



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 12/04/2005 (Per: JTK)



Appendix A ... Part 02 of 16

☞ The 2005 drafting file for LRB 05-2978/11

has been copied/added to the 2005 drafting file for

**LRB 05-3956 (SB 426)**

☞ The attached 2005 draft was incorporated into the new 2005 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied, and added, as a appendix, to the new 2005 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2005 drafting file. The drafting file was then returned, intact, to its folder and filed.

LRB  
05-2978  
Drafting  
File

## ANALYSIS OF PROPOSED UI LAW CHANGE

### Remove Authority to Recover Imposter Penalties from Unemployment Compensation

#### 1. Description of Proposed Law Change

The proposed change would remove the department's authority to offset benefit payments in order to recover administrative assessments levied against imposters. This change is necessary to ensure continued compliance with federal law.

#### 2. Proposed Statutory Language

Amend Wis. Stat. § 108.22(8)(b) to read:

To recover any overpayment which is not otherwise repaid or recovery of which has not been waived, ~~or any assessment under section 108.04(11)(cm)~~, the department may recoup the amount of the overpayment from benefits the individual would otherwise be eligible to receive...

#### 3. Proposer's Reason for the Change

Federal law mandates that all money withdrawn from the unemployment fund be used solely for the payment of unemployment compensation and refunds of money erroneously paid into the fund. Funds can be withdrawn for other purposes only if they fall within four narrowly construed exceptions to this requirement. Recovery of administrative assessments is not one of the stated exceptions, and therefore unemployment reserve funds cannot be used to recover administrative assessments against imposters. The U.S. Department of Labor (DOL) has notified the department that the provisions as they are currently written do not comply with federal law and therefore this change must be made to bring our UI laws back into compliance with federal law.

#### 4. Brief History and Background of Current Provision

The provision allowing the department to recover administrative assessments against imposters was added in 2004 with the passage of AB 668 to address difficulties encountered in collecting penalties assessed against imposters. However, prior to passage of this bill, the DOL notified the department that the proposed changes to Wis. Stats. § 108.04(11)(cm), which would allow the department to offset benefit payments in order to recoup administrative assessments against imposters, violated § 3304(a)(4) of FUTA, which requires all money withdrawn from the unemployment fund be used solely to pay unemployment compensation. Because it was too late to remove the faulty provisions from the pending bill, the department instead made a commitment to the DOL to not apply the new provision and to eliminate the provision in the next UI Advisory Council bill.

March 23, 2004

**D05-7**

Proposed by: Department  
Prepared by Jessica Nelson

**5. Effects of the Proposed Change**

Administrative Impact

The change will not cause any administrative problems in implementation. Because the DOL informed the department that the provisions violated federal law before the Wisconsin legislature had passed AB 668, which added the authority to collect imposter administrative assessments from future benefit payments, this provision of the UI law was never enforced. Therefore, removing the provision will have no administrative impact because this change will simply remove a provision that was never applied. Similarly, this change will have no effect on employers or claimants because there will not be any change in the way the law is applied.

**6. State and Federal Issues**

This change will not have any effect on other sections of Chapter 108 or require the promulgation of administrative rules. It is necessary to bring Wisconsin law into conformity with federal law.

**7. Proposed Effective/Applicability Date**

The proposal, if enacted, would be effective the first Sunday after publication.

November 17, 2004  
Proposed by: Department  
Prepared by: Nadine Konrath and Jessica Nelson

**ANALYSIS OF PROPOSED UI LAW CHANGE**  
**Add Authority to Issue a Warrant Against Individual Liable under 108.22(9)**

**1. Description of the Proposed Change**

Under Wis. Stats. sec. 108.22(9), "an individual who is an officer, employee, member or manager holding at least 20% of the ownership interests of a corporation" or LLC who has some control or influence over any responsibilities related to the payment of UI taxes may be held personally liable for outstanding UI debt when the corporation or LLC is unable to pay that debt. Under Wis. Stats. sec. 108.22(2), the department may issue a warrant against an employing unit that fails to pay its UI debt. When filed with the clerk of circuit court, the warrant acts as a lien against the debtor's property in that county, similar to IRS and Department of Revenue tax liens. This change would make it clear that warrants may be filed against persons who have been found personally liable for a corporate or LLC debt.

**2. Proposed Statutory Language**

Amend Wis. Stat. § 108.22(2)(a) to state:

1. If any employing unit or an individual found personally liable under 108.22(9) fails to pay to the department...
2. The clerk of circuit court shall enter in the judgment and lien docket the name of the employing unit or individual mentioned in the warrant and...
3. A warrant entered under subd. 2. Shall be considered in all respects as a final judgment constituting a perfected lien upon the employing unit's or individual's right, title, and...
4. The department...county where real or personal property of the employing unit or individual is found, commanding the sheriff to levy upon and sell sufficient real and personal property of the employing unit or individual to pay...

Amend Wis. Stat. § 108.22(2)(b) to state:

... The fees shall then be paid by the department, but the fees provided by s. 814.61(5) for entering the warrants shall be added to the amount of the warrant and collected from the employing unit or individual when satisfaction or release is presented for entry.

**3. Proposer's Reason for the Change**

When the personal liability statute was enacted, the warrant statute was not amended to specifically include persons held personally liable for a corporate debt. This appears to have been an oversight. Department legal staff have expressed concern that, while the statute could be interpreted to include implicit authority to issue warrants against persons held personally liable, it would be better to make the authority specific.

**4. Brief History and Background of Current Provision**

The warrant statute has been in the UI law since 1943. The lien it provides is an important tool in the collection of delinquent UI taxes. The personal liability provision was added to the UI law in 1979. It, too, has become an important tool in the collection of delinquent UI taxes. It allows the department to seek recovery from those who were responsible for deciding not to pay a corporate or LLC UI tax liability when there was a choice between paying the tax or some other obligation.

