployment insurance law be sent to the U.S. Department of Labor for conformity review.

5. Proposed Effective/Applicability Date

This proposal would be effective with other changes made as part of the agreed bill cycle.

D17-01 (Revised)
Assessment for Employers that Fail to Comply with Adjudication Requests

Prepared by: Technical Services Section

FISCAL ANALYSIS OF PROPOSED LAW CHANGE

UI Trust Fund Impact:
This proposal is expected incentivize compliance, thus would have a negligible but positive impact on the UI Trust Fund. Any penalties recouped would go the Program Integrity Fund.

IT and Administrative Impact:
This law change proposal will require approximately 750 hours of IT changes at a one-time cost of $65,250. The administrative cost is estimated at approximately 30% the IT cost or $19,575. The total one-time cost is estimated at $84,825.

Summary of Proposal:
The department experiences difficulty in investigating concealment cases when employers fail to cooperate in providing necessary information. If the employer does not provide the requested information, the department must make a determination based on the best evidence available. There is often little incentive for an employer to return the weekly wage verification form because the claimant's benefits are usually not charged to their account. And, there is no civil penalty for failing to return the wage verification form.[4] The department proposes a law change to assess a penalty of $100.00 for an employer or employer agent that fails to comply with the department's request for information during adjudication. The penalty would be deposited into the UI Program Integrity Fund. The department may waive the penalty if the department, in its sole discretion, finds that the report was late for a reason beyond the control of the employer or employer agent.

Trust Fund Methodology:
Based on 2016 data, there were 5,038 work and wage determinations with an overpayment due to concealment that were detected from a cross match or by the agency[5]. These were chosen as these investigations rely heavily on employer information for the determination to be accurate. According to subject matter experts within the Benefit Operations Bureau, approximately 20% of work and wage information verification forms are not received or are incomplete. That results in approximately 1,007 work and wage concealment determinations made annually when employers fail to respond or fail to provide complete information. A total of 1,007 determinations with a $100 civil penalty would result in up to $100,700 annually in recouped penalties that would flow to the UI Program Integrity Fund.

The recouped penalties are expected to decrease over time, as this proposal should incentivize employers to comply with future work and wage verification form requests. The department will also remove or waive the penalty to those employers who respond late with good cause.

[4] A criminal statute provides a fine of $100 to $500 and imprisonment up to 90 days for anyone who "knowingly refuses or fails to keep any records or to furnish any reports or information duly required by the department…."
[5] Wage Record Cross Match, State New Hire Cross Match, National New Hire Cross Match, Interstate Cross Match, State Payroll Cross Match, Federal Wage Cross Match and Agency Detection

D17-01 (Revised)
Assessment for Employers that Fail to Comply with Adjudication Requests

IT and Administrative Impact Methodology:
The IT hours and cost assumes is based on high level business requirements. It assumes 600 SUITES hours and 150 CEDARS hours to make the necessary changes. The administrative cost is 30% of the IT cost based on prior project estimates.

D17-06 (updated with fiscal estimate)
Standard of Proof in Unemployment Insurance Law Cases

Date: February 16, 2017
Proposed by: DWD
Prepared by: Andy Rubsam

ANALYSIS OF PROPOSED UI LAW CHANGE
Standard of Proof in Unemployment Insurance Law Cases

1. Description of Proposed Change

The standard of proof is "a rule about the quality of the evidence that a party must bring forward to prevail."[1] The standard of proof used in a legal proceeding depends on the nature of the proceeding. The preponderance of the evidence is the burden of proof used "in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be."[2] A more stringent burden of proof is clear and convincing evidence, which is "evidence indicating that the thing to be proved is highly probable or reasonably certain."[3] The highest level of proof is beyond a reasonable doubt, which is used in criminal proceedings.

Currently, Wisconsin's unemployment insurance law does not contain a uniform standard of proof. The Commission applies the clear and convincing standard to concealment cases and cases involving misconduct for theft by the employee. Minnesota unemployment law provides that all issues of fact are determined by a preponderance of the evidence.[4] The Department proposes that all issues of fact in Wisconsin unemployment insurance cases (other than criminal penalties) shall be determined by a preponderance of the evidence. Criminal cases based on violations of the unemployment insurance law would continue to be determined by the higher "beyond a reasonable doubt" standard.

