

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

June 18, 2015

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

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

Department Staff Present: Ben Peirce, Lili Crane, Scott Sussman, Karen Schultz, Tyler Tichenor, Lutfi Shahrani, Amy Banicki, Tom McHugh, Pam James, Richard Chao, Delora Newton and Robin Gallagher

Members of the Public Present: Mary Beth George (Rep. Sinicki's Office), Brian Dake (Wis. Independent Businesses, Inc.), Larry Smith (UC Management Services), Kevin Magee (Legal Action of Wisconsin), Chris Reader (Wisconsin Manufacturer's & Commerce), Rachael Inman (Legislative Audit Bureau), Mike Duchek (Legislative Reference Bureau), Victor Forberger (UI Appeals Clinic), Laurie McCallum (Labor and Industry Review Commission), and Erika Strebel (Daily Reporter)

1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) meeting to order at 10:05 a.m. in accordance with Wisconsin's Open Meetings law. Council members and department staff introduced themselves. Ms. Knutson recognized Mary Beth George (Rep. Sinicki's office) and Laurie McCallum (Labor and Industry Review Commission) and welcomed those in attendance.

2. Approval of Minutes of May 19, 2015

The May 19, 2015 meeting minutes should be corrected to reflect the meeting was held at the State of Wisconsin Investment Board. Motion by Mr. Griesbach, second by Mr. Lump to approve the May 19, 2015 minutes as corrected. Motion carried unanimously.

3. Report on the Unemployment Insurance Reserve Fund

Mr. McHugh provided an update on the Unemployment Insurance (UI) Reserve Fund. As of May 31, 2015, the UI Reserve Fund balance was \$538 million compared to \$14 million at the end of May last year. The UI Trust Fund cash balance as of June 16, 2015 was \$523 million.

Because the cash balance in the Trust Fund will exceed \$300 million on June 30, UI will trigger on to Tax Schedule B for 2016 tax rates. The change from Tax Schedule A (which has been in effect since 2010) to Tax Schedule B, will save employers an estimated \$97 million.

As of May 31, 2015, \$306 million in UI benefit payments were paid compared to \$363 million last year and tax receipts totaled \$619.9 million compared to \$653.9 million last year. The decrease in taxes is a result of improved experience ratings for many employers.

Mr. McHugh summarized the 2015 rate categories for Wisconsin employers. Approximately 20% of small employers pay a tax rate of 0.27% while only 1.6% of large employers pay the minimum 0.70%. This represents approximately 10% of small employers' taxable wages and less than 1% of large employers' taxable wages.

4. Update on Legislation

Mr. Sussman provided an update on the following legislation (the Council had previously received a full analysis):

2015 Senate Bill 140/2015 Assembly Bill 212

Senate Bill 140 and Assembly Bill 212 relates to a seven-year period of unemployment insurance (UI) benefit ineligibility for a claimant who commits two or more consecutive acts of concealment. Both bills have been referred to the respective legislative committees. The department submitted the proposed language to the U.S. Department of Labor (USDOL) for conformity review, but has not yet received a response.

2015 Assembly Bill 192

Assembly Bill 192 relates to a drug testing program for UI claimants. Assembly Bill 192 was passed by the Assembly and referred to the Senate. To date, no action has been taken by the Senate.

2015 Assembly Bill 140

Assembly Bill 140 (AB 140) relates to providing annual public benefit statements to the individual or family. AB 140 was referred to the respective committee, but to date no action has been taken.

Budget Bill

Ms. Knutson reported that the Joint Finance Committee (JFC) passed two motions. Motion #455 provides modifications to the proposed budget bill provisions for drug testing certain UI claimants that include:

- Splitting the allocated \$500,000 for drug treatment in fiscal year 2016-17 to also fund substance abuse screening, testing and treatment to claimants for fiscal years 2015-16 and 2016-17.
- Allowing the department to determine by administrative rule the duration of a claimant's ineligibility for failing to pass a drug test. The 52-week penalty has been removed.
- Establishing by administrative rule that a claimant who is participating in a drug treatment program can have one more positive drug test after the initial drug test, and still be qualified for UI benefits.
- Clarifying that information regarding a UI claimant enrolled in a treatment program is confidential.
- Requiring that the results of the initial screening must provide a reasonable suspicion for the claimant to submit to a drug test.
- For the pre-employment testing, specifying the prospective employer must have required that the employee submit to a test for the presence of controlled substances "as a condition of an offer of employment" and the prospective employer withdrew the conditional offer after the employee either refused to submit to the test or tested positive for one or more controlled substances.
- Clarifying that the department shall promulgate rules identifying occupations for which drug testing is regularly conducted in this state and provide notice of those rules to the USDOL.