**5. Effects of the Proposed Change**

Policy

Validates the department's authority to establish a lien against this class of tax debtor and unifies the collection remedies for all tax debtors.

Administrative Impact

Minimal. The change will codify existing administrative practice.

Equitable

There will be no impact on claimants. The only individuals impacted will be those who are found liable for the outstanding debt of a corporation or LLC. This will result in greater equity because the department will be able to satisfy more debts from the property of those found liable for the debt. This will reduce the amount of debt that is written off and thus reduce the burden on other employers who might otherwise have to subsidize such debts.

**6. Fiscal Impact**

There is no significant fiscal impact. The change codifies an existing practice.

**7. State and Federal Issues**

None

**8. Proposed Effective/Applicability Date**

Applicable to liabilities in existence on or created on or after the effective date.

Date: November 23, 2004  
 Proposed by: Department  
 Prepared by: Carla Breber

## ANALYSIS OF PROPOSED LAW CHANGE

### 1. Description of Proposed Change

The proposed change would require that wages earned by volunteer firefighters, emergency medical technicians, and "first responders" be recognized and included when applying the formula to determine benefits due for a week of partial unemployment.

### 2. Proposed Statutory Language

**108.05(3) BENEFITS FOR PARTIAL UNEMPLOYMENT.** (a) Except as provided in pars. (b) and (c), if an eligible employee earns wages in a given week, the first \$30 of the wages shall be disregarded...for any week. For purposes of this paragraph, "wages" includes...which is treated as wages under s. 108.04(1)(a), ~~but excludes any amount that a claimant earns for services performed as a volunteer firefighter, volunteer emergency medical technician or volunteer "first responder".~~ In applying this paragraph...by employees and employers."

### 3. Proposer's Reason for the Change

Currently we do not consider any amount that a claimant earns for services performed as a volunteer fire fighter or volunteer emergency medical technician or first responder, when computing the amount of benefits payable for a week of partial unemployment under 108.05(3)(a). However, these wages are treated as base period wages, the employer is liable for benefits paid based on such wages, and the relief of charges under the part-time noncharge provision in 108.07(3) is often not applicable.

Almost all individuals who help our communities as firefighters and emergency medical technicians receive some compensation for their services. Although the amount of the compensation and method used to compute the amount vary widely throughout the state, there are very few actual "volunteers" left and it is becoming increasingly more difficult to clearly define the types of services that would be considered "volunteer". Also, under the current provision it is virtually impossible to make the treatment of benefit year and base period wages earned by performing such services equitable for claimants and employers.

### 4. Brief History and Background of Current Provisions

In 1994, section 108.05(3)(a) was amended to disregard payments for services performed as a volunteer fire fighter or a volunteer emergency medical technician when using the partial wage formula to compute the weekly amount of an unemployment compensation payment. Since that time claimants have been instructed not to report work and wages from services performed as a volunteer fire fighter or volunteer EMT. However, the wages remained taxable and are treated as covered base period wages for computing the weekly benefit rate, maximum benefit amount and employer liability.

It was not anticipated that the 1994 law change would have a significant effect on employers because the number of claims impacted would be small and the amount of wages involved usually minimal. The primary reason for thinking that the law change would have a minimal effect on employers was related to Section 108.07(3m), which provides for a relief of charges to base period employers who paid less than 5% of the claimant's total base period wages. Since base period wages earned as a volunteer fire fighter or volunteer EMT normally represent less than 5% of a claimant's total base

period wages, it was anticipated that employers of volunteer fire fighters and volunteer EMT's would not be liable.

Since 1994, we have encountered several issues associated with our treatment of volunteer firefighters and volunteer EMT's as shown below:

- There have been claims where 108.07(3m) was not applicable either because the base period wages were 5% or greater, or the redistribution of the liability was not applicable because the claim included UCX wages, UCFE wages, or combined wages from 2 states.
- Employers with liability based on these wages are not always entitled to the part-time noncharge provision of 108.07(3), and when they are, the process is problematic since the wages earned for these services are not reported on the weekly claim certifications.
- Defining "volunteer" is difficult because the method/amount of reimbursement and the employment relationship of volunteer fire fighters/EMT's vary significantly among the employing units. Wage crossmatch investigations have determined that claimants were not volunteers, resulting in overpayments for which recovery was waived or where the claimant had to make repayment.
- Volunteer EMT's take their turn at being the "driver" of the emergency vehicle but current language does not extend the protection of 108.05(3)(a) to these workers.
- First Responders were included in the protection of 108.05(3)(a) in 1999 by Wisconsin Act 56 (a non-UI bill), without our knowledge. The inclusion of this service was inappropriate because first responders are either not paid for their services or they are paid wages from their regular employers if they are "on the job" when the service is performed.

## 5. Effect of the Proposed Change

### a. Policy

No other law or policies would be affected.

### b. Administrative Feasibility

No administrative issues.

### c. Equitable

The law change will make treatment of benefit year and base period wages earned from services as a volunteer fire fighter and volunteer emergency medical technician/driver equitable for both claimants and employers. In addition, it will make the treatment of all claimants who earn wages during weeks of unemployment more equitable.

## 6. Fiscal

The total income offsetting benefits is unlikely to reach significant proportions in a year late in a business expansion. It could reach \$100,000 during a severe downturn. Most individuals in small jurisdictions would not be affected. Many receive nominal payments that are likely to fall within the disregarded amount of \$30.

## 7. State and Federal Issues

No state/federal issues.

## 8. Proposed Effect/Applicability Date

Weeks claimed after the week of publication.

## ANALYSIS OF PROPOSED LAW CHANGE

### 1. Description of Proposed Law Change

The various subsections under 108.04(1) deal with situations where work is missed because an employee is unable/unavailable for work for a period of time, but has not quit. The employee may miss work on a day-to-day call-in basis, take a leave of absence for a specific amount of time (including Family Medical Leave) or suspend the employment relationship indefinitely. Determining which subsection to apply has become more difficult in recent years due to law changes that have thrown them out of synch, requiring band-aid policies to rectify the resulting inequities. This proposal will eliminate the inequities and the need for such policies, as well as simplifying the adjudication process.

