

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

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

March 19, 2015

The meeting was preceded by public notice as required under Wis. Stat. §19.84.

Members Present: Janell Knutson (Chair), Scott Manley, Michael Gotzler, Edward Lump, James LaCourt, Earl Gustafson, Mark Reihl and Mr. Griesbach

Department Staff Present: Joe Handrick (UI Administrator), Ben Pierce, BJ Dernbach (Legislative Liaison), Scott Sussman, Andy Rubsam, Karen Schultz, Tyler Tichenor, Patrick Lonergan, Lutfi Shahrani, Amy Banicki, Tom McHugh, Pam James, Robert Usarek, Delora Newton and Robin Gallagher.

Members of the Public Present: Representative Michael Shraa (53rd District), Mark Austinson and Ben Hubrick (Rep. Knodl's Office), Mary Beth George (Rep. Sinicki's Office), Brian Dake (WI Independent Businesses, Inc.), James Buchen, Chris Reader (WI Manufacturer's & Commerce), Ryan Horton (Legislative Fiscal Bureau), Rachel Inman (Legislative Audit Bureau), Victor Forberger (UI Appeals Clinic) and David Nance (Labor and Industry Review Commission)

1. Call to Order and Introductions

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) meeting to order at 10:05 a.m. in accordance with Wisconsin's open meeting law. Council members and department staff at the table introduced themselves. Ms. Knutson recognized Representative Shraa, Mark Austinson and Ben Hubrick from Representative Knodl's Office and Rachael Inman from the Legislative Audit Bureau and welcomed those in attendance.

2. Approval of Minutes of February 19, 2015

Motion by Mr. Manley, second by Mr. Gotzler to approve the February 19, 2015 minutes without corrections. Motion approved unanimously.

3. Report on the Unemployment Insurance Reserve Fund

Mr. McHugh provided the Council with an update on the UI Trust Fund (Fund). The Fund balance at the end of January 2015 was \$255 million and as of March 17, 2015 was \$142.5 million. Current projections show it is unlikely the department will have to borrow money from the federal government to pay benefits.

All federal loans were paid off by July 29, 2014, the first time since February 2009 the department had no outstanding loan balance (with the exception of a brief period in July). Total loans since February 2009 equaled \$4.9 billion, with the highest loan balance at \$1.7 billion in April 2011.

Tax receipts for January were \$108.1 million compared to \$108.4 million for January 2014. Receipts in January represent fourth quarter taxes due January 31. Approximately 50% of annual tax revenue is generated from first quarter taxes, which are due April 30, since the first \$14,000 of an employee's wages are taxed. Large employers, defined by state statute as employers with taxable payrolls over \$500,000, represent 74% of the tax revenue collected.

Fourth quarter gross wages reported by employers increased 4.93% (approximately \$24.9 billion) compared to fourth quarter last year (approximately \$23.8 billion). Taxable payroll increased 6.23% (approximately \$2.9 billion in 2014 and approximately \$2.7 billion in 2013) during the same time period. The small decrease in fourth quarter tax receipts from last year indicates the effect of employer tax rate decreases between 2013 and 2014.

4. Overview UI Financing System

Mr. Usarek updated the Council on a UI Trust Fund Projection. Projections are based on UI data and the U.S. Congressional Budget Offices' Budget and Economic Outlook for 2015 to 2025. The benefit projection modeling is still difficult given the above average unemployment rate but the extremely low benefit payment amounts.

An average high cost multiple (AHCM) is used by the U.S. Department of Labor (USDOL) to measure the health of a UI Trust Fund. During the projection period, an AHCM of 1.0 (1.81% of total covered payroll) is expected to be in the \$1.6 to \$1.9 billion range over the forecast period. In addition:

- The ending Trust Fund balance in 2017 is projected to be \$887 million.
- UI benefits are projected to continue to remain historically low.
- UI tax revenue is projected to continue to fall due to:
 - Improved employer account balances lowering individual employer tax rates.
 - Shifting to tax schedule B in 2016 reducing UI tax revenue by approximately \$97 million per year.
- The end of year balance in both 2016 and 2017 are forecasted close enough to \$900 million that triggering onto schedule C is possible by the end of the forecast period, reducing tax revenue by approximately \$37 million annually.

Although UI benefit payments are projected to remain historically low, benefit payment amounts are expected to increase over time as employee payrolls increase.

5. Budget Proposals

Changes to Suitable Work Definition

Mr. Sussman provided a summary of the budget bill provisions relating to changes to the suitable work definition. The budget bill directs the department to define by administrative rule what constitutes suitable work for claimants and must also specify what constitutes suitable work based upon the number of weeks a claimant has received UI benefits. The budget bill's framework for defining "suitable work" is similar language used by other states. General language regarding "suitable work" is found under s. DWD 127.01, Wis. Admin. Code, but a definition is not contained in the current statute.

