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

December 17, 2015

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

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

Department Staff Present: Joe Handrick (Administrator), Lili Crane, Andy Rubsam, Tom McHugh, Amy Banicki, Emily Savard, Janet Sausen, Patrick Lonergan, Karen Schultz, Robin Gallagher, Tyler Tichenor, Andrew Evenson, Georgia Maxwell and Becky Kikkert

Members of the Public Present: Senator Chris Kapenga, Christian Laatsch (33rd Senate District), Senator Janet Bewley, Robert Kovach (Senator Frank Lasee's Office), Representative Mike Kuglitsch, Mary Beth George (Rep. Sinicki's Office), Ryan Schroeder (Rep. Tod Ohnstad's Office), Mathew Spencer (Rep. Kuglitsch's Office), Eric Koch (Rep. Amanda Stuck's Office), Geoff Gusta (Sen. Janet Bewley's Office), Rachael Inman (Legislative Audit Bureau), Ryan Horton (Legislative Fiscal Bureau), Aaron McKean (Legislative Reference Bureau), Mike Duchek (Legislative Reference Bureau), Victor Forberger (UI Appeals Clinic), Bryan Kirschbaum (Dept. of Administration), Brian Dake (WI Independent Businesses, Inc.), Kerri Poulson (ABR Employment Services), Erika Strebel (Daily Reporter), Kevin Magee (Legal Action of Wis.) Chris Reader (WI Manufacturing & Commerce), and Bill Neville (Hubbard Wilson & Zelenkova, LLC)

1. Call to Order and Introductions

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) meeting to order at 9:35 a.m. in accordance with the Wisconsin's Open Meetings law. Council members introduced themselves. Ms. Knutson recognized Senator Bewley, Representative Kapenga, Representative Kuglitsch and Robert Kovach (Senator Lasee's Office) and welcomed those in attendance.

2. Approval of Minutes of the November 19, 2015 Council Meeting

Motion by Mr. Mielke, second by Ms. Feistel to approve the November 19, 2015 meeting minutes. The motion carried unanimously.

3. Senator Bewley (LRB 3849 –Work Search Wavier)

Senator Bewley thanked the Council for the opportunity to speak. Many businesses in northern Wisconsin close during the winter, and the way the UI system operated in the past, businesses in the north were able to rely on retaining experienced and talented workers during the winter months to stay profitable.

Senator Bewley has been contacted by local business owners that cannot operate on a year-round basis concerned about losing qualified employees because of a change requiring laid off workers to seek and accept other work after 8 weeks of unemployment.

Changes to current law that were implemented by administrative rule this summer reduced the amount of time an employee that will be rehired can claim UI benefits without having to search for work. Employers paying into the UI system now risk losing trusted employees. This change in the law is affecting the lives of people in keeping good companies and good jobs.

Mr. Mielke stated that the change in the law brings uncertainty to employers, especially in highway construction. Employers having skilled employees that return after the winter season allows them to bid on highway projects. Employers are expressing concern over unpredictability resulting from the new work search rules because they are unsure of how many employees will return and how many are going to be able to do the job.

Mr. Lump stated that requiring an employee to conduct a search for work when there is no work available, creates a burden on employers who are open, but not hiring.

Mr. Manley stated at a time when the state is struggling in certain areas, finding and maintaining skilled workers for positions during a seasonal downturn is a legitimate concern for employers. Mr. Manley asked if under current law, an employer could be allowed the ability to treat longer-term and more highly-skilled workers differently, in terms of work-search requirements, than someone with less tenure. Ms. Knutson stated there may be a conformity issue with this, but the department will research this issue.

Senator Bewley stated this change impacts mostly outdoor companies such as the ferry boat operator, landscapers, construction, resorts and orchards in northern Wisconsin. There is typically some work available during the winter months, but not year round.

Mr. Gotzler asked if there was any anticipated fiscal impact, either negative or positive, on the Trust Fund. Ms. Knutson stated that at the time the rule was promulgated, the fiscal impact was indeterminate. The department will analyze statistics at the end of the season to identify how many employees received waivers, how many obtained jobs, how many worked part-time and how many remained unemployed, etc. Once statistics are gathered, a report will be presented to the Council.

Mr. Manley stated there are employers not laying off employees who are subsidizing the cost of allowing workers to collect UI benefits without looking for work. Mr. Manley requested the department look at data for employers who are requesting the 8 weeks, plus 4 weeks extension,

and determine the typical or average balance position of the employer. Reviewing this data may assist in determining the impact on the Trust Fund if employers are already significantly overdrawn. Mr. Gotzler requested that the data group employers together by business type.