Specific revisions to the law include a provision to reduce benefits rather than totally disqualify a week when work is only missed for a portion of a week due to a family medical leave under 108.04(1)(b)3 or by a suspension or termination due to inability/unavailability under 108.04(1)(b)1. Currently this provision already exists for work that is missed on a day-to-day basis and for leaves of absence not under the Family Medical Leave Act.

### 2. Proposed Statutory Language

#### Section 108.04(1)(b) – No Change

“An employee is ineligible for benefits:

#### Section 108.04(1)(b)1

“While the employee is unable to work, or unavailable for work, if his or her employment with an employer was suspended by the employee or by the employer or was terminated by the employer because the employee was unable to do, or unavailable for, suitable work otherwise available with the employer, **except as provided in par. (c).**”

#### Section 108.04(1)(b)3

“While the employee is on family or medical leave under the federal family and medical leave act of 1993 (P.L. 103-3) or s. 103.10, until whichever of the following occurs first, **except as provided in par. (c).**”

#### Section 108.04(1)(c)

“If a leave of absence **under par. (b)2 or a family or medical leave under par. (b)3** is granted to an employee for a portion of a week, **or if only a portion of the available work in a week is missed due to a suspension under par. (b)1 or in the week a termination under (b)1 occurs**, the employee’s eligibility for benefits for that partial week shall be reduced by the amount of wages that the employee would have earned in his or her work had the leave not been granted **or had the suspension or termination not occurred**. For purposes of this paragraph, the department shall treat the amount the employee would have earned as wages in that work for that week as wages earned by the employee, and shall apply the method specified in §108.05(3)(a) to compute the benefits payable to the employee. The department shall estimate the wages that an employee would have earned for a partial week if it is not

possible to compute the exact amount of wages that the employee would have earned for that partial week.”

### **3. Proposer’s Reason for Change**

The changes in this proposal are recommended so that we have a consistent method for determining benefits payable for partial weeks under these related statutes. Both the work available provision under 108.04(1)(a) and the leave of absence provision under (1)(b)2 already apply a partial reduction of benefits when only a portion of the work in a week is missed. Extending this application to 108.04(1)(b)1 and 108.04(1)(b)3 will provide equal treatment for employees in very similar situations. The provisions under 108.04(1) will also be much easier to administer if the recommended changes are made and will eliminate the need for cumbersome policies that have been applied in an effort to maintain some of the missing consistency.

### **4. Brief History and Background of Current Provision**

In 1991, Wisconsin Act 89 included a provision that allows the department to treat the wages an employee could have earned but didn’t as wages actually earned for benefit calculation purposes when an employee does not perform all work available in a week under section 108.04(1)(a). Previously, benefits were denied for the entire week.

Benefits were still totally denied for partial weeks of a leave of absence under 108.04(1)(b)2 and for partial weeks of a family medical leave under (1)(b)3. And suspensions and terminations under 108.04(1)(b)1 still totally denied a partial week at the beginning of a suspension when the claimant was not able and available for work on the general labor market.

Eventually, LIRC started to apply only a reduction to partial weeks of a leave of absence under 108.04(1)(b)2 based on equity without statutory authority. So in 1999, Wisconsin Act 15 created section 108.04(1)(c). This provision allowed for only a reduction of benefits for a partial week of a leave of absence under 108.04(1)(b)2, using the same calculation as used in 108.04(1)(a). However, Act 15 neglected to remedy the same inconsistencies under 108.04(1)(b)3 and 108.04(1)(b)1. This proposal, if enacted, would provide that remedy.

### **5. Effects of the Proposed Change**

#### **a. Policy**

The requested law changes would eliminate the need for current policies that attempt to provide for some of the equity that would now be provided by the law change. Otherwise, no effect.

#### **b. Administrative Feasibility**

This proposal would impact workload slightly due to the additional information that would be required to determine the amount of wages that the claimant could have earned in partial weeks and because partial weeks and full weeks will have to be addressed on separate determinations. However, the change would also simplify our application all of these related statutes, requiring less time consulting materials and less initial training time for adjudicators. Staff education time regarding the change would be minimal, as would programming and staff implementation time.

#### **c. Equitable**

There are several equity issues. As previously discussed, this proposal would make the department’s application of leaves of absence, family medical leaves and suspensions/terminations due to inability/unavailability for work consistent and more equitable overall.

Also, applying a reduction for partial weeks based on what could have been is more equitable than denying benefits for an entire week regardless of the amount of work missed. And for

suspensions under Section 108.04(1)(b)1, the treatment of partial weeks at the beginning and end of the suspension will be more equitable. Currently if the claimant does not meet the able and available requirement overall, the week the suspension begins is always totally disqualified without considering on what day the restrictions began, whereas the date the restrictions end is considered when determining payment for the final week.

With regard to equity for the employer, there will be some additional benefits payable and chargeable to employers by applying only a reduction for partial weeks. However, the more critical issue for employers has normally been the payment of full benefits to an employee who cannot do his or her work for the employer but meets the able/available requirements under 108.04(1)(b)1. To provide more equity for employers, this proposal could be modified to include a relief of charges (noncharge) when benefits are payable under 108.04(1)(b)1.

**d. Fiscal**

As written, this proposal would result in additional payments of \$50,000 per year. If the proposal were modified to include a noncharge for payments made under Section 108.04(1)(b)1, it would cost an additional 6.3 million dollars per year.

**6. State and Federal Issues**

**a. Chapter 108**

No other provisions of Chapter 108 will be affected by this change.

**b. Rules**

No administrative rules will need to be promulgated or changed as a result of this proposal.

**c. Conformity**

There are no conformity issues with respect to this proposal.

**7. Proposed Effective/Applicability Date**

This change will be effective with separations occurring as of the first Sunday after publication.