Increased Penalties for Acts of Concealment

Mr. Sussman provided a summary of the budget bill provisions relating to criminal and civil penalties for a claimant fraudulently filing for UI benefits by concealing any material facts relating to UI benefit eligibility. The civil penalties will increase from 15% to 40% of UI benefit payments erroneously paid to a claimant as a result of one or more acts of concealment. Criminal penalties are increased for a person who knowingly makes a false statement or representation to obtain any UI benefit payment to mirror existing penalties contained in criminal statutes ranging from the equivalent of a class A misdemeanor to a class G felony.

UI Drug Testing Program

Mr. Rubsam provided a summary of the budget bill provisions relating to the UI drug testing program. Federal law permits states to require a UI claimant to submit to a test for the unlawful use of controlled substances as a condition of receiving UI under two circumstances.

First, states may test claimants who were terminated from employment with their most recent employer because of the use of controlled substances. Second, a state may test a UI benefit claimant for whom suitable work is only available in an occupation that regularly conducts drug testing. The USDOL will determine, by regulations not yet final, which occupations regularly conduct drug testing.

The budget bill directs the department to establish by administrative rule, requirements for a drug testing program. When a claimant applies for UI benefits, the department will determine whether the claimant is an individual for whom suitable work is only available in an occupation that regularly conducts drug testing. If so, the department must screen the claimant in order to determine whether the claimant should be required to submit to a test for controlled substances.

If the test is negative for controlled substances, the claimant may be entitled to UI benefits if the claimant is otherwise eligible without further testing. If the test is positive for a controlled substance, but the claimant has a valid prescription for the controlled substance, the claimant may be entitled to UI benefits if otherwise eligible.

If the claimant refuses to submit to the test, or if the claimant tests positive for controlled substance and does not hold a valid prescription, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim in a subsequent year. If a claimant tests positive, the claimant may maintain eligibility for UI benefits for each week in which the claimant participates in a state-sponsored substance abuse treatment program and undergoes a state-sponsored job skills assessment.

The budget bill also permits employers to voluntarily submit the results of a test for controlled substances conducted as part of pre-employment screening to the department. In addition, the employer may inform the department that an individual refused to take a pre-employment test for controlled substances. If an employer reports that an individual refused to submit to a test for controlled substances as part of a pre-employment screening, or tests positive for controlled substances and does not have a valid prescription, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim in a subsequent year. If the individual tests positive for controlled substances (and lacks a valid prescription), or if the individual refuses to take the test, there is a rebuttable presumption that the claimant refused to accept suitable work. If a claimant tests positive, the claimant may maintain eligibility for UI benefits for each week in which the claimant participates in a state-sponsored substance abuse treatment program and undergoes a state-sponsored job skills assessment. The department is directed to promulgate administrative rules specifying how a claimant may overcome this presumption.

The Council requested that the department identify the number of Wisconsin employees who work in the occupations list proposed under USDOL regulations.

6. Report on Detection and Prevention of Fraud in the UI Program

Mr. Shahrani presented the 2014 annual report on the detection and prevention of fraud in the UI program to the Council. Under Wis. Stat. § 108.14 (19), the department is required to present a yearly report to the Council by March 15 on the department's efforts to combat waste, fraud and abuse in the UI program.

Fraud is committed when a claimant intentionally provides false or inaccurate information in an effort to obtain UI benefits or by an employer to avoid Wisconsin UI tax liability. In an effort to deter UI fraud, the department educates employers and claimants on the legal consequences of committing fraud.

The department utilizes multiple tools to detect and prevent fraud when educational efforts fail. In addition to cross-referencing federal social security administration records and Wisconsin Department of Transportation records, the department:

- Reviews employer wage files to determine a claimant's work history.
- Mails Benefit Payment Notices to employers informing them of UI benefit charges to their account.
- Verifies non-citizen work authorization with the U.S. Citizenship and Immigration Services when a claimant is not a U.S. citizen.

- Blocks everyone from using the department's bank account number to initiate unauthorized electronic funds transfers transactions.
- Scans employer tax and benefit charge information to identify potential fictitious employers.

In 2014 the department detected approximately \$20.5 million in fraud overpayments and \$16.9 million in non-fraud overpayments. The department recovered nearly \$40.5 million of fraud and non-fraud overpayments in 2014, including \$2.5 million in debts 5 years and older.

The department pursues criminal prosecution in cases of egregious fraudulent activity working with district attorneys, the Wisconsin Department of Justice and federal prosecutors. In 2014, the department referred 19 cases for state criminal prosecution and five individuals were convicted in the U.S. Eastern District of Wisconsin for a fictitious employer scam.