[1] Standard of Proof, Black's Law Dictionary (10th ed. 2014).
[2] Preponderance of the Evidence, Black's Law Dictionary (10th ed. 2014).
[3] Evidence, Black's Law Dictionary (10th ed. 2014).
[4] MN Stat. § 268.031(1).

2. Proposed Statutory Changes

Section 108.09 (3m) of the statutes is created to read:

(3m) STANDARD OF PROOF. All issues of fact in cases decided under this section are determined by a preponderance of the evidence.

Section 108.095 (5) of the statutes is amended to read:

(5) ~~Any~~ A hearing on an appeal under this section shall be held before an appeal tribunal ~~appointed~~ established under s. 108.09 (3). Section 108.09 (3m), (4), and (5) applies to the proceeding before the appeal tribunal.

Section 108.10 (2) of the statutes is amended to read:

(2) ~~Any~~ A hearing on an appeal under this section ~~duly requested~~ shall be held before an appeal tribunal established ~~as provided by~~ under s. 108.09 (3). ~~, and s.~~ Section 108.09 (3m), (4), and (5) ~~shall be applicable~~ applies to the proceedings before ~~such~~ the appeal tribunal. The department may be a party in any proceedings before an appeal tribunal. The employing unit or the department may petition the commission for review of the appeal tribunal's decision under s. 108.09 (6).

3. Effects of Proposed Change

a. Policy. The proposed change regarding the standard of proof will require parties to all non-criminal unemployment insurance cases to show the same level of evidence as in other civil cases. This will align the burden of proof in unemployment insurance cases with the burden of proof in other civil cases.

b. Administrative. This proposal will require training of adjudication staff and administrative law judges.

c. Fiscal. A fiscal estimate is attached.

4. State and Federal Issues

There are no known federal conformity issues with this proposal. All changes to the unemployment insurance law should be sent to the U.S. Department of Labor for conformity review.

5. Proposed Effective/Applicability Date

This proposal would be effective with other changes made as part of the agreed bill cycle.

D17-06 (updated with fiscal estimate)
Standard of Proof in Unemployment Insurance Law Cases

Prepared by: Technical Services Section

FISCAL ANALYSIS OF PROPOSED LAW CHANGE

UI Trust Fund Impact:

This law change proposal would save the UI Trust Fund approximately $86,667 annually.

IT and Administrative Impact:

This law change proposal would not have an IT impact. The administrative one time impact is estimated at 258 hours or $10,262.

Summary of Proposal:

The standard of proof is the quality of evidence that a party must bring forward in order to prevail. The standard of proof in criminal proceedings is beyond a reasonable doubt. The standard of proof in most civil proceedings is a preponderance of the evidence, which is interpreted to be more likely than not. Currently, Wisconsin's unemployment insurance law does not provide a statutory standard of proof. The department recommends that, like Minnesota, the standard of proof in all unemployment cases be a preponderance of the evidence.

Trust Fund Methodology:

For 2016, there were 446 concealment determinations that were overturned upon appeal with attached Benefit Amount Reductions (BARs) of $1.3 million dollars. These determinations were chosen, as concealments investigations would be most affected by the proposed change in the standard of proof. Based on 50 random samples and case review by Senior Administrative Law Judges, the proposed change in the standard of proof is expected to reduce the number of cases reversed by approximately 20%. This would reinstate $260,000 worth of BARs annually. Approximately 50% of individuals with a BAR would be expected to return to collect UI within the 6 year period that BAR is in effect. This would lead to an annual reduction of benefits of $130,000. This reduction in benefits would lead to an approximate reduction of UI taxes by $43,333 per year. This proposal then is expected to save the UI Trust Fund approximately $86,667 per year.

This law change proposal is expected to bring conformity and clarity when determining benefit eligibility issues.

IT and Administrative Impact Methodology:

This law change proposal would not have an IT impact. The one-time administrative cost to prepare and conduct adjudication and administrative law judge staff training is estimated at 258 hours or $10,262.

