

# 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

September 17, 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, John Mielke, Michael Gotzler, Shane Griesbach, Sally Feistal and Mark Reihl

**Department Staff Present:** Georgia Maxwell (Deputy Secretary), BJ Dernbach (Legislative Liaison), Joe Handrick (Administrator), Lili Crane, Andy Rubsam, Lutfi Shahrani, Amy Banicki, Janet Sausen, Matthew Aslesen, Tom McHugh, Pam James, Richard Chao, Karen Schultz, Tyler Tichenor, and Robin Gallagher

**Members of the Public Present:** Representative Samantha Kerkman (61<sup>st</sup> Assembly District), Mary Beth George (Rep. Sinicki's Office), Brian Dake (Wis. Independent Businesses, Inc.), Kevin Magee (Legal Action of Wisconsin), Vicki Selkove (Legal Action of Wisconsin), Jim Boullion (WI Associated General Contractors of Wisconsin), Aaron McKean (Legislative Reference Bureau), Mike Duchek (Legislative Reference Bureau), Rachael Inman (Legislative Audit 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 10:00 a.m. in accordance with Wisconsin's Open Meetings law. Ms. Knutson introduced and welcomed new Council management member John Mielke, representing Associated Builders and Contractors and acknowledged new Council labor members Michael Crivello, representing the Milwaukee Police Association and Terry Hayden, representing the Plumbers & Steamfitters Union who were unable to attend today's meeting. Council members and department staff introduced themselves and Ms. Knutson welcomed Representative Kerkman, Ms. McCallum, Mr. Dernbach and those in attendance.

### 2. Approval of Minutes of June 18, 2015

Motion by Mr. Manley, second by Mr. Gotzler to approve the June 18, 2015, meeting minutes. The motion carried unanimously.

### **3. Secretary's Office Update**

Mr. Dernbach provided an update on the following:

#### ***Budget Bill***

The Budget Bill included the following provisions related to:

- Pre-Employment and Occupational Drug Testing:
  - Provides that the drug testing penalty will be determined by administrative rule, not by statute.
  - Clarifies that the department shall submit the list of occupations identified by the department that regularly conduct drug testing in Wisconsin to the U.S. Department of Labor (USDOL) after the administrative rules are created.
  - Specifies under the pre-employment drug test reporting program that the employer must require the employee submit to a test for the presence of controlled substances as an offer of employer and withdraw the conditional offer after the employee refused to take the test or tested positive for one or more controlled substances.
- Removal of increased criminal penalties for fraud as originally proposed in the budget.
- Labor and Industry Review Commission (LIRC):
  - Moves LIRC from the department to the Department of Administration (DOA).
  - Provides LIRC is attached to DOA, allowing LIRC to be a distinct unit of DOA.
  - Reduces LIRC's federal unemployment insurance (UI) funding and returns those funds for UI program integrity purposes.

#### ***Assembly Bill 212/Senate Bill 140***

Assembly Bill 212 (AB 212) and Senate Bill 140 (SB 140) relate to acts of concealment and misrepresentation in filing for or claiming unemployment insurance benefits. Public hearings were held on both AB 212 and SB 140. The Public Benefit Reform Committee passed AB 212 with amendments that provide a 6-month effective date and provides the department is not required to enforce the law if USDOL finds the bill does not conform to federal law.

Representative Kerkman spoke to the Council and requested their support on AB 212. This legislation was prompted by overpayment findings in the Legislative Audit Bureau Report 2014-15. The report showed that over a 3-year period 577,000 individuals unintentionally provided inaccurate information resulting in UI overpayments. Over the same time period, 64,000 individuals intentionally provided inaccurate information, resulting in fraudulent UI overpayments of approximately \$86 million. Representative Kerkman stated a deterrent needs to be put in place that is strong enough to discourage individuals from intentionally committing UI fraud. There are current penalties in place, but are not strong enough. Mr. Rubsam clarified that under current law, those who commit work and wages fraud must repay benefits they received for those weeks, and depending on the number of acts of concealment, they are ineligible for

benefits in an amount 2, 4 or 8 times the claimant's weekly benefit rate. As of October 5, 2015, the department can assess a penalty in an amount equal to 40% of the benefits received (the current penalty is 15%).