## Illustration of Proposal D05-27

### **Situation:**

Separation begins on Wednesday of Week One and Ends on Wednesday of Week Three

### **Currently:**

#### (1)(b)1 Suspensions by Either Party

**If claimant does not initially meet the 15/50% A&A requirement**

- Benefits are denied Weeks One & Two
- Benefits for Week Three depend on 15/50% criteria

#### (1)(b)1 Terminations by Employer

**If claimant does not initially meet the 15/50% A&A requirement**

- Benefits are denied Weeks One & Two
- Benefits for Week Three depend on 15/50% criteria

#### (1)(b)2 Leave of Absence

- Benefits for Weeks One and Three are determined using the partial wage formula.
- Benefits are denied Week Two

#### (1)(b)3 Family & Medical Leave

- Benefits are denied Weeks One, Two & Three

### **Proposed:**

#### (1)(b)1 Suspensions by Either Party

**If claimant does not initially meet the 15/50% A&A requirement**

- Benefits for Weeks One and Three are determined using the partial wage formula.
- Benefits for Week Two are denied.

#### (1)(b)1 Terminations by Employer

**If claimant does not initially meet the 15/50% A&A requirement**

- Benefits for Week One are determined using the partial wage formula.
- Benefits for Week Two are denied.
- Benefits for Week Three depend on 15/50% criteria.

#### (1)(b)2 Leave of Absence

- Benefits for Weeks One and Three are determined using the partial wage formula.
- Benefits are denied Week Two

(1)(b)3 Family & Medical Leave

- Benefits for Weeks One and Three are determined using the partial wage formula.
- Benefits are denied Week Two

03/23/05

Date: April 15, 2005  
Proposed by: Department  
Prepared by: Gretchen Mrozinski/Carla Breber

## ANALYSIS OF PROPOSED LAW CHANGE

### 1. Description of Proposed Change

The proposed change would provide that benefits “stand as paid” when an employer fails to provide complete and correct information during a department investigation. In the event that the information is provided at a later date, a new decision may be issued, but benefits would “stand as paid” through the week a new decision is issued. The proposed change would define the failure to provide complete and correct information as employer fault. The proposed change would also remove the agent’s right to represent the employer should the agent repeatedly fail to provide the complete and correct information when requested.

### 2. Proposed Statutory Language

See attached.

### 3. Proposer’s Reason for the Change

For years the department has encountered great difficulty with employers who fail to respond to requests for information, primarily with those employers who use an agent to administer their UI business. This failure to respond has resulted in numerous overpayments when the employer does provide the information at the hearing level (the ATD reverses the determination that allowed benefits which determination was issued in large part because the employer/agent failed to respond). The department then encounters difficulty in collecting these large overpayments, not to mention the high administrative cost involved in collecting the overpayments. In addition, many hearings could have been avoided had the employer/agent responded at the adjudication level. The department has tried to work with the employer/agents—outside of a law change—to rectify this situation, and has encountered little to no success. The proposed law change will provide consequences for the employer/agent’s failure to respond. Benefits paid as a result of the employer’s failure to provide the information will not be affected by a subsequent decision, and if the employer used an agent, the agent’s representative rights may be suspended for up to 12 months.

### 4. Brief History and Background of Current Provision

The proposed law change would expand on current provisions. Wisconsin Stat. § 108.04(13)(c) currently provides that benefits paid erroneously as a result of employer fault will be charged to that employer’s account.. Wisconsin Stat. § 108.04(13)(f) provides that certain circumstances will constitute employer fault. Wisconsin Stat. § 108.105 suspends the agent’s right to represent the employer

during hearings if certain conditions are met. The proposed law change expands what constitutes employer fault and expands when the agent's right to represent an employer can be suspended.

**5. Effect of the Proposed Change**

- A. Policy  
No change in department policy.
- B. Administrative Impact  
Initially, implementing a new law change will add additional work for adjudicators and ALJs who will need to decide if the employer/agent failed to respond as required. There may be a few more redeterminations issued. In addition, the department will need to develop a procedure to keep track of how many times an employer/agent fails to respond. Once the employer/agent has failed to respond on at least 10 occasions in a 12-month period, the Secretary will need to be notified to determine if the agent's right to represent the employer should be suspended via a hearing conducted under Wis. Stat. Ch. 227. However, once department staff become familiar with the new law change, the workload should even out. This law change proposal will likely result in a reduction of workload once employer/agents realize what will happen should they fail to respond to department requests for information. The change will also relieve administrative time spent trying to collect the overpayment.
- C. Equitable Considerations  
Employer/agents who do not respond to requests for information have cost the department in terms of increased workload for department staff and lost revenue via uncollected overpayments. The proposed law change would serve to counter these costs and put the employer/agents on notice that they need to comply with requests for information. Although the employers stand to lose money if benefits "stand as paid"—such circumstances are far outweighed by the need to hold these employer/agents accountable, and the employer always has the option of ending the contract with an agent who is not properly responding to requests regarding their account.
- D. Fiscal  
We are waiting on fiscal results, but expect the fiscal returns to demonstrate little to no impact.

**6. State and Federal Issues**

This proposed law change would place Wisconsin on similar footing with other states that have taken measures to curb employer/agent failure to respond. Federal law does not appear to prohibit the proposed law change.

7. **Proposed Effective/Applicability Date**

A date set several months after the publication of the bill so that employer's and their agents have advance notice to change their internal practices so to comply with the proposed law change.

**Kuesel, Jeffery**

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**From:** Smith, Thomas E - DWD UI  
**Sent:** Monday, July 25, 2005 10:12 AM  
**To:** Kuesel, Jeffery  
**Subject:** D05-33 Employer Penalty for NR 108 04(13) -  
Jeff: Here is the attachment for D05-33.