D17-08 (updated with fiscal estimate)
Various Minor and Technical Changes

Date: February 16, 2017
Proposed by: DWD
Prepared by: Andy Rubsam

ANALYSIS OF PROPOSED UI LAW CHANGE
Various Minor and Technical Changes

1. Description of Proposed Change

The department proposes several minor and technical changes to chapter 108, as follows.

a. Congress repealed the federal Workforce Investment Act of 1998 ("WIA") and replaced it with the federal Workforce Innovation and Opportunity Act ("WIOA"). The department proposes to update the references in chapter 108 from WIA to WIOA and to include language to obviate the need to update the statute if WIOA is repealed.

b. Under s. 108.04(17)(e), a school year employee employed by a government unit, Indian tribe, or nonprofit organization is ineligible for benefits during the summer between two school years if there is a reasonable assurance that the employee will perform those services in the second school year. The statute omits a reference to "Indian tribe" in one instance. The department believes that the missing reference to "Indian tribe" is a drafting error and proposes to insert "Indian tribe" where it is missing.

c. The previous UIAC agreed bill, 2015 Act 334, modified certain provisions in s. 108.04(8), related to suitable work. A cross-reference in s. 108.04(7)(e) was not revised to reflect the changes to s. 108.04(8). The department proposes to correct this error.

d. Previously, the department paid all unemployment benefits by paper checks. Currently, the department pays about 80% of benefits by direct deposit, about 20% by deposit to debit cards and less than 1% by paper check. The department proposes updating the statutes to replace references to checks with issuance of payment.

e. The previous UIAC agreed bill, 2015 Act 334, provided for electronic delivery of decisions as an alternative to mailing decisions to parties. The department proposes to revise other statutes in chapter 108 to provide for optional electronic delivery of other department determinations and notices.

f. The previous UIAC agreed bill, 2015 Act 334, created provisions to permit appeal tribunals to issue decisions regarding a party's failure to appear at hearings without holding a hearing on the party's failure to appear. The amended statutes do not clearly state that the appeal tribunal should dismiss the appeal if the appellant lacked good cause for failing to appear and that the appeal tribunal should issue a decision based on the original hearing record if the respondent lacked good cause for failing to appear. The Legislative Reference Bureau recommends amending these statutes to confirm the department's interpretation of these statutes: the appeal tribunal should issue a decision (1) addressing whether the party had good cause for failing to appear; and (2) dismissing the appeal (if the appellant failed to appear) or deciding the case based on the original hearing (if the respondent failed to appear).

g. If a state has outstanding federal loans for two or more consecutive years as a result of borrowing in order to pay state unemployment benefits, employers' federal unemployment tax (FUTA) credit will be reduced.[1] This is known as the FUTA credit reduction and results in employers paying additional federal unemployment taxes. The federal government applies the additional federal unemployment taxes to the state's loan balance. After the state's federal loan is repaid, the federal government remits the excess amount of additional federal unemployment taxes, if any, to the state. The state must

[1] 26 USC § 3302(c)(2).

deposit the funds into the state's unemployment trust fund.[2] The Legislative Fiscal Bureau recommends a law change so that state law aligns with federal law so that any excess FUTA credit reduction payments made to Wisconsin in the future will be deposited into the balancing account.

h. In lieu of layoffs, employers may reduce employees' hours under a work share plan that results in a pro rata payment of unemployment benefits.[3] The department recommends the following changes to the work share statute:

   1. Vacation, holiday, termination, and sick pay should be treated as hours for the purposes of calculating an employee's work share benefit. This is similar to current law for regular benefits.
   2. The department shall disregard discrepancies of less than 15 minutes of work reported, which is similar to the disregard of $2 of wages earned in a week for regular benefits.
   3. The department shall treat missed work available for work share employees similarly as claimants applying for regular benefits so that work share employees are not paid greater benefits when missing work with a work share employer.

i. Section 20.445 contains various provisions related to the appropriations of funds for the department. The department's Office of Policy and Budget recommends that the appropriation language for the unemployment interest payment fund and the unemployment program integrity fund be amended. The amendments will convert these

[2] 42 USC § 1101(d)(1)(B): "The Secretary of the Treasury is directed to transfer from the employment security administration account--To the account (in the Unemployment Trust Fund) of the State with respect to which employers paid such additional tax, an amount equal to the amount by which such additional tax received and covered into the Treasury exceeds that balance of advances, made under section 1321 of this title to the State, with respect to which employers paid such additional tax."
[3] *See* Wis. Stat. § 108.062. For more information, visit http://dwd.wisconsin.gov/uitax/workshare.htm.

funds from "segregated-sum sufficient" to "segregated-continuing." The purpose of these changes is to make the accounting for these funds more efficient. The department also proposes a fiscal provision to add 5.0 positions, to be compensated from the program integrity fund. These staff will conduct program integrity activities, investigate concealment, and investigate worker misclassification.