In addition to being ineligible for benefits and the liable penalties, under AB 212 a claimant would be ineligible for UI benefits for 7 years if the claimant intentionally commits fraud in two subsequent benefit years.

Regarding AB 212, Mr. Reihl opined that the current concealment penalties are "pretty tough" and that some penalties were increased by the 2015-2017 budget bill. Mr. Reihl believes that the Council should consider the Department's proposal to amend the definition of concealment in conjunction with AB 212. Mr. Reihl stated that the proposal to change the definition of "conceal" needs more work because of the concern about claimants being accused of concealment when they made innocent mistakes. Mr. Reihl believes that the definition of concealment should be clear so that claimants are not banned from claiming benefits for 7 years after a second mistake.

Representative Kerkman responded that she and Senator Cowles (sponsor of SB 140) are not comfortable with the proposed concealment definition. AB 212 and SB 140 were drafted under the current statutory definition of concealment. One question that is asked while filing for weekly benefits and has become a big topic is "during the week, did you receive, or will you receive, sick pay, bonus pay or commission?" Representative Kerkman suggested that this question be split into two separate questions.

Ms. Knutson stated that the UI claiming system is very antiquated, but it is anticipated by the end of the year the question will be broken out for claimants filing online. Department staff has internally discussed ways to strengthen warnings and provide explanations to make sure questions are answered correctly when filing online. The original department proposal was changed after consultation with the Council, and additional changes may be included after Council review.

Mr. Handrick explained that since the audit, in fiscal year 2015, there were zero blocked calls and 99.5% of all calls were answered within 10 minutes.

Mr. Shahrani clarified that a claimant may have multiple cases of intentionally concealing work or wages in one year, but this will not trigger the automatic seven-year ban. Under this legislation, a claimant must have intentionally concealed work or wages in subsequent benefit years before the seven-year ban would apply.

Mr. Gustafson asked for statistics on how many cases of fraud were determined by the department, and of those that were appealed, how many cases were reversed upon the appeal?

Mr. Rubsam stated in 2013, LIRC issued 147 decisions on concealment. Of those, LIRC reversed 25 cases in which the appeal tribunal had determined fraud, affirmed 77 cases in which the appeal tribunal had determined concealment, remanded 11 cases to the appeal tribunal for hearings on additional evidence, and in 34 cases, the appeal tribunal determined no concealment and LIRC affirmed those decisions.

In 2014, LIRC issued 196 decisions on concealment. Of those, LIRC reversed 123 cases in which the appeal tribunal had determined fraud, affirmed 28 cases in which the appeal tribunal had determined concealment, and remanded 39 cases to the appeal tribunal for hearings on additional evidence.

In 2015, from January to April, LIRC issued 44 decisions on concealment. Of those, LIRC reversed 14 cases in which the appeal tribunal had determined fraud, affirmed 23 cases in which the appeal tribunal had determined concealment, remanded 4 cases to the appeal tribunal for hearings on additional evidence and in 3 cases, affirmed the appeal tribunal decisions and found no concealment.

Ms. Crane stated that cases are fact intensive and determined on case-by-case basis and it is difficult to determine why there was a large amount of cases reversed in 2014 by LIRC. There are cases that the department has appealed to circuit court. Ms. Knutson reported that one Dane County case was remanded back to LIRC; the court agreed with the department that LIRC was reading additional requirements into the statute. LIRC reconsidered the case and still found no concealment. One Milwaukee County case is still pending in the court of appeals. Adjudicators and ALJs are finding more cases of concealment due to training and determining intent. The department disagrees with LIRC's interpretation of the statute regarding the burden of proof.