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**108.04(13) Notification as to ineligibility**

- (c) If an employer, after notice of a benefit claim, fails to file an objection to the claim under s. 108.09(1), any benefits allowable shall, unless the department applies a provision of this chapter to disqualify the claimant, be promptly paid. Except as otherwise provided in this paragraph, benefits erroneously paid prior to the end of the week in which a determination is issued as to the eligibility question, and charges to the employer's account for such payments, will not be affected by the eligibility issue, unless the benefits are erroneously paid without fault on the part of the employer. If an employer is at fault because it fails to provide correct and complete information requested by the Department during a fact-finding investigation, but later provides the requested information, charges to the employer's account for weeks paid prior to the end of the week a redetermination or an appeal tribunal decision is issued concerning the eligibility question, will not be affected by the eligibility question. If benefits are erroneously paid because the employer and the employee are at fault, the department shall charge the employer for the benefits and proceed to create an overpayment under s. 108.22(8)(a). If benefits are erroneously paid without fault on the part of the employer, regardless of whether the employee is at fault, the department shall charge the benefits as provided in par. (d), unless par. (e) applies, and proceed to create an overpayment under s. 108.22(8)(a). If benefits are erroneously paid because an employer is at fault and the department recovers the benefits erroneously paid under s. 108.22(8), the recovery does not affect benefit charges made under this paragraph.
- (e) If the department erroneously pays benefits from one employer's account and a second employer is at fault, the first employer's account shall be credited for such benefits paid prior to the end of the week in which a determination is issued as to the eligibility question, and the second employer's account shall be charged for such benefits. If the second employer is at fault because it fails to provide correct and complete information requested by the Department during a fact-finding investigation, but later provides the requested information, benefits paid prior to the end of the week a redetermination or appeal tribunal decision is issued concerning the eligibility question will be charged to the second employer's account. If the department recovers the benefits erroneously paid under s. 108.22(8), the recovery does not affect benefit charges made under this paragraph.

8

(f) If benefits are erroneously paid because the employer fails to file a report required by this chapter, fails to provide correct and complete information on the report, fails to object to the benefit claim under s. 108.09(1) or aids and abets the claimant in an act of concealment as provided in sub. (11), the employer is at fault. During the period from January 01, 2006 through June 29, 2008, the employer will also be at fault if a decision finds that benefits are erroneously paid because the employer failed to provide correct and complete information requested by the Department during a fact-finding investigation.

(g) If an employer is at fault because it fails to provide correct and complete information requested by the Department during a fact-finding investigation under par. (c) and the employer alleges that such failure is with good cause, an appeal tribunal will hear and decide the matter of good cause. If good cause is established, benefits that were paid erroneously as a result of the employer's actions or inaction will be treated as if they were paid without fault by the employer under par. (d) and (e).

## ANALYSIS OF PROPOSED UI LAW CHANGE

### CHANGE THE DEFINITION OF EMPLOYEE TO FOLLOW PRESENT PRACTICE

#### 1. Description of the Proposed Change.

As presently constituted, Wis. Stats. §108.02(12)(a) defines an employee as “any individual who is or has been performing services for an employing unit in an employment, whether or not the individual is paid directly or indirectly by such employing unit except as provided in paragraph (b), (bm), (c), or (d)”. The key change would remove the language about performing services “in an employment” and substitute “performing services for pay for an employing unit.” This removes the direct tie between being an employee and performing services in “employment” as defined in all of Wis. Stats. §108.02(15).

That definition of “employment” starts out with a broad definition of “performance for services for pay” but then goes on with a lengthy laundry list of exclusions. The effect of present language in §108.02(12)(a) is that an individual not performing services in an “employment”, as that term is defined in §108.02(15), is not an employee. The change removes the tie to the definition of employment so that an employee is simply an individual performing services for pay subject to the exclusions of Wis. Stats. §108.02(12)(b) and the other provisions of the definition of employee.

#### 2. Proposed Statutory Language

“Employee” means any individual who is or has been performing services for pay for an employing unit, ~~in an employment~~, whether or not the individual is paid directly by such employing unit; except as provided in paragraph (b), (bm), (c), or (d)...

#### 3. Proposer’s Reasons for Change

In practice, the department has construed the definition of employee to mean an individual who performs services for pay. This is understandable, because Wis. Stats. §108.02(15)(a) says that the definition of “employment” is the performance of services for pay. However, §108.02(15) then goes on for over two pages with a list of exclusions from that base definition.

This creates problems in partial unemployment/benefit cases because the partial benefit statute, Wis. Stats. §108.05(3), requires reducing the benefit entitlement of an employee who earns wages in the week being claimed. The question arises as to whether or not wages from service in excluded employment are reportable as being earned by an “employee” for benefit

eligibility purposes. The practice has been to treat the wages earned in excluded employment as having been earned by an "employee". The change will put in the statute wording that comports with department practice and in effect makes us legal.

4. History and Background of the Current Provision

The wording of the present statute has been in the statute for at least 40 years, and probably goes back to at least the 1940's. The purpose is not clear.

5. Effects of the Proposed Change

The proposed change should have no practical effect, because it is merely defining employee to comport with department practice. That practice is to simply consider an employee to be any individual performing services for pay subject to the other provisions in Wis. Stat. §108.02(12). It will not change anything for employers or claimants. The same is true for the workload. There are no fiscal effects, and this change does not change the relative rights of employers or employees.

6. Fiscal No fiscal effect. Codifies existing practice.

7. State or Federal Issues

No amendments in other statutes should be needed because of the way other statutes are worded. The same is true of the administrative rules, because DWD §100.02(18) ties the definition of "employee" to that in the statute. Therefore, the statute will change the Administrative Code definition. There are no conformity issues because there is no substantive change from prior practice, but merely a wording change to make sure practice complies or comports with the law.

8. Effective Date or Applicability Date

Effective for services performed on or after January 1, 2006.