2. **Proposed Statutory Changes**

Section 20.445 (1) (u) of the statutes is amended to read:

(u) *Unemployment interest payments and transfers*. ~~From~~ All moneys paid into the unemployment interest payment fund under s. 108.19 (1q), ~~a sum sufficient~~ to make the payments and transfers authorized under s. 108.19 (1m).

Section 20.445 (1) (v) of the statutes is amended to read:

(v) *Unemployment program integrity*. ~~From~~ All moneys paid into the unemployment program integrity fund under s. 108.19 (1s), ~~a sum sufficient~~ to make the payments authorized under s. 108.19 (1s).

Section 108.02 (13) (i) of the statutes is amended to read:

An "employer" shall cease to be subject to this chapter only upon department action terminating coverage of such employer. The department may terminate an "employer's" coverage, on its own motion or on application by the "employer", by ~~mailing~~ issuing a notice of termination to the "employer~~'s~~" ~~last known address~~. An employer's coverage may be terminated whenever the employer ceased to exist, transferred its entire business, or would not otherwise be subject under any one or more of pars. (b) to (g). If any employer of agricultural labor or domestic service work becomes subject to this chapter under par. (c) or (d), with respect to such employment, and such employer is otherwise subject to this chapter with respect to other employment, the

employer shall continue to be covered with respect to agricultural labor or domestic service or both while the employer is otherwise subject to this chapter, without regard to the employment or wage requirements under par. (c) or (d). If a termination of coverage is based on an employer's application, it shall be effective as of the close of the quarter in which the application was filed. Otherwise, it shall be effective as of the date specified in the notice of termination.

Section 108.04 (7) (e) of the statutes is amended to read:

Paragraph (a) does not apply if the department determines that the employee accepted work which the employee could have failed to accept under sub. (8) and terminated such work on the same grounds and within the first 30 calendar days after starting the work, or that the employee accepted work which the employee could have refused under sub. (9) and terminated such work within the first 30 calendar days after starting the work. For purposes of this paragraph, an employee has the same grounds for voluntarily terminating work if the employee could have failed to accept the work under subs. (8)(d) to (em) when it was offered, regardless of the reason articulated by the employee for the termination.

Section 108.04 (16) (a) 4. of the statutes is amended to read:

A plan for training approved under the federal ~~workforce investment act, 29 USC 2822~~ Workforce Innovation and Opportunity Act, 29 USC 3112, or another federal law that enhances job skills.

Section 108.04 (17) (e) of the statutes is amended to read:

A school year employee of a government unit, Indian tribe, or nonprofit organization which provides services to or on behalf of any educational institution who performs services other than in an instructional, research or principal administrative capacity is ineligible for benefits based on such services for any week of unemployment which occurs during a period between 2

successive academic years or terms if the school year employee performed such services for any such government unit, Indian tribe, or nonprofit organization in the first such year or term and there is reasonable assurance that he or she will perform such services for any such government unit, Indian tribe, or nonprofit organization in the 2nd such year or term.

Section 108.062 (2) (m) of the statutes is amended to read:

Indicate whether the plan ~~will~~ includes employer-sponsored training to enhance job skills ~~sponsored by the employer~~ and acknowledge that~~, pursuant to federal law,~~ the employees in the work unit may participate in training funded under the federal ~~Workforce Investment Act of 1998~~ Workforce Innovation and Opportunity Act or another federal law that enhances job skills without affecting availability for work, subject to ~~the~~ department approval ~~of the department~~.

Section 108.062 (6) (a) of the statutes is amended to read:

Except as provided in par. (b), an employee who is included under a work-share program and who qualifies to receive regular benefits for any week during the effective period of the program shall receive a benefit payment for each week that the employee is included under the program in an amount equal to the employee's regular benefit amount under s. 108.05 (1) multiplied by the employee's proportionate reduction in hours worked for that week as a result of the work-share program. Such an employee shall receive benefits as calculated under this paragraph and not as provided under s. 108.05 (3). For the purposes of this paragraph, the department shall treat amounts paid for holiday pay, vacation pay, termination pay, and sick pay as hours worked. In applying this paragraph, the department shall disregard discrepancies of less than 15 minutes between hours reported by employees and employers.