#### ***Assembly Bill 318 – Repealing One-Week Waiting Period***

Mr. Dernbach stated Assembly Bill 318 (AB 318) was introduced by Representative Kolste and eliminates the one-week waiting period that was passed in 2011. AB 318 was referred to the Assembly Committee on Public Benefit Reform, but no public hearing has been scheduled.

#### ***Introduction of Georgia Maxwell, Deputy Secretary***

Ms. Maxwell introduced herself to the Council as the department's Deputy Secretary. Ms. Maxwell is looking forward to working with the Council and is available as a resource.

#### **4. Report on the Unemployment Insurance Reserve Fund**

Mr. McHugh provided an update on the UI Reserve Fund. As of July 31, 2015, the UI Reserve Fund cash balance was \$735.4 million compared to \$235.2 million at the end of July 2014. The last time the balance was over \$700 million was in April 2007.

As of July 31, 2015, \$371.2 million in UI benefit payments were paid compared to \$445.4 million last year and tax receipts totaled \$880.7 million compared to \$929 million last year.

Although the taxable payroll for the first two quarters is up 2.6% over last year, the reduction in revenue reflects the decrease in tax rates between 2014 and 2015 due to experience rating. Gross wages reported by employers for the first and second quarters of 2015 increased 4.1% compared to the same quarters last year.

Mr. McHugh summarized the taxes paid and benefits charged over a three year period grouped by industry classifications. During the last three fiscal years, employer account balances increased by a total of \$462 million, reflecting the decrease in tax rates over the last few years. The manufacturing industry had the largest increase in account balances at \$189 million (even though the industry represents only 6% of the employers), 22% of all benefit charges and 26% of all taxes paid. The construction industry had a \$99 million decrease in account balances, 25% of all benefit charges; however, it accounted for only 12% of taxes paid.

Mr. McHugh indicated the department will trigger from Tax Schedule A to Tax Schedule B next year, which will decrease the total taxes paid by employers by approximately \$97 million. The manufacturing industry will see bigger tax cuts, and the construction industry rates will remain as is or slightly lower.

## **5. Update on Legislation**

Mr. Rubsam reported the final language within the Budget Bill is similar to the proposed language that was distributed at the last meeting. Provisions of the budget bill provide that:

- The department is required to determine a period of ineligibility and requalification requirements for UI drug testing and pre-employment drug testing.
- The civil penalty for fraud increased from 15% to 40% for all fraudulent overpayments established on or after October 4, 2015.
- The department must define the term suitable work by administrative rule.

## **6. Review and Discussion on Administrative Rules**

Ms. Knutson reported on the following administrative rules:

### ***Pre-employment Drug Testing and Occupational Drug Testing Scope Statements***

The department filed scope statements for both pre-employment and occupational drug testing. The scope statements cover the intention of the rules, which is outlined in the Budget Bill. The department is working on the pre-employment drug testing rule by gathering information and talking with the Department of Children and Families which is implementing drug testing within the next few weeks. The department is required to determine the penalty and requalification requirements for a claimant who fails or refuses to participate in a drug test. Once the department has general language and concepts, the Council will have an opportunity to review and provide input on the rule. Both the occupational and pre-employment drug testing rules will move forward by emergency and permanent rule. The language in the Budget Bill provides the

department does not need to identify an emergency under the emergency rule process. The department anticipates having a draft on pre-employment drug testing early next year for the Council to review.

USDOL reviewed the drug testing statutes and has not communicated any concerns to date. USDOL did state the 52-week disqualification penalty for suitable work violations under the pre-employment drug testing provisions did not conform to federal law. The penalty was removed from statute and the department was instructed to determine a penalty and requalification requirements.

The occupations identified under the department's occupational drug testing rule will be in addition to the occupations identified under USDOL's regulations that are currently under promulgation and expected to be finalized this fall.