4. Senator Kapenga (Senate Bill 401/Assembly Bill 533 – Criminal Penalties)

Senator Kapenga thanked the Council for the invitation to speak on Senate Bill 401 (SB 401) and recognized Representative Kerkman for her leadership on companion bill Assembly Bill 533. SB 401 relates to criminal penalties for fraud in obtaining UI benefits. Penalties for an individual who intentionally defrauds the UI system are substantially lower than penalties for theft. Because current penalties for UI fraud are so low, there is a lack of incentive for district attorneys to prosecute cases. SB 401 will ensure penalties for UI fraud are similar to the penalties for theft, which will strengthen the integrity of the UI program.

Ms. Knutson stated the department has entered into a Memorandum of Understanding with the Department of Justice (DOJ) that specifies the department will provide funding for a half-time assistant attorney general to handle fraud cases in Milwaukee County. Due to the increase in fraud investigations and increased misclassification staff, Ms. Knutson stated the department referred 109 cases for prosecution this year, with 40 of those referred to DOJ and 36 complaints were filed. The remainder of the cases were referred to local district attorneys. The department has three employees in the worker misclassification unit that are former DOJ agents in the DCI division. The department is continuing to work closely with DOJ in preparation of cases for prosecution.

Mr. Reihl stated in the construction industry, there is an ongoing issue with employers misclassifying workers to avoid paying UI taxes or providing workers compensation, which creates an unfair advantage to contractors who pay for their employees. Mr. Reihl asked if Senator Kapenga would be supportive of increasing these penalties to criminal penalties to deter employers from continuing this practice. Senator Kapenga responded he would be willing to look into this and is open to making sure everyone is following the law.

Mr. Mielke stated that the U.S. Department of Labor (USDOL) recently issued a new statement regarding who is considered an employee and who is not. The test administered by USDOL to determine classification is different than the test administered by the Department of Revenue and the Department of Workforce Development.

5. Senator Kapenga and Representative Kuglitsch (Senate Bill 422/Assembly Bill 578 – Franchisors)

Senator Kapenga and Representative Kuglitsch appreciate the opportunity to address the Council on franchisors and franchisees. The franchise business model has been very successful and is responsible for almost 200,000 jobs in the state of Wisconsin and $13.5 billion in economic output. Since the early 1980's, the National Labor Relations Board (NLRB) has been examining franchisor's practices to ensure they are within standards. This August, NLRB issued a decision that will have a detrimental impact on business models of franchisors, franchisees and the employees of franchisees.

Senate Bill 422 and Assembly Bill 578 (SB 422) codifies that a franchisor is not the employer of a franchisee or the employees of a franchisee. The franchisee is responsible for worker's compensation, unemployment insurance, wage and payments, and equal rights and discrimination policies of the franchisee employees.

Mr. Lump expressed his appreciation in bringing this bill forward. The franchise business model is commonly used among all franchisees, such as hotels, restaurants and staffing companies. The actions of the NLRB have dampened the potential of the franchise industry that has enabled a lot of people with limited means to build very successful careers. Half of the McDonalds franchisees started as crew employees by using the current franchise business model. The actions of NLRB will destroy the current business model and ultimately change the framework completely of how franchisors and franchisees operate.

Ms. Knutson reported the department is aware of the decision of the NLRB and the preliminary opinion is there will be minimal impact, if any, on UI. Ms. Knutson stated the department is not aware of any cases where the franchisor has been found liable for UI taxes for employees of the franchisee. Ms. Knutson stated under SB 422, there is a possible unintended UI tax burden on franchisors. If the federal government determines that the franchisor is the employer for purposes of paying federal unemployment tax, the franchisor will need to pay the full federal tax on the employee's wages and will not receive a tax credit because the franchisee is responsible for the paying state taxes on employees' wages. In this situation, more total tax is paid than if just one employer paid both the state and federal tax on employees' wages because that one employer would receive the federal tax credit.

Mr. Rubsam stated that the policy goal is to make sure there is no misunderstanding on determining whether the franchisor or the franchisee is the employer, and the current law is effective in determining this issue. SB 422 may create an unintended UI tax burden on franchisors. In addition, the use of certain undefined terms relating to control over the franchisee or the franchisee's employees "that is not customarily exercised by a franchisor for the purposes of protecting the franchisor's trademarks and brands" may result in litigation to obtain a further interpretation of the terms "customarily exercised" and "purposes of protecting the franchisor's trademarks and brands".