D17-08 (updated with fiscal estimate)
Various Minor and Technical Changes

Section 108.062 (10) of the statutes is amended to read:

AVAILABILITY FOR WORK. An employee who ~~is receiving~~ receives benefits under sub. (6) (a) for any week need not be available for work in that week other than for the normal hours of work that the employee worked for the employer that creates the work-share program immediately before the week in which the work-share program began and any additional hours in which the employee is engaged in training to enhance job skills sponsored by the employer that creates the plan or department-approved training funded under the federal ~~Workforce Investment Act of 1998~~ Workforce Innovation and Opportunity Act or another federal law that enhances job skills ~~that is approved by the department~~. Unless an employee receives holiday pay, vacation pay, termination pay, or sick pay for missed work available under a work-share program, the department shall treat the missed work that an employee would have worked in a given week as hours actually worked by the employee for the purpose of calculating benefits under sub. (6).

Section 108.09(4)(d)2. of the statutes is amended to read:

If the appellant submits to the appeal tribunal a written explanation for failing to appear at the hearing that is received before a decision is electronically delivered or mailed under subd. 1., an appeal tribunal shall review the appellant's explanation. The appeal tribunal shall electronically deliver or mail to the respondent a copy of the appellant's explanation. The respondent may, within 7 days after the appeal tribunal electronically delivers or mails the appellant's explanation to the respondent, submit to the appeal tribunal a written response to the appellant's explanation. If the appeal tribunal finds that the appellant's explanation does not establish good cause for failing to appear, the appeal tribunal shall issue a decision containing this finding and dismissing the appeal. ~~and s~~ Such a decision may be issued without a hearing. If the appeal tribunal finds that the appellant's explanation establishes good cause for failing to appear, the appeal tribunal

shall issue a decision containing this finding, and such a decision may be issued without a hearing. The same or another appeal tribunal established by the department for this purpose shall then issue a decision under sub. (3) (b) after conducting a hearing concerning any matter in the determination. If such a hearing is held concerning any matter in the determination, the appeal tribunal shall only consider testimony and other evidence admitted at that hearing in making a decision.

Section 108.09(4)(e)2. of the statutes is amended to read:

If the respondent submits to the appeal tribunal a written explanation for failing to appear at the hearing that is received before a decision favorable to the respondent is electronically delivered or mailed under subd. 1., the appeal tribunal shall acknowledge receipt of the explanation in its decision but shall take no further action concerning the explanation at that time. If the respondent submits to the appeal tribunal a written explanation for failing to appear that is received before a decision unfavorable to the respondent is electronically delivered or mailed under subd. 1., an appeal tribunal shall review the respondent's explanation. The appeal tribunal shall electronically deliver or mail to the appellant a copy of the respondent's explanation. The appellant may, within 7 days after the appeal tribunal electronically delivers or mails the respondent's explanation to the appellant, submit to the appeal tribunal a written response to the respondent's explanation. If the appeal tribunal finds that the respondent's explanation does not establish good cause for failing to appear, the appeal tribunal shall issue a decision containing this finding, and such a decision may be issued without a hearing. <u>The same or another appeal tribunal established by the department for this purpose shall also issue a decision based on the testimony and other evidence presented at the hearing at which the respondent failed to appear.</u> If the appeal tribunal finds that the respondent's explanation establishes good cause for failing to appear, the appeal

tribunal shall issue a decision containing this finding, and such a decision may be issued without a hearing. The same or another appeal tribunal established by the department for this purpose shall then issue a decision under sub. (3) (b) after conducting a hearing concerning any matter in the determination. If such a hearing is held concerning any matter in the determination, the appeal tribunal shall only consider testimony and other evidence admitted at that hearing in making a decision.

Section 108.095 (8) of the statutes is amended to read:

The ~~mailing~~ issuance of determinations and decisions under this section shall be by electronic delivery or first class mail and ~~,~~ may include the use of services performed by the postal service requiring the payment of extra fees.

Section 108.10 (5) of the statutes is amended to read:

The ~~mailing~~ issuance of determinations and decisions provided in subs. (1) to (4) shall be by electronic delivery or first class mail~~,~~ and may include the use of services performed by the postal ~~department~~ service requiring the payment of extra fees.