Motion #509 provides the following modifications:

- Increasing penalties for UI fraud:
 - Specifies collections from the increased 25% penalty for UI benefit fraud would be deposited into the Program Integrity Fund. Ms. Knutson reported the Program Integrity Fund when established included a sunset of the fund in 20 years. The Council should consider repealing the sunset in the agreed bill or in a technical correction bill if language is not added to the statute.
 - Removes changes to criminal penalties and provides that a penalty modification could be considered by the Council for possible inclusion in the Council's regular 2015-16 legislative session bill, which may also include a provision modifying the definition of concealment.
- Clarifying that the tiered levels of suitable work to be established by the department would apply after the initial six-week canvassing period.

Mr. Reihl requested additional time to review the concealment proposal. Legislators and other individuals have been contacting him and voicing concerns that the concealment language could have a negative effect on a lot of people who are not intentionally trying to defraud the UI program. It is important to incorporate changes correctly so people, who are unintentionally answering questions incorrectly while claiming benefits, are not the ones being punished.

Ms. Knutson stated the final draft language on concealment has not yet been approved by the Council. Ms. Knutson offered to answer any questions or provide additional information if needed.

5. Litigation Update

Mr. Sussman provided an update on the Social Security Disability Insurance (SSDI) litigation. The first SSDI decision on the merits issued by a Dane County Circuit Court Judge reversed the decision of the Labor and Industry Review Commission (LIRC), finding the department's interpretation of the relevant law was the most reasonable. The judge also stated that LIRC's decision is contrary to how the Wisconsin Supreme Court has instructed courts to interpret statutes and that LIRC's decision focused on only a small part of the statute, not the entire statute. Moreover, if there was ambiguity in the statute, the Wisconsin Supreme Court instructs lower courts to consult the legislative history, which in this case fully supports the department's interpretation of the statute. The department has a few other pending cases in different circuit courts. In one of those cases, LIRC informed the court that it disagrees with the Dane County Circuit Court decision and has asked the court to conduct its own analysis. In each court case, the relevant facts are the same and the case centers on a question of law.

6. Review and Discussion of Department Proposals.

Agreed Bill

Ms. Knutson stated the concealment language is contained in the agreed bill. There is time for the Council to review the proposed language and discuss it at the next meeting.

Reimbursable Employer Fraud Charging

Ms. Knutson stated additional time is needed to draft specific language relating to reimbursable employer fraud charging with the Legislative Reference Bureau (LRB). Once the final language is received from LRB, the proposal will be sent to USDOL for conformity review.

Appeals Modernization

The Council has not taken any action to date on the appeals modernization proposal. Ms. Crane was available to answer questions relating to hearing procedures.

Mr. Lump requested information on the current procedures when a party to a hearing does not show up. Ms. Crane stated if either the claimant or employer fail to attend the scheduled hearing, the party that did not attend is provided an opportunity to state the reason for their non-attendance. Current statute requires a hearing be held to determine if the nonappearance was for good cause, and another hearing to determine the merits. If an appellant is more than 15 minutes late, the hearing should be dismissed. Mr. Manley and Mr. Lump both stated this is not currently happening. Ms. Crane requested specific details be given to her in order to follow up on this issue.

The proposal allows review of the reason for nonappearance and issuance of a decision without holding a formal hearing. The current proposal does not provide an opportunity for the employer or claimant to dispute why the appellant failed to appear. Mr. Lump requested that it be written into the statutes that the respondent receives a copy of the written reason as to why the appellant could not attend the hearing and allow the respondent an opportunity to respond. If the respondent does not provide a response, a decision can be issued. If the respondent does provide a response, and disagrees with the appellant's written reasoning, a hearing will be scheduled to determine whether the appellant had good cause for the nonappearance.

Mr. Manley questioned the incongruity between the language added under 108.09 (4)(d)2., that provides:

"[I]f the appeal tribunal finds that the appellant's explanation for failing to appear, when taken as true and construed most favorably to the appellant, does not establish good cause for the failure to appear....."

Under 108.09 (4)(e), which relates to the respondent's failure to appear, that added language is not included in the proposal.

Mr. Gustafson suggested that rather than using "taken as true and construed most favorably" the language include a statement on credibility. Ms. Knutson stated when determining credibility, an in-person hearing would need to be conducted.

Mr. Manley suggested the law should include a clear definition of good cause, so there is a clear understanding of what constitutes good cause and what does not.

Mr. Sussman stated the LIRC standard for good cause is the equivalent of excusable neglect in a court proceeding (also known as the reasonably prudent person standard). Ms. Crane added that legally, good cause is different than reasons beyond your control, however, very similar.