### ***Willful Misclassification***

Ms. Knutson reported the department is required by statute to define the term "willful" misclassification and a scope statement has been filed to start the administrative rule process. Under Wis. Stat. § 108.24, any employer engaged in construction, painting or drywall finishing of buildings or other structures that willfully provides false information for the purpose of misclassifying an employee as an independent contractor, is subject to a fine imposed by the court up to \$25,000 for each violation. This rule will also apply to the divisions of equal rights and worker's compensation and will not be part of the UI administrative code chapters.

## **7. Review and Discussion of New Department Proposals**

The following department proposals were presented to the Council for review and approval:

### ***D15-13 - Repeal Sunset of Program Integrity Fund***

Ms. Knutson stated the Program Integrity Fund is scheduled to automatically sunset on January 1, 2034. Because the budget bill increases the civil penalty assessed for concealment from 15% to 40%, and provides the additional 25% civil penalty be deposited into the Program Integrity Fund, the proposal repeals the sunset so the fund continues to exist.

### ***D15-10 – Technical Changes to Wis. Stat. § 108.05***

Mr. Rubsam stated that under current statutes, charts are printed in the statutes to show what a claimant's benefit rate is based on the highest quarterly wages. These charts are also published on the department's website and in addition, a calculator is available for claimants to estimate their weekly benefit rate based on their wages. The department proposes to delete the charts from the statutes and provide only the statutory formula used to determine the current minimum and maximum amount of benefits. The proposal requires the department to continue to publish the charts on the website. The proposal will also repeal sections that are no longer applied by the department and are obsolete.

### ***D15-11 – Transfer Circuit Court Review Statutes to Wis. Stat. Ch. 108***

Ms. Knutson stated that the procedures for actions for judicial review of UI decisions issued by LIRC are contained in Wis. Stat. § 102.23, the worker's compensation statute. LIRC appeared before the Council in November 2013 requesting changes to address confusion of the courts and claimants on why LIRC references Wis. Stat. § 102.23, which also contains language that does not pertain to UI. At that time, Ms. Knutson suggested LIRC prepare a proposal that transferred relevant sections from Wis. Stat. § 102.23 to Wis. Stat. Ch. 108 for the changes they were recommending; however, they chose not to proceed at that time.

Mr. Rubsam provided a summary of the following changes:

- Amends Wis. Stat. § 108.09 to include procedures for actions for judicial review of UI decisions issued by LIRC.
- Clarifies the department does not need to appear before LIRC in order to appeal any decisions issued by LIRC.
- Establishes a 60-day time frame in which LIRC is required to transmit relevant documents and transcripts of proceedings to the circuit court when an appeal is filed to prevent judicial review delays.
- Allows consolidation of related actions in a county in which none of the parties to a particular case reside, similar to how other court actions are handled. Litigants will be allowed to file a motion to keep a case in the assigned county if there's an objection. The Legislature has stated they do not want all administrative appeal hearings held in Dane County. The department had tried to consolidate cases in past; however, LIRC would only agree to the consolidation if the cases were heard in Dane County. A vast majority of appeals to circuit court are filed by claimants or businesses and in the county in which they reside. Often these cases are dismissed due to technicalities discovered by LIRC.
- Provides the department is a party in all UI appeals to court, which ensures that the department has the opportunity to defend its position in judicial review cases. Currently, Division of Unemployment Insurance attorneys represent the department in all circuit court tax appeals. It is not possible to assign a department attorney to attend all benefit hearings due to the large volume of cases.

### ***D15-12 – Technical Change to Definition of Employer***

Mr. Rubsam reported that the Budget Bill created a statute that permits fiscal agents to act on behalf of children who are being provided long-term community supports services. If a child or a child's parent received direct funds for the child's long-term case and those funds are used to pay caregivers, the child may be considered an employer for UI purposes. The new law is similar to existing laws related to fiscal agents acting on behalf of elderly individuals receiving long-term communication support services. This proposal would modify the definition of "employer" to exclude fiscal agents acting on behalf of children receiving long-term support services.