Mr. Gotzler stated the staffing industry is aware of the NLRB decision, and the expansive wording in a majority of the decision leaves the franchisor and franchisee uncertain on exactly who the employer is. Mr. Gotzler expressed his appreciation for the preemptive effort to get statutes in place to address this issue.

Mr. Manley reiterated that many business sectors are using the current franchisor business model to grow (especially for small business), and preventing any potential obstacle or barrier through public policy is positive. Mr. Manley thanked Senator Kapenga and Representative Kuglitsch for their leadership on this legislation.

6. Robert Kovach on Behalf of Senator Frank Lasee (Senate Bill 375/Assembly Bill 456 Real Estate Licensees)

Mr. Kovach, speaking on behalf of Senator Frank Lasee, thanked the Council for the opportunity to speak on Senate Bill 375 (SB 375) relating to technical changes within the real estate industry and further classifying real estate professionals as independent contractors. The intent of SB 375 is not to change the independent contractor status for real estate agents but more closely reflect federal law references to real estate professionals as real estate agents, whereas statutes reference "employees."

Mr. Rubsam explained that under current UI law, "employment" is defined to exclude real estate agents if all of their income is from real estate agency commission. If any additional income is paid hourly, real estate agents are considered to be employees whose services are not excluded. Under federal law, a qualified real estate agent is not treated as an employee if substantially all of the real estate agent's pay is commission-based. The Internal Revenue Service interprets "substantially all" to mean at least 90%.

Under this proposal, a real estate licensee would not be an employee and would be excluded from coverage under UI law, worker's compensation law, wage and hour law or under any rule or under any other law if 75% or more of the real estate agent's pay is commission-based. This proposal could result in an unexpected federal tax for Wisconsin employers since federal law interprets "substantially all" to mean 90%, and a real estate agent whose compensation is 75% to 89% commission-based would not be an employee for Wisconsin UI law purposes, but could be considered an employee for federal tax purposes.

Determining UI benefit payments would be burdensome to administer and the department would need to create new forms and train staff to request additional information from employers to breakdown the amounts paid to real estate agents to determine whether the agents are employees or not.

Ms. Knutson stated the department was available to work on the identified issues with Senator Lasee's office.

7. Public Benefit Statements (2015 AB 140)

Mr. Rubsam reported that a proposed amendment has been introduced for the bill pending in the Legislature requiring the Department of Administration (DOA) to issue an annual statement to individuals and families itemizing their benefits received from the Departments of Health Service, Children and Families and Workforce Development.

The proposed amendment directs DOA to develop a legislative plan for sending out the public benefit statements to individual and families. The department has identified several issues with the bill, and the amended version, and its impact on the UI division. Under federal law, the department cannot disclose information about an UI benefit claimant to the claimant's family without the claimant's permission. To comply with AB 140, claimants would need to voluntarily

waive their right to confidentiality. The department currently distributes Form 1099 each year to claimants for reporting UI benefit payments as income for their income tax return.

In addition, federal law requires use of grant funds for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of Wisconsin's UI law. The department cannot use grant money to comply with the provisions of AB 140 and it would need to be reimbursed for any staff time or other administrative costs for complying with AB 140. Funding for reimbursement is not provided under the current proposal.

8. Report on the Unemployment Insurance Reserve Fund

Mr. McHugh provided an update on the UI Trust Fund. The Trust Fund balance as of December 14, 2015 was $767.2 million, compared to last year's balance of $243.8 million. Third quarter tax receipts totaled $143.0 million, with a year-to-date total of $1.04 billion. Last year's tax receipts at this time totaled $1.10 billion. Year-to-date benefit payments totaled $537 million, compared to $646 million last year (a 17% decrease).

9. Department Proposals

Ms. Knutson reported that department proposal D15-06 relating to appeals modernization and efficiency is still awaiting Council action.

10. New Department Proposals

Mr. Handrick provided background information on the reason for proposing D15-14 (Transfer of Special Assessment for Interest Funds to Program Integrity Fund) and D15-15 (Program Integrity Assessment). During times of recession and high unemployment, costs associated with the UI program and benefits paid to claimants increase, and federal revenue received is even more dramatically increased. During that time, states build reserve funds for when the economy improves and there are fewer claimants and demands on the system.