## ANALYSIS OF PROPOSED LAW CHANGE

### 1. Description of Proposed Change:

This amendment would require all non-profit employers who have elected reimbursement financing under 108.151 to pay an assessment into a newly created account. The assessment would be made only if there were amounts determined to be uncollectible. The assessment proceeds credited to this account would be used solely to reimburse the Unemployment Reserve Fund for benefit reimbursements, which have been determined to be uncollectible. Indian tribes would be excluded from the assessment.

### 2. Proposed Statutory Language:

**108.151(7)(a)** Each non-profit employer who has elected reimbursement financing under this section and which is subject to this chapter as of the date a rate is established under this subsection shall pay an assessment to the Unemployment Reserve Fund at a rate established by the department sufficient to reimburse the Fund for amounts written-off including amounts written-off in 2004 and 2005.

(b) As of June 30 each year the treasurer shall determine the total amounts due from non-profit employers who have elected reimbursement financing under 108.151 and which have been determined to be uncollectible. In order to be determined uncollectible, all collection efforts must have been exhausted including liquidation of the assurance required under section 108.151(4). The amounts determined to be uncollectible shall be charged to the reimbursable allowance for doubtful accounts within the Unemployment Reserve Fund. Whenever this account has a balance of \$5,000 or more, the Treasurer shall determine an assessment rate for nonprofit employers who have elected reimbursement financing under 108.151. The Department shall assess a maximum of \$200,000 in any year. If assessment receipts are not sufficient to eliminate the balance, the remaining balance may be carried forward to future years for assessment.

(c) The amount of any employer's assessment shall be the product of the rate established for that employer multiplied by the employer's payroll of the previous calendar year as taken from quarterly contribution reports filed by the employer or, in the absence of the filing of such reports, estimates made by the department. Employer assessments less than \$10 shall not be billed but shall be reallocated to the remaining employers. If

the amounts collected under this subsection are in excess of the amounts needed to reimburse the Trust Fund, the amounts shall be retained in the Trust Fund and used to reduce future assessments.

(d) When an assessment is made it shall be added to the September monthly reimbursement statement and will be due as specified under 108.151(5)(f). Interest will be assessed on any overdue amount in accordance with 108.22. If an employer is delinquent in paying the assessment, the Department may terminate the employer's election of reimbursement financing at the close of any calendar year.

### **3. Proposers Reason for Change:**

Employers who have elected reimbursement financing do not pay state or federal UI taxes but rather reimburse the Fund for any benefits based on wages paid to their employees. There has been a significant increase in the amount of reimbursement receivables that have been declared uncollectible. When this occurs, the benefits are charged to the Fund's balancing account which is funded by employers who pay state UI taxes. There has been a number of medium to large size non-profit employers who have gone out of business over the last few years and not reimbursed the Reserve Fund for all the benefits. After exhausting all collection efforts, write-offs in excess of assurance proceeds for 2004-2005 totaled \$421,660 on 6 accounts. Write-offs identified for 2006 in excess of assurance proceeds currently total \$282,364. We estimate 2006 write-offs to be approximately \$300,000 once all claims being charged to these accounts have been exhausted.

Current UI law requires all non-profit employers who elect reimbursement financing to file an assurance of reimbursement with the Fund's treasurer. The intent of the assurance is to guarantee payment of the required reimbursement including any interest and tardy filing fees. Experience has shown that the intent is not being met. The law requires each employer to maintain an assurance equal to or greater than 4% of the employer's taxable payroll. The assurance can be a surety bond, letter of credit, certificate of deposit or any other nonnegotiable instrument of fixed value. Of the approximately 810 active non-profit employers required to file an assurance, the majority have either a letter of credit or certificate of deposit on file. In cases where the employer ceases business, the benefit pay out is sometimes significantly more than the assurance on file. The largest active non-profit employer has over 6,700 employees and pays \$397 million in annual wages. This employer has an assurance on file of \$2.8 million. The potential benefit payouts if this employer ceases operation would be significantly more than \$2.8 million. For example, if 1,000 employees drew the maximum weekly benefit rate for the maximum 26-week period, the employer would be required to reimburse over \$8.5 million.

Simply increasing the amount of the required assurance would not provide equitable or adequate protection against loss. For example, if the required assurance were increased to 3 times the current amount, the potential loss would still be significant.

This would also increase the annual assurance cost for all non-profit employers even during periods when little or no receivables are being declared uncollectible.

4. **Brief History and Background of Current Provisions:**

Non-profit organizations, which meet the coverage criteria, are considered an employer subject to Wisconsin's UI law. Any employer who is considered a non-profit employer under section 501(C)(3) of the Internal Revenue Code has the option to elect reimbursement financing. There are approximately 810 active non-profit reimbursable employers subject to our law. All of these employers are required to file an assurance of reimbursement with us that is equal to 4% of their reported taxable payroll. The assurance can be in the form of a surety bond, letter of credit, certificate of deposit, or any other nonnegotiable instrument of fixed value. These assurances are required to be updated periodically

Until recently, the amount of reimbursement receivables written off to the Fund's balancing account has been insignificant. As stated above, the recent amounts determined to be uncollectible total over \$700,000.

5. **Effect of the Proposed Change:**

a. **Policy**

Assessments may be in effect.

b. **Administrative Feasibility**

Some modifications will have to be made to SUTES to accommodate the new receivable type that will be added to non-profit employer accounts. In addition, the system will have to calculate the assessment amount for each employer. Employer billing will be done through the normal monthly statement process.

c. **Equitable**

The effect of this change is to spread the cost of the uncollectible reimbursements among all non-profit employers who have elected reimbursement financing instead of among all employers who are paying UI taxes. Since the non-profit reimbursable employers make no payments to the Fund's balancing account as do all employers paying UI taxes, they are not sharing in the cost of these uncollectible receivables. In addition, non-profit employers are not subject to the federal unemployment tax act and do not pay federal unemployment taxes. As such, they do not share in funding the cost of administering the UI program at either the federal or state level.