As of September 2014, claimants who file weekly claims online and are required to search for work must enter their four work search actions each week. The department conducts random audits of work search actions of claimants. In 2014 the department conducted 11,394 random audits and issued 4,780 decisions denying UI benefits, resulting in over \$1.2 million in savings to the UI Trust Fund.

Worker misclassification contributes to waste and fraud in the UI program. During 2014, Wisconsin UI auditors identified misclassified workers in 31% of the audits that involved the construction industry. Worksite investigations are conducted by five experienced department investigators, all with law enforcement backgrounds and funded through federal Supplemental Budget Request grants. The investigative staff has conducted 76 field investigations resulting in 46 referrals to the Field Audit Section. On average, an audit conducted by the department resulting from a referral by investigators has yielded 12 misclassified workers and an additional \$4,722 in unpaid UI taxes.

Agency detection and use of departmental tools resulted in establishing \$7.2 million in UI fraud. The largest amount of UI fraud overpayment detections (\$7.8 million) resulted from wage record cross matching.

Unemployment insurance fraud is a national problem. Through enforcement and collection efforts, the department expects to collect 78% of overpayments established in 2014 over the next 10 years.

The Bureau of Tax and Accounting distributed information, per Council request, on the number of misclassification investigations conducted by field audit staff.

Recess

By unanimous consent, the board recessed for lunch at 12:05 p.m. and reconvened at 12:45. p.m.

7. Department Proposals

D15-01 - Social Security Disability Income (SSDI)

Ms. Knutson provided an update to the Council on amendments to the recently enacted SSDI provision. It was the intent of the Legislature, department, and Council that claimants are not only ineligible for UI benefits in the week in which the SSDI check was delivered to the SSDI benefit recipient, but a SSDI payment would disqualify a claimant from UI benefits in all weeks of the month. The Labor and Industry Review Commission (LIRC) has issued a number of decisions that interpret the language to mean that a claimant is only ineligible for UI benefits during the week a SSDI payment is received by the claimant. Proposed statutory language is now included in the proposal for Council review. Mr. Sussman stated the critical language that is needed to correct the misinterpretation by LIRC is addressed in this draft by clarifying that a claimant is ineligible for UI benefits each week in the entire calendar month in which a claimant receives SSDI. The language contains no ambiguity and is a technical correction to what the Council previously approved in the prior agreed bill cycle.

The department has 11 SSDI litigation cases pending in circuit court. No court decisions have been issued. Claimants in these cases are currently collecting UI benefits as federal law requires UI benefits be paid, and continue to be paid once a decision is issued awarding benefits, and can only stop when a subsequent decision denying benefits is issued.

D15-02 - Combined Wage Claim

Ms. Knutson provided an update on the combined wage claim proposal. This proposal addresses a federal mandate that requires states to pay UI benefits in cases where an unemployed individual has wages and employment in more than one state, commonly referred to as a combined wage claim. There is no anticipated impact to the Trust Fund and no changes have been made to this proposal since last month.

D15-03 - Treasury Offset Program

Ms. Knutson provided an update on the Treasury Offset Program (TOP). This proposal addresses a federal mandate and expands the department's use of TOP to collect unpaid specified UI debt owed by employers for unpaid UI contributions due to the Trust Fund and any penalties and interest due on the debt. The department already uses TOP to collect UI benefit overpayments owed by employees. This proposal has not changed since last month and USDOL has given informal approval of the proposed language.

D15-04 - Reimbursable Employer Fraud Charging

Ms. Knutson provided an update on the department proposal relating to reimbursable employer fraud charging. Identity theft is a problem experienced by many state UI agencies. Thieves assume the work history of claimants to obtain UI benefits, resulting in fraudulent charges to

employer's accounts. For governmental units, Indian tribes, and nonprofit organizations that have elected reimbursement financing, overpayment of UI benefits are charged to an employer's account and remained charged to that account until the overpayments are recouped by the department.

This proposal will treat reimbursable employers in a similar manner as contribution employers. The proposal directs the department to set aside \$2 million plus interest to pay for identity theft charges against reimbursable employers. If the balance of the set aside funds is less than \$100,000, all reimbursable employers will be assessed to pay the UI benefit charges due to identity theft. The assessment would be similar to the Reimbursable Employer Debt Assessment under Wis. Stat. § 108.151 (7).

Mr. Lump requested the department consider an option to provide that an assessment would be charged when the set aside funds reach \$1 million rather than \$100,000. The Council expressed interest in an option that would provide the Council an opportunity to review and provide a recommendation to the department on charging an assessment when set aside funds reach \$1 million, similar to reviews conducted by the Worker's Compensation Advisory Council. The department will provide alternate proposals to the Council at the next meeting.