Mr. Gotzler suggested if the Council were going to try and define good cause in statute or administrative code, the department should review other state laws and research how they handle determining good cause for not attending a hearing. The state of Illinois has some very specific examples, and may be a good starting point. It is probable a "catch-all" phrase would need to be included as well.

Mr. Griesbach inquired how often someone who has appealed a hearing fails to appear, and of those, how many individuals requested a hearing to determine good cause, and how many of those requests were granted. Ms. Crane will gather this information and present it to the Council at the next meeting.

Mr. Reihl stated if the problem is a lack of uniformity in enforcing the rule, it should be corrected. Mr. Gotzler added the impression and concern from employers is that determining good cause for failure to appear is not uniformly interpreted and applied, and having a definition of good cause would help ensure more consistency.

Mr. Reihl stated he is not opposed to looking at defining good cause, but indicated this proposal is to take away one of the mandatory hearings needed to determine good cause.

Mr. Manley stated the law provides that an Administrative Law Judge (ALJ) may dismiss a hearing application if the appellant is more than 15 minutes late. If the respondent is more than 5 minutes late, and the appellant is present, the ALJ may proceed with the hearing. The law treats appellants and respondents differently. If an appellant fails to appear within the first 15 minutes and the ALJ closes the hearing, an ALJ should not be allowed to hold a hearing if the appellant shows up an hour later and the respondent has already left. Ms. Knutson stated this may be based on USDOL guidelines and the department will research the rationale for this. If the department cannot find a federal requirement, the Council can request the department address this. Under no circumstances should an ALJ hold a hearing if the ALJ had adjourned the hearing and the respondent was no longer present, simply because the appellant showed up later than the scheduled time. If this is happening, Ms. Knutson requested case specifics for investigation. Mr. Lump suggested that a reminder be sent to the ALJs of this procedure.

Ms. Knutson stated that the department will address these suggestions and present a revised proposal at the next meeting.

7. Responses from the Legislature to UIAC Letter

Ms. Knutson stated that the letter from the Council, relating to the Council's role in recommending UI law changes and encouraging submission of any legislative proposal related to the UI program to the Council before passage in the Legislature, was delivered to the Legislature on June 5, 2015.

The department did hear from the offices of Representative Sprietzer and Representative Subeck and they have expressed interest in meeting with the Council. Representative Sprietzer is available to meet on July 8 and Representative Subeck requested a meeting the week of July 7. Ms. Knutson requested direction on arranging these meetings, and suggested the Council designate one or two members from each side to meet individually with the Representatives, or allow the department to act on the Council's behalf and arrange a joint meeting between the Representative's and Council members. Mary Beth George (Rep. Sinicki's Office) suggested that she could reach out to members of the Assembly to gauge interest in a meeting.

8. Research Request from Council

Mr. Reihl had requested that the department provide information on other states' penalties for misclassifying workers as independent contractors and look at options for increasing the penalty to present to the Council. Ms. Knutson reported that the department began the research and reviewed laws in the surrounding states of Iowa, Minnesota, Michigan and Illinois and provided a summary of those initial findings. Mr. Reihl requested additional research on penalties for employers who not only misclassify, but fraudulently do not pay UI taxes for employees. Ms. Knutson stated that the department will continue research, and provide more clarifying information to the Council at the next meeting.

9. Correspondence

The department received correspondence from Barbara Santiago, addressed to the Council. Ms. Knutson stated she had received previous correspondence from Ms. Santiago asking questions, and the department had responded. A copy of the correspondence is included in the Council materials, and no response is needed.

10. Meetings and Future Agenda Items

Council meetings are scheduled the third Thursday of each month, with the next meeting on July 16, and then August 20. Ms. Knutson suggested the Council meet through the summer months to stay on schedule in presenting the agreed bill to the legislature for introduction in January.

Ms. Knutson stated the Council had discussed at a previous meeting considering review of the UI financing system and the health of the Trust Fund. The department could start working on any research items requested from the Council.

11. Motion to Caucus

Motion by Mr. Manley, second by Mr. Gotzler to recess and go into closed caucus session pursuant to Wis. Stat. § 19.85 (1) (ee), to discuss labor and management proposals at approximately 11:20 a.m. The motion carried unanimously.

12. Report out of Caucus

The Council reconvened at 12:57 p.m. Mr. Manley reported that the Council will continue to work on proposals and be prepared to exchange proposals at the August 20 meeting, and not meet in July. Labor is in agreement with this.

13. Adjournment

Motion by Mr. Manley, second by Mr. Reihl to adjourn at 1:00 p.m. Motion carried unanimously.