It would not be equitable to increase the assurance for all employers who elect reimbursement financing. Most employers continue in business and do not default on reimbursing the Fund for benefits paid to claimants who had worked for them. Employers are already informing us how difficult and costly it is to file

an assurance at the current level of 4% of taxable payroll. In addition, even if the assurance were doubled, it would not provide adequate protection in most cases. The three largest debtor accounts with write-offs totaling \$666,206 would have required assurance percents of 19.4%, 13.7%, and 10.2% to cover the total debt.

If the total assessment amount were \$200,000, 320 non-profit reimbursable employers would pay \$0 while 266 employers would pay \$100 or less. 41 employers would pay more than \$1,000. The largest assessment would be \$11,107.

## **6. Fiscal Effect**

Losses due to uncollectible amounts owed by reimbursing employers were zero in six years and less than \$10,000 annually in eight other years from 1989 through 2003. However, uncollectible amounts in 2004 approached \$400,000 and in 2006 will be approximately \$300,000. The assessment does not reflect authorization to collect any more revenue than at present. However, it is a new funding source that will be used when amounts that are owed and have been paid in the past are no longer paid. While the estimated assessment is \$200,000 in each of the next four state fiscal years, the assessment is likely to decline in the future after past, unpaid amounts are amortized. UI administrative costs would be incurred as a result of having to modify automated systems and administer the assessment. However, the increased costs of administration would not be significant.

## **7. Proposed Effect/Applicability Date**

The amount of the assessment for uncollectibles shall be determined on June 30 of each year beginning in 2006 and amounts shall be assessed before the end of September of that year.

DATE OF THIS DRAFT: MAY 20 2005  
PROPOSED BY: DEPARTMENT  
ANALYSIS BY: PETER W. ZEEH

**ANALYSIS OF PROPOSED UI LAW  
CHANGE THE DEFINITION OF PROFESSIONAL EMPLOYER ORGANIZATION**

1. Description of Proposed Change.

The change simply changes the definition of professional employer organization so as to limit those organizations that qualify as such organizations to those that are in the business on a ongoing basis of providing staffing services as otherwise stated in the professional employer organization statute. While I made this proposed change before I become aware of the new Federal Anti-SUTA Dumping Law, I think this change would facilitate compliance with the Federal Law. In at least two or three of the appeals in which I represented the department, a parent entity tried to act as a professional employer organization (PEO) for a subsidiary. In at least two of these cases, the parent had a much lower unemployment insurance tax rate. In fairness, though, I believe this sort of activity was undertaken in many cases simply so the overall enterprise of the parent and subsidiaries is only reporting under the parent to simplify reporting.

2. Proposed Statutory Language.

PROFESSIONAL EMPLOYER ORGANIZATION. "Professional employer organization" means any person who contracts to provide the non-temporary, ongoing employee workforce of a client under a written leasing contract and who under contract and in fact:

- (a) Has the right to hire and terminate the employees who perform services for the client and to reassign the employees to other clients;
- (b) Sets the rate of pay of the employees, whether or not through negotiations;
- (c) Has the obligation to and pays the employees from its own accounts;
- (d) Has a general right of direction and control over the employees, including corporate officers, which right may be shared with the client to the degree necessary to allow the client to conduct its business, meet any fiduciary responsibility, or comply with any applicable regulatory or statutory requirements;
- (e) Assumes responsibility for the unemployment insurance coverage of the employees, files all required reports, pays all required contributions or reimbursements due on the wages of the employees, and otherwise complies with all of the provisions of this chapter that are applicable to employers on behalf of the client;
- (f) Has the obligation to establish, fund, and administer employee benefit plans for the employees;
- (g) Provides notice of the arrangement to the employees; and
- (h) Provides the non-temporary, ongoing workforces of multiple clients; the majority of which are not under the same ownership, management or control as the person other than through the terms of its written agreements with clients to provide workforces.

Proposed Revision to Wis. Stat. §108.02(21e):

3. Proposer's Reason for Change

The reason for the change is to make sure that our law is in line with the reasons for the enactment of the statute. This provision in the statutes is primarily to benefit companies which act on a routine basis as professional employer organizations. It is not in the law to allow a parent to act as a professional employer organization as to one of its subsidiaries. Allowing the latter is contrary to experience rating and is probably contrary to the new Federal Anti-SUTA Dumping provisions. It has not been considered whether other alternatives are suitable, because this is simplest way of dealing with the problem. It is certainly not an attack on the professional employer organization industry, but only on employers not in that business who wish to "play the game".

4. Effects of the Proposed Change.

The primary impact in this case is to eliminate some employers from possible professional employer organization status. However, this is appropriate. Basically the employers that are trying to use this when they are not in the business of being a professional employer organization are trying to payroll or otherwise avoid experience rating and/or make their bookkeeping simpler rather than being a true professional employer organization. I do not anticipate any change in workload for the Bureau of Tax and Accounting and do not anticipate any real change for claimants. In this situation, claimants will have the same benefits rates based on wages earned that they would have otherwise, but employers may be effected in terms of experience rating because of different benefit charging.

5. Fiscal

6. State and Federal Issues.

I would be hard put to find that the administration of any other provisions in Chapter 108 is affected or that we would need any changes in Administrative Rules. As far as conformity, enacting such a provision may facilitate conformity with the new Anti-SUTA Dumping provision.

7. Proposed Effective/Applicability Date.

January 1, 2006, because I think that is the earliest legislation may be finished for the 2005 legislation session, and it makes a good clean break.

Date: 11/22/04  
Proposed By: Department  
Prepared By: Cindy Brunker

## ANALYSIS OF PROPOSED UI LAW CHANGE

### 1. Description of Proposed Law Change

This proposal would repeal Section 108.04(7)(f) of the State Statutes.

### 2. Proposed Statutory Language

No language is needed, as the proposal would remove this subsection from the statutes.

### 3. Proposer's Reason For The Change

October 2003 through September 2004 there has been only two decisions issued. Currently, Section 108.04(7) has 19 exceptions to the quit statute. Many of these exceptions are not used or seldom used. The large number of exceptions makes the law difficult to administer and difficult to understand. Repealing unnecessary exceptions will make the law clearer and less cumbersome.

