

UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

Meeting Minutes

Offices of the State of Wisconsin Department of Workforce Development
201 E. Washington Avenue, GEF 1, Room H206
Madison, WI

April 13, 2016

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

Members Present: Janell Knutson (Chair), Earl Gustafson, Scott Manley, John Mielke, Michael Crivello, Shane Griesbach, Terry Hayden and Mark Reihl. Sally Feistel appeared via telephone.

Department Staff Present: Secretary Ray Allen, Joe Handrick (via telephone), Ben Peirce, Andy Rubsam, Andrew Evenson, Tyler Tichenor, Lili Crane, Tom McHugh, Pam James, Janet Sausen, Robert Usarek, Amy Banicki, Emily Savard, Matthew Aslesen, Karen Schultz, and Robin Gallagher

Members of the Public Present: Victor Forberger (UI Appeals Clinic), Brian Dake (Wisconsin Independent Businesses, Inc.), Jim Boullion (Associated General Contractors of Wisconsin), Chris Reader (WI Manufacturing & Commerce), Ryan Horton (Wisconsin State Legislature), Mike Duchek (Legislative Reference Bureau), Aaron McKean (Legislative Reference Bureau) and Maria Gonzalez Knavel (Labor and Industry Review Commission, General Council)

1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) to order at 10:05 a.m. in accordance with the Wisconsin's Open Meetings law. Council members introduced themselves and Ms. Knutson recognized DWD Secretary Ray Allen, Ms. Gonzalez, General Counsel of the Labor and Industry Review Commission, Mike Duchek, Aaron McKean and Ryan Horton.

2. Remarks from DWD Secretary Ray Allen

Secretary Ray Allen thanked the Council for their work on the Agreed Bill which was signed by the Governor. The Council's long history demonstrating the ability to collaborate has truly benefited the citizens and state of Wisconsin. Secretary Allen thanked the Council for their great work which has made the department's Unemployment Insurance (UI) program in Wisconsin the best in the U.S. Secretary Allen looks forward to working together.

3. Approval of Minutes of the March 17, 2016 Council meeting

Moved by Scott Manley, second by Mr. Griesbach, to approve the March 17, 2016 meeting minutes. The motion carried unanimously.

4. Legislative Update

Mr. Rubsam reported the Council's Agreed Bill (2015 Wis. Act 334) was passed and signed by the Governor on March 30. The Council received a plain language summary of legislation introduced in the 2015-17 biennium. No additional statutory changes are expected before the end of 2016. The plain language summary includes information on the following:

- 2015-17 Budget Bill provisions;
- Three provisions from the Agreed Bill signed last year by the Governor;
- Franchisor and Franchisee law changes;
- Real estate agent law changes; and
- Effective dates for the law changes.

5. STC (Workshare) Program Update

Ms. Knutson reported on the Short-Term Compensation (Workshare) program. Following enactment of the department's law change proposal approved by the Council, the partial wage formula is no longer considered when paying UI benefits. The law change went into effect last year.

There are currently two employers with active Workshare programs, one employer with about 40 employees, and the other with about 30 employees. The latter employer is submitting another plan for a different work unit with the same number of employees. There are an additional two employers that have expressed interest in participating, one employer with 50-100 employees and the other with 60 employees. Federal reimbursements are no longer available for the Workshare program.

6. Research Request from Council

The Council requested the department provide data on work search waivers, and the results of the work search waiver recall that went into effect in June. The winter season is not technically over until the end of April, making it too early to provide this data. The department is unlikely to determine the number of employees that were recalled from an employer or found other work until employers file their second quarterly wage reports. Department staff will be able to start analyzing information in August.

Because of limitations with the computer systems, data is not available to determine how many people received 8 week waivers versus 12 week waivers. The department will have information on how many people are on a recall waiver, when the waiver ended, and how many people went back to work.

Ms. Knutson stated preliminary information shows the percentage of claimants claiming benefits the first few weeks of 2016, compared to 2015, has decreased and in some weeks, almost by half.

Mr. Manley requested the department provide data on the number of claimants subject to work search requirements from November 2015 to February 2016 compared to the number of claimants subject to work search requirements from November 2014 to February 2015. Ms. Knutson stated that she will report that information to the Council at the next meeting.