D15-05 – Enabling Department to Hold Managing Partners of LLP's Personally Liable

Mr. Rubsam provided an update on the department proposal relating to holding managing partners of a limited liability partnership (LLP) personally liable for the contributions owed by the LLP. At the last Council meeting, Mr. Manley asked if within Wis. Stat. ch. 77 "other responsible person" is defined and in Wis. Stat. ch. 71 "other form of business" is defined. These terms are not defined within the statutes. Based on case law, the terms are to be interpreted broadly but not without limit. This proposal to amend Wis. Stat. § 108.22 (9) is designed to permit an assessment of personal liability for unpaid UI contributions against individuals who, by nature of their "status, duty and authority" are responsible for filing the contribution reports and paying the taxes. This proposal is similar to the way that LIRC currently interprets Wis. Stat. § 108.22 (9) and is consistent with the federal IRC and the Wisconsin Revenue statutes.

D15-06 Appeals Modernization and Efficiency Improvements

Ms. Knutson provided an update on the department proposal relating to appeals modernization and efficiency improvements. This proposal was presented to the Council at the last meeting, but additional efficiency items may be added and submitted to the Council next month. This proposal aligns department technology to the 21st century, streamlines appeal processes for efficiency purposes and allows for video web hearings. In addition, the proposal will allow an Administrative Law Judge (ALJ) to review documents submitted by the party in order to determine "good cause" for failure to appear at the original hearing. If "good cause" is found, the ALJ will schedule a hearing on the merits, saving both the state and the parties' time and resources. This proposal does not change the definition of "good cause." ALJs determine "good cause" based on previous LIRC decisions.

Mr. Manley requested the department provide the Council examples of case law in which "good cause" for failure to appear shows varied factual findings on what is considered "good cause."

D15-07 – Work Share Partial Wage Formula

Ms. Knutson updated the Council on the department proposal relating to eliminating the partial wage formula within the work share program. This proposal was submitted to the Council at the last meeting and the fiscal estimate is now attached. Leaving the partial wage formula in the work share law will cause cost over runs for information technology changes of over \$730,000, which is not covered by grant funds. The number of claimants this proposal impacts is projected to be very small. The proposed draft contains one change to the statute.

D15-08 Concealment

Mr. Rubsam provided a summary of the department proposal relating to the definition of concealment. In 2008, as part of the agreed bill, the definition of concealment was enacted. This proposal is necessary in response to what the department considers erroneous decisions that have been issued by LIRC on concealment issues. LIRC has read into the definition of concealment additional language that states the department must also provide evidence that the claimant obtained benefits which the claimant knew they were not entitled. The proposal is not intended to identify more fraud; it clarifies the department's position that concealment does not require such knowledge. The proposal also creates a rebuttable presumption that the claimant misled the department when providing the false information and provides for rebuttal by submission of competent evidence. The fiscal impact to the Trust Fund is expected to be small, but positive. The department has appealed approximately 10 cases to circuit court in which the department determined LIRC misinterpreted the concealment statute. One Dane County judge found LIRC misinterpreted the statute and remanded the case back to LIRC. Because the court gives LIRC's decisions a high level of deference, other circuit court judges are upholding LIRC decisions.

Mr. Riehl requested information on the total number of concealment cases that were determined by the department and how many of those concealment cases were reversed by LIRC.

Ms. Knutson stated the department anticipates submitting an additional department proposal to the Council at the next meeting.

8. Other Business

Ms. Knutson informed the Council that yesterday the Joint Legislative Council Committee voted to introduce a bill to standardize criminal penalties in various chapters of statutes and put them into the same format as the state criminal code. This was done for all agencies and after a review of Wis. Stat. ch. 108, no department program penalties were repealed. There are a few minor adjustments that will be made due to the standardization, involving classification of offenses and length of imprisonment.

9. Future Meetings and Agenda Items

The next meeting is scheduled for April 16. A survey will be sent to all Council members to confirm this date. Mr. Lump will not be able to attend.

Motion

Motion by Mr. Reihl, second by Mr. Manley to recess and go into closed caucus session pursuant to Wis. Stat. § 19.85 (1) (ee), to discuss department proposals. The motion carried unanimously and the meeting was recessed at 1:30 p.m.

Report Out of Caucus

The Council reconvened from caucus at approximately 2:10 p.m. Motion by Mr. Reihl, second by Mr. Manley to approve the following proposals and send them to the Legislative Reference Bureau for drafting:

- D15-02 - Combined Wage Claim
- D15-03 - Treasury Offset Program
- D15-05 – Enabling Department to Hold Managing Partners of LLP's Personally Liable

The motion carried unanimously. Mr. Reihl stated labor members are not ready to support the SSDI proposal because they are waiting to review further information. Mr. Manley stated management members are ready to support the SSDI proposal.

10. Adjourn

Motion by Mr. Manley, second by Mr. Griesbach to adjourn at 2:25 p.m. Motion carried unanimously.