Section 108.15 (3) (a) of the statutes is amended to read:

~~It~~ The government unit shall file a written notice of election ~~to that effect~~ with the department before the beginning of such year or within 30 days after the department issues a determination that the government unit is subject to this chapter, whichever is later. ~~except that if the government unit became newly subject to this chapter as of the beginning of such year, it shall file the notice within 30 days after the date of mailing to it a written notification by the department that it is subject to this chapter.~~ ~~Such~~ An election under this subsection shall remain in effect for not less than 3 calendar years.

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Various Minor and Technical Changes

Section 108.15 (5) (b) of the statutes is amended to read:

The department shall monthly bill each government unit for any reimbursements required under this section. The reimbursements shall be due within 20 days after the department issues the bill. ~~, and any reimbursement thus billed shall be due and shall be paid by such government unit within 20 days after the date such bill is mailed to it by the department.~~

Section 108.155 (4) of the statutes is amended to read:

The department shall bill assessments under this section to a reimbursable employer at its last known address in the month of September of each year and the assessment shall be due to the department within 20 days after ~~the date such bill is mailed by~~ the department issues the assessment. Any assessment that remains unpaid after its ~~applicable~~ due date is a delinquent payment. If a reimbursable employer is delinquent in paying an assessment under this section, in addition to pursuing action under the provisions of ss. 108.22 and 108.225, the department may do any of the following:

Section 108.16 (2) (e) of the statutes is amended to read:

Except as provided in par. (em), benefits ~~to~~ shall be charged against a given employer's account ~~shall be so charged~~ as of the date ~~shown by the check~~ that the department issues the payment covering such benefits. Each ~~such check~~ benefit payment shall be promptly ~~mailed~~ issued and shall, in determining the experience or status of such account for contribution purposes, be deemed paid on the date ~~shown on the check~~ issued.

Section 108.16 (2) (em) of the statutes is amended to read:

Benefits improperly charged or credited to an employer's account for any reason other than adjustment of payroll amounts between 2 or more employers' accounts shall, when so identified, be credited to or debited from that employer's account and, where appropriate, recharged to the

correct employer's account as of the date of correction. Benefits improperly charged or credited to an employer's account as a result of adjustment of payroll amounts between 2 or more employers' accounts shall be so charged or credited and, where appropriate, recharged as of the date ~~shown by the check covering such benefits~~ on which the department issued the benefit payment. This paragraph shall be used solely in determining the experience or status of accounts for contribution purposes.

Section 108.16 (6) (p) of the statutes is created to read:

Any amount received from the federal employment security administration account under 42 USC 1101 (d) (1) (B).

Section 108.19 (1m) of the statutes is amended to read:

Each employer subject to this chapter as of the date a rate is established under this subsection shall pay an assessment to the unemployment interest payment fund at a rate established by the department sufficient to pay interest due on advances from the federal unemployment account under Title XII of the social security act (42 USC 1321 to 1324). The rate established by the department for employers who finance benefits under s. 108.15 (2), 108.151 (2), or 108.152 (1) shall be 75 percent of the rate established for other employers. The amount of any employer's assessment shall be the product of the rate established for that employer multiplied by the employer's payroll of the previous calendar year as taken from quarterly employment and wage reports filed by the employer under s. 108.205 (1) or, in the absence of the filing of such reports, estimates made by the department. Each assessment made under this subsection is due ~~on the 30th day commencing~~ within 30 days after the department issues the assessment. ~~date on which notice of the assessment is mailed by the department.~~ If the amounts collected from employers under this subsection ~~are in excess of~~ exceed the amounts needed to pay interest due, the

department shall use any excess to pay interest owed in subsequent years on advances from the federal unemployment account. If the department determines that additional interest obligations are unlikely, the department shall transfer the excess to the balancing account of the fund, the unemployment program integrity fund, or both in amounts determined by the department.

Section 108.21 (2) of the statutes is amended to read:

The findings of ~~any such~~ an authorized representative of the department under sub. (1), based on examination of the records of any such employing unit and embodied in an audit report issued ~~mailed~~ to the employing unit, ~~shall constitute~~ are a determination under ~~within the meaning of~~ s. 108.10.