Mr. Handrick stated all resources necessary will be provided to allow the Council a data driven decision-making opportunity on work search waivers.

7. Correspondence

Ms. Knutson stated correspondence addressed to the Council included an email from one individual and a letter from another individual, both expressing frustration having to search for work this winter season. Neither individual expressed specific questions, other than acknowledgment that their concerns were provided to the Council. Ms. Knutson will inform each individual that the Council received their correspondence.

8. Proposed Emergency Rule Pre-Employment Drug Testing and Treatment

Ms. Knutson requested Council approval on the pre-employment drug testing and treatment emergency rule. Mr. Rubsam explained this does not include a rule for UI occupational drug testing. The statutory provisions for drug testing and treatment were part of the Governor's budget. The occupational drug testing program will screen individuals to determine if their only suitable work is in a drug testing occupation and if there is a reasonable suspicion of using drug, then require a drug test. The occupational drug testing rule will be presented as a separate rule; however, the department is not able to move forward on that rule until the federal regulations are implemented.

This emergency rule relates to pre-employment drug testing and creates a voluntary program for employers to report to the department the results of a failed or refused pre-employment drug test that was required of an individual as a conditional offer of employment. The information provided by the employer will be used to determine benefit eligibility. An individual that refuses to submit to a drug test must meet the same requalification requirements as failure to accept suitable work by earning six times the weekly benefit rate in wages. An individual that fails a pre-employment drug test without evidence of a valid prescription is subject to the same requalification requirements for failure to accept suitable work; however, a claimant may maintain benefit eligibility by enrolling in and complying with a substance abuse treatment program and completing a job skills assessment. Costs associated with the substance abuse treatment program will be paid by the department. A job skills assessment includes attending a reemployment services session. Mr. Rubsam reported that the rule includes:

- Requirements for an employer to submit information to the department when an individual refuses a drug test.

- Requirements for an employer to submit information to the department when an individual fails a drug test.
- The claimant's opportunity to overcome the presumption that failure or refusal to take the test was not a failure to accept suitable work.
- Guidelines for a substance abuse treatment program.
- Requirements of a job skills assessment.

The department will discard all information relating to an individual that fails or refuses a drug test who is not a claimant. The employer will not know whether an individual is a claimant, unless the claimant informs the employer directly.

Ms. Knutson stated following submittal of the rule to the Clearinghouse and a public hearing is held, minor changes to the rule are anticipated. The department will also be submitting the rule to the U.S. Department of Labor (USDOL) for conformity review.

Mr. Manley expressed concern that the test be conducted by a laboratory certified by the Substance Abuse and Mental Health Services Administration (SAMHSA) of the U.S. Department of Health and Human Services. Mr. Manley requested that the language reflect that a SAMHSA certified laboratory is required to analyze the results of a test, but conducting the test is not required at a SAMHSA certified laboratory.

Mr. Rubsam responded the current language was written to reflect the requirements of the department for determining misconduct after drug testing. In addition, USDOL will require occupational drug testing be conducted by a SAMSHA certified laboratory. A list of SAMHSA certified laboratories is available to the public on the SAMHSA website. Mr. Rubsam stated the department will review this request.

Mr. Manley also expressed concern with the requirement that an employing unit inform the individual before testing, that the employing unit may notify the department that the individual refused to submit to a test for controlled substances, or the individual tested positive for controlled substances without a valid prescription. Mr. Manley asked for an explanation on the basis of this requirement and how the department will require the employer demonstrate that this notification was satisfied.

Mr. Rubsam responded that the department will require an employer to certify on a form that this information was relayed to the individual and if a copy of the information was provided, the employer can submit that information to the department. This provision was drafted to provide notice to an individual because of the potential impact the submittal of information may have on an individual's benefit eligibility or the impact it may have on an individual who is not a claimant. This provision also protects the employer against any HIPAA (Health Insurance Portability and Accountability Act) violations or violations of the ADA (Americans with Disability Act) which requires an employer take certain precautions before releasing information to the department.