## 8. Update and Review of Department Proposals.

### *D15-04 Reimbursable Employer Fraud Charging*

Ms. Knutson indicated the Council had approved the language on reimbursable employer fraud charging which has been drafted by the Legislative Reference Bureau (LRB). The department submitted a copy of the language to USDOL for review, which was approved and presented no conformity issues. The final language is now ready for the Council's review and approval to be included in the agreed bill package.

### *D15-06 - Appeals Modernization and Efficiency Improvements*

Ms. Knutson requested the Council consider appeals modernization and efficiency improvements proposal. The Council has not taken any action to date and at the last meeting following a lengthy discussion, the Council requested additional information on the number of appeals in which the claimant or employer failed to appear, the number of claimants and employers who requested a hearing on good cause for failure to appear and of those, how many hearings were granted. Because of a very antiquated system, Ms. Crane provided the Council with information available for appeal cases in 2014:

Number of total appeals filed by claimants and employers:	21,694	
Appeals filed by claimants:		(17, 954)
Appeals filed by employers:		(3,382)
Appeals filed by both employers and claimants:		(358)
Number of claimants and employers who failed to appear at hearing:	4,099	
No further communication from absent party		(3,359)
Requests for hearing to determine good cause		(730)
Number of requests for hearing to determine good cause <i>dismissed without a hearing</i> :	215	
Number of hearings held to determine merits of good cause:	515	
Hearings held to determine merits of good cause (employer)		(94)
Hearings held to determine merits of good cause (claimant)		(421)

In many situations, an ALJ grants a hearing on the merits for good cause for both the employer and claimant that fail to appear. If a party is granted a hearing on the merits to determine good cause, notice of that hearing is provided to all parties.

Currently, ALJs provide 15 minutes for the person who filed the appeal to arrive at the hearing, and if the appellant is on-time for the hearing, the respondent is allowed five minutes to show up before the ALJ proceeds with the hearing. If a respondent is going to be late, they can call the hearing office to inform the ALJ, and the ALJ may provide 15 minutes for the respondent to join.

Some states have no leeway for claimants or respondents to participate in a hearing and others allow 15 minutes for both parties. Problems may surface by allowing both the claimants and employers 15 minutes when the state is in a recession and appeals are extremely high.

In situations where the respondent attends a hearing, but the appellant does not show up, the ALJ will still hold the hearing and ask questions to make a finding of why the separation occurred. If the appellant attends the hearing, and the respondent does not, the hearing begins after five minutes. For cases involving concealment or fraud, documents showing wages can be sent in and the employer is not required to attend.

### ***D15-08 Definition of Concealment***

Ms. Knutson reported that the proposal on the definition of concealment has been drafted by the LRB and Labor had requested additional time to review the proposal. Mr. Reihl stated Labor members would like an opportunity to discuss the proposal during caucus. Mr. Reihl verified that the department would be breaking up the compound questions. Ms. Knutson stated for claimants filing weekly claims online, the questions would be broken down into single page questions by the end of the year and will ask:

- Did you work?
- Did you receive commission?
- Did you receive bonus pay?
- Did you receive sick pay?

New questions will be asked about pensions for school employees and on separation to replace the fired and quit questions. In addition, upgrades for collecting work search information and updates to the claimant handbook instructions will be made. Department staff is reviewing and working with technical staff on ways to increase instructions and warnings for claimants working and reporting wages.

## **9. Correspondence**

Representative Andy Jorgensen submitted a letter to be shared with the Council regarding a constituent that drives school bus, files for benefits each year and is concerned with the amount of time the department spends investigating UI claims. Representative Jorgensen requested the Council look into streamlining the eligibility verification process to allow consideration of previous determinations of independent contractor status.

The department responded to Representative Jorgensen addressing his concerns and explaining that state and federal law require the department to determine the cause of separation and identify that the individual has become unemployed through no fault of their own. Without this determination, and not allowing an employer the opportunity to respond to any claims against their account, would be a violation of their right to due process. The department cannot assume that a claimant who may have once been an independent contractor will always be an independent contractor.