Fiscal Change:

In the schedule under section 20.005 (3) of the statutes for the appropriation to the department of workforce development under section 20.445 (1) (v) of the statutes, as affected by the acts of 2017, the dollar amount is increased by $1,630,000 for the first fiscal year of the fiscal biennium in which this subsection takes effect for the purpose of increasing the authorized FTE positions for the department of workforce development by 5.0 SEG positions annually and providing additional funding for the purpose of conducting program integrity activities, investigating concealment, and investigating worker misclassification. In the schedule under section 20.005 (3) of the statutes for the appropriation to the department of workforce development under section 20.445 (1) (v) of the statutes, as affected by the acts of 2017, the dollar amount is increased by $1,630,000 for the second fiscal year of the fiscal biennium in which this subsection takes effect for the purpose of increasing the authorized FTE positions for the department of workforce development by 5.0 SEG positions annually and providing additional funding for the

purpose of conducting program integrity activities, investigating concealment, and investigating worker misclassification.

3. Effects of Proposed Change

a. Policy. This proposal will align Wisconsin law with current federal law, correct typos in Wisconsin's law, and update outdated references in the statutes.

b. Administrative. Staff will need to be made aware of the changes.

c. Fiscal. A fiscal estimate is attached.

4. State and Federal Issues

There are no known federal conformity issues with this proposal. The Department recommends that all changes to the unemployment insurance law be sent to the U.S. Department of Labor for conformity review.

5. Proposed Effective/Applicability Date

This proposal would be effective with other changes made as part of the agreed bill cycle.

D17-08 (updated with fiscal estimate)
Various Minor and Technical Changes

Prepared by: Technical Services Section

FISCAL ANALYSIS OF PROPOSED LAW CHANGE

UI Trust Fund Impact:

These minor or technical changes would not impact the Trust Fund.

IT and Administrative Impact:

The amendments to Section 20.445 would allow an administrative change in the funding source in the amount of $1,630,000 to fund 5 program integrity related positions and other program integrity related activities. All changes are minor or technical in nature and would not result in an IT or administrative impact.

Summary of Proposal:

The department proposes several minor and technical changes to chapter 108, as follows:

a. Update the references in chapter 108 from WIA to WIOA and to include language to obviate the need to update the statute if WIOA is repealed.
b. Correct a drafting error regarding school-year employment. The relevant statute, s. 108.04(17)(e), appears to be missing the phrase "Indian tribe" in one instance.
c. Correct a drafting error regarding suitable work language that was not updated in a cross reference.
d. Update the statutes to remove the word "check." Currently, Chapter 108 refers to the issuance of "checks" for payment of unemployment benefits. But, the Department primarily pays benefits by direct deposit or debit card deposit.
e. Amend the statutes to refer to the option of "electronic delivery" for all types of determinations and notices.
f. The Legislative Reference Bureau recommends amending the statutes to confirm the department's interpretation: the appeal tribunal should issue a decision (1) addressing whether the party had good cause for failing to appear; and (2) dismissing the appeal (if the appellant failed to appear) or deciding the case based on the original hearing (if the respondent failed to appear).
g. Authorize the deposit of FUTA credit reduction payments to the balancing account in accordance with the current practice and in compliance with federal law. FUTA credit reduction payments are made by the federal government to the states when the states borrow funds from the federal government in order to pay unemployment benefits.
h. Modify three areas of the work share provisions. First, codify Department policy, which is that the amounts of dismissal, sick or vacation payments be treated as hours for work share calculation purposes. Second, disregard discrepancies of less than 15 minutes of work reported, which is similar to the $2 disregard of wages earned in a week for regular benefits. Third, clarify that a claimant who misses work available with a work-share employer would be treated the same as if the claimant missed work while receiving regular UI benefits.

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Various Minor and Technical Changes

i. Amend appropriation language in Section 20.445 for the unemployment interest payment fund and the unemployment program integrity fund. The amendments will convert these funds from "segregated-sum sufficient" to "segregated-continuing" to make accounting for these fund more efficient. This would result in allowing an administrative change in the funding source in the amount of $1,630,000 to fund five program integrity-related positions and other program integrity-related activities.

Trust Fund Methodology:

These minor or technical changes would not impact the Trust Fund.

IT and Administrative Impact Methodology:

The amendments to Section 20.445 would allow an administrative change in the funding source in the amount of $1,630,000. It would allow utilization of funds from the Program Integrity Fund rather than UI Grant Monies and/or SBR funds. The amount will fund five program integrity-related staff positions and other program integrity-related activities. All changes are minor or technical in nature and would not result in an IT or administrative impact.