Mr. Manley stated he appreciates the department's effort to try and assist businesses engage in best practices; however, there is not any enabling statutory authority under Wis. Stat. §108.133 that would require an employer to disclose this information before testing. Therefore, this may be inconsistent with the department's statutory authority. Mr. Manley also inquired about the use of a form provided by the department that an employer could present to a perspective employee for signature and for use as verification of disclosure.

Mr. Rubsam responded that while there is no specific statutory requirement under Wis. Stat. ch. 108 for this provision, it is allowed. The rule was drafted to make the program as easy as possible to administer while remaining consistent with the law. The department will consider all Council feedback and make changes as necessary. Ms. Knutson stated that the department will consider the creation of a form for an employer's use.

Mr. Hayden expressed the importance of informing a perspective employee of the ramifications of refusing to submit to a test and the employer potentially reporting that refusal to the department.

Ms. Knutson stated that information relating to an employing unit voluntarily reporting a perspective employee's refusal to submit to a drug test or failing a drug test will be published in the department's claimant handbook, so employees are educated.

Mr. Mielke stated with workers across the state, many employers operate a drug testing program with drug testing collection points that adhere to certain chain of custody practices and send the sample for analyzing. Mr. Mielke recommended the rule reflect this practice.

Ms. Knutson stated the rule was written to decrease administrative hearings involving issues on how the test was administered, chain of custody, and if the laboratory was certified.

Ms. Feistal asked about the fiscal impact on implementing this rule. Ms. Knutson stated that General Purpose Revenue (GPR) funds are used to pay for the treatment and the department is unable to project any impact at this time on the Trust Fund. The department was allocated \$500,000 over two years for treatment, and once the occupational drug testing rule is promulgated, drug testing and screening.

Mr. Mielke reported that in his experience even when an employer had access to obtain medical data through a release, when talking to the provider, it was very difficult to get information from the provider. It is often stated that the provider is an advocate for that individual and they will not provide any damaging information.

Ms. Knutson responded that the department will be under contract with vendors. The rule states that providers will provide the department with an individual's treatment plan and a week by week update on whether or not the individual is complying with the treatment plan. This information will also be in the contract.

9. Future Meeting Dates

Ms. Knutson stated that this fall starts the beginning of another agreed bill cycle. The Council could break from June to August if preferred and start again in September. The Council is scheduled to meet April 21 and May 19.

The department would like the Council to consider holding the public hearing in October and consider changing the times of the session to from 3:30 p.m. to 6:00 p.m. History over the past few years has reflected no attendees are present after 6:00 p.m. Locations and the ability to connect via video-conferencing would remain the same.

Mr. Manley requested not to hold a meeting on April 21. Ms. Knutson responded that a meeting would not need to be held if the Council took action today on the emergency rule. Once the emergency rule is approved by the Council, the department would implement the rule and hold a public hearing to determine what changes would need to be made to the rule moving forward.

10. Motion to Caucus

Motion by Mr. Reihl, second by Mr. Manley to recess and go into closed session pursuant to Wis. Stat. § 19.85 (1) (ee), to deliberate the proposed emergency rule and any other agenda items at 10:50 a.m. All Council members voted "Aye" and the motion carried unanimously.

11. Report Out of Caucus

The Council reconvened at 1:55 p.m. Ms. Knutson reported that after review, the department will change the current rule language to clarify that actual specimen collection does not need to be conducted at a SAMHSA certified laboratory; however, any positive test results are required to be confirmed by a SAMHSA certified laboratory. The SAMHSA certified laboratory will not certify any results without being certain specimen collection and chain of custody procedures were followed.

Ms. Knutson also stated there is a typographical error on page 6, and the department will remove the word "test" in the last sentence on line 12.

Mr. Manley reported that Management members would like more time to review the rule and requested that the department schedule a teleconference the week of April 25 for potential rule approval.

Ms. Knutson stated the department will poll Council members to determine a date to schedule a teleconference and the corrections noted to the rule will be made and sent to the Council members.

12. Adjourn

Motion by Mr. Reihl, and second by Mr. Manley to adjourn at 2:00 p.m. Motion carried unanimously.