## **10. Research Requests from Council**

Mr. Reihl had requested additional information on other state's worker misclassification penalties. Mr. Rubsam reported the states of Illinois, California, Rhode Island and Maryland have penalties under their wage and hour laws. Illinois has one of the strictest misclassification laws in the United States with a \$1,000 penalty per employee, per day, that the employer misclassifies an employee. This penalty may be applied for any first-time violation. Any repeat violations will result in a \$2,000 civil penalty per employee, per day. Under Maryland law, language has been included and specific considerations must be factored in determining whether the employer "knowingly" misclassified a worker as an independent contractor based on previous violations of misclassification, refusal or failure to produce records, failure or refusal to cooperate in an investigation, evidence the employer classifies workers who perform the same tasks different and evidence the employer acted with "reckless disregard for whether or not the worker is misclassified." The department will provide an update at the next Council meeting on the misclassification penalties in Minnesota.

## **11. Timeline of Agreed Bill**

Ms. Knutson provided a proposed timeline of the agreed bill cycle to determine the Council's next steps. The Council is expected to meet again on October 15 and November 15, with the option of additional meetings in between. If the Council wants to move forward and have the agreed bill introduced in the legislature next year, it is vital to stick to a rigorous schedule.

Ms. Knutson requested the Council consider splitting the following three proposals into a separate bill:

- Treasury Offset Program – Implement the federal program that allows tax interception of refunds for employers that owe tax. The department anticipates collecting \$4 million under this program.
- Combined Wage Claims – updated language to meet federal conformity requirements.
- Work-share – Repeal the partial wage formula. As of August 22, federal money used to reimburse employers ended. The department has grant money available, but not enough to cover programming costs to split out the partial wage from the regular work-share formula in determining payment of benefits.

The three proposals are federal requirements and once a directive has been made for a state to make changes, it is expected the changes will be completed during the next legislative session. If we do not split out the proposals, the department may lose out on \$4 million in tax revenue collection under the TOP program in 2017.

## **Motion to Caucus**

Motion by Mr. Manley, second by Mr. Reihl to recess and go into closed caucus session pursuant to Wis. Stat. § 19.85 (1) (ee), to discuss department proposals and labor and management proposals at approximately 12:25 p.m. The motion carried unanimously.

## **12. Report out of Caucus**

The Council reconvened at 2:45 p.m. The Council reported on the following:

### **Splitting Department Proposals**

Motion by Scott Manley, second by Mr. Reihl to submit a separate agreed bill to the legislature that includes department proposals on TOP, Combined Wage Claims and Work-share. The motion carried unanimously.

### **Assembly Bill 212**

There is no Council consensus. Management members have no objection to the language. Labor members declined to take a position.

### **Reimbursable Employer Fraud Charging Issue**

Motion by Mr. Manley, second by Mr. Reihl to approve the reimbursable employer fraud charging issue proposal. The motion carried unanimously.

### **Labor Proposals**

Mr. Reihl stated Labor members are not ready to discuss their proposals and will continue to look at the concealment issue.

### **Management Proposals**

Mr. Manley stated Management members will be prepared to present their proposals at the next meeting.

### **Department Proposals D15-10 to D15-13**

Management members are ready to approve department proposals D15-10 to D15-13. Mr. Manley agreed to additional time on these proposals if Labor members need additional time to review. Mr. Reihl stated Labor members would like to defer those proposals to the next meeting.

### **Appeals Modernization and Efficiency**

Mr. Manley requested additional time to review the proposal.

## **13. Other Business**

The next meeting is scheduled for October 15, but will be rescheduled to accommodate Council members' schedules. A poll will be conducted for a range of dates beginning October 12. Any research or agenda item requests can be submitted to Ms. Knutson.

#### **14. Adjournment**

Motion by Mr. Lump, second by Ms. Feistal to adjourn at 2:50 p.m. The motion carried unanimously.