In federal fiscal year 2009, Wisconsin received $80.7 million to operate the UI program. In federal fiscal year 2016, Wisconsin will receive $56.5 million, a 30 percent reduction. The department has already decreased costs through staff reductions and spending. For example, at peak the department had a staff of 800 employees and currently there are 600 employees. Last winter, there were 120 employees at the call center, and this year there are 80 employees. The department reduced spending by $5 million; however, the reserve funds that were accumulated are now almost depleted.

The department will not be requesting General Purpose Revenue (GPR) from the Legislature and will not be asking employers for additional tax revenue. Instead, the department is proposing to utilize the revenue already collected to maintain ongoing operations and core functions of the UI program and in particular program integrity activities, which is currently only funded by supplemental federal grants.

D15-14 – Transfer of Special Assessment for Interest Funds to Program Integrity Fund

Ms. Knutson reported that a special assessment for interest (SAFI) was levied on employers when the department was borrowing money from the federal government to pay UI benefits during the recession. Federal law does not allow the department to use Trust Fund or administrative grant dollars to pay the interest due on the loans from the federal government.

In the 2013-15 state budget, the Legislature allocated state GPR funds to pay interest due on the loan from the federal government for 2013 and 2014. Under current law, if the federal loans are repaid and it is unlikely the department will need to borrow money in the future, the department is required to transfer any excess SAFI funds to the balancing account.

The SAFI account currently has a $9.3 million balance, which is non-lapsable and by statute can only be used to pay interest on a federal loan. This proposal would permit the department to transfer any excess SAFI funds to the Unemployment Program Integrity Fund to maintain program integrity efforts. The treasurer would have the option of transferring SAFI funds to either the balancing account, program integrity account, or both; however, it would be preferred that the balance in the SAFI fund be transferred for program integrity purposes.

Due to the complexity of transferring money between funds and time restraints, the department has worked with the Legislative Reference Bureau to draft and prepare the proposed language, if approved.

D15-15 Program Integrity Assessment

Ms. Knutson reported that until the end of 2009, there was a provision in the law that allowed an assessment of 0.01% of an employer's solvency contribution be used for administrative purposes, specifically programming purposes (information technology systems). This was not an additional tax on employers and in return, employers received an equivalent reduction in their solvency rate. On average, the department collected $2.3 million per year and with the Council's support, developed the current computer system for tax (SUITES).

This proposal reinstates this assessment, with the change that the money would be allocated to the program integrity fund to be used for program integrity purposes. The original law will be kept in place due to the department still collecting assessments from employers; however, a new section will be added to include relevant language to add program integrity activities as a permissible use for the funds. Each year by November 30, the department will determine whether to levy the assessment and the rate (maximum 0.01%).

The proposal also includes safeguards which require the department to consider the balance of the Trust Fund before issuing the assessment. If the department determines an assessment is needed, the Secretary is required to consult with the Council and publish notice of the assessment by November 30, or the assessment would not take effect.

11. Labor and Management Proposal

Additional time is needed for the Council members to discuss the proposals submitted by both Labor and Management members.

12. Presentation – Internet Weekly Claims

The Council requested that the presentation on internet weekly claims be rescheduled. Ms. Knutson stated screen shots of the presentation are available and will be distributed to the Council at the meeting.

13. Motion to Caucus

Motion by Mr. Gotzler, second by Mr. Reihl to recess and go into close caucus session pursuant to Wis. Stat. §19.85 (1) (ee), to deliberate department proposals, labor and management proposals and any other agenda item at 11:30 a.m. All Council members voted "Aye" and the motion carried unanimously.

14. Report Out of Caucus

The Council reconvened at 3:00 p.m. and reported on the following:

Department Proposals D15-14 –Transfer of Special Assessment for Interest Funds to Program Integrity Fund and D15-15 – Program Integrity Assessment

Motion by Mr. Manley, second by Ms. Feistel to approve department proposals D15-14 relating to transfer of special assessment for interest funds to program integrity fund and D15-15 relating to program integrity assessment. Motion approved unanimously.

D15-06 Appeals Modernization and Efficiency Improvements
This proposal has been tabled until the next Council meeting.

Labor and Management Proposals
Labor and Management proposals will be discussed at the next Council meeting.

15. Additional Meeting Dates
Council members will be polled to determine a meeting date the first week of January.

16. Future Agenda Items
The next meeting agenda will only include roll-call, approval of minutes and caucus on department proposals, labor and management proposals and the agreed bill.

17. Adjourn

Motion by Ms. Feistel, second by Mr. Manley to adjourn at 3:06 p.m.