### 4. Brief History and Background of the Current Provision

Section 108.04(7)(f) was created in 1961 to allow benefits if: "the employee terminates his or her work because the employee was transferred by his or her employing unit to work paying less than two-thirds of his or her immediately preceding wage rate with the employing unit, except that the employee is ineligible to receive benefits for the week of termination and the 4 next following weeks."

### 5. Effect of the Proposed Change

- a. Policy: If an employee quits after a cut in pay and the new conditions meet the federal definition of "new work", the protection of labor standards is applied. In addition, if the cut in pay is substantial, the department considers the employee to have quit with good cause attributable to the employer under (7)(b) and would allow benefits. Any case that was previously resolved under (7)(f) could also have been resolved under (7)(b). Under (7)(f), the employee

is disqualified the week of the quit plus the next four weeks, whereas (7)(b) allows for the immediate payment of benefits.

- b. Administrative Feasibility: The repeal would not cause any administrative problems and would have no affect on workload.
- c. Equitable: The change would not have any real adverse or advantageous effect on either employees or employers since this section is seldom used. There would be a slight benefit to the employee as a ruling under (b) allows immediately while a ruling under (f) requires a time lapse of 4 weeks after the week of quit.
- d. Fiscal: The small number of cases involved and the fact that an exception to the disqualification can be found under another section of the statutes means that no significant fiscal effect is expected from repealing this section of the law.

#### **6. State and Federal Issues**

- a. Chapter 108: The proposed repeal would not have any effect on other sections of Chapter 108.
- b. Rules: No administrative rules are needed.
- c. Conformity: None

#### **7. Proposed Effective/Applicability Date**

The proposal, if enacted, would be effective with quits occurring the Sunday after publication and later.

March 14, 2005  
Proposed by: Department  
Prepared by: Thomas E. Smith

## **ANALYSIS OF PROPOSED LAW CHANGE**

### **1. Description of the Proposed Change.**

Amend the Wisconsin UI law to add provisions mandated by federal law that are designed to address the practice known as "SUTA dumping". See attached page entitled SUTA DUMPING for further explanation.

### **2. Proposed Statutory Language.**

See attached draft language.

### **3. Proposer's Reason for the Change.**

United States Department of Labor (USDOL) staff was concerned that the practice of SUTA dumping was a serious threat to the experience rating concept which requires employers covered by a state's UI law to pay taxes based on each employer's own benefit experience. As a result of that concern, Congress passed and the President signed the Federal SUTA Dumping Prevention Act of 2004. It requires all states to amend their UI laws to include specific provisions which:

- a) Require mandatory transfer of employer experience where the seller and buyer of a business are owned, managed or controlled by substantially the same interests.
- b) Prohibit the transfer of employer experience where a new employer acquires an existing business with a rate lower than the state's new employer rate solely or primarily for the purpose of avoiding the new employer rate.
- c) Provide civil and criminal penalties for knowing violation of the required or prohibited transfer provisions.
- d) Establish procedures for identifying SUTA dumping.
- e) Require the state to interpret and apply its SUTA dumping provisions in accordance with the minimum requirements contained in any guidance or regulations issued by USDOL.

#### 4. Brief History and Background of the Current Provision.

Our current successorship law does require mandatory transfer of employer account experience where the seller and buyer in a business transfer are owned or controlled by the same interests. The federal law further requires that the transfer of account experience be mandatory if the seller and buyer are "managed" by substantially the same interests. The proposal adds that change. The proposal also restores a requirement that ended in the early 1980s that contribution rates for the employers involved in a business transfer be recomputed as of the date of transfer rather than as of the beginning of the next calendar year. USDOL has strongly requested that states make such a change if their automated systems can handle the computations. Our new SUITES system will be able to make the necessary computations whereas the current UTAS system cannot.

The proposal also includes a provision that allows the department to nullify a mandatory transfer of account experience where it is found that a substantial purpose of the transfer was to obtain a reduced rate. This provision is not required by the federal legislation but is also strongly recommended by USDOL. It is designed to discourage an employer from transferring workers from a larger operation to a separate small business it owns in anticipation of a major layoff and then ceasing operation of the small business, thus dumping the benefit charges and the rate effects on the small account.

All the other provisions in the proposal are new in that they don't amend or otherwise change the application of existing law.

#### 5. Effects of the Proposed Change.

- a) Policy: The Wisconsin UI program has always placed great importance on maintaining a strong policy of employer experience rating. This proposal does not conflict with that policy and indeed will enhance it if it is found that there is SUTA dumping going on that we are not aware of.
- b) Administrative Impact:
  - (1) Employers: The proposal will affect employers by prohibiting transfers of account experience from a low rate employer to a new employer where the purpose of the transfer is solely or principally to buy the lower rate. It will create a maximum rate penalty or maximum rate plus 2% penalty for employers who knowingly attempt to circumvent the mandatory or prohibited transfer provisions and it creates the option of Class A misdemeanor criminal penalties as well. It will also require immediate recalculation of rates for all employers involved in permissible transfers that could result in the payment of more tax in the year of transfer.

There are no additional employer reporting requirements. Employers are currently required to report to the department any business transfer in which they are involved.

- (2) **Claimants:** The proposal makes no changes in how claimants interact with the UI system.
  - (3) **Department:** It is difficult to know if there will be increased workload for the department because we don't know if there is significant undetected SUTA dumping in Wisconsin. USDOL, in cooperation with several other states, is developing and testing a software application designed to detect SUTA dumping by various analyses of employer records. When operational, the application will be made available to all the states and we hope to be able to answer the question. Any SUTA dumping that we do find will cause us more work to investigate the facts, determine intent, issue determinations, deal with appeals and process the necessary account adjustments.
- c. **Equitable:** There should be little or no effect on claimants. All the effects will fall on employers and the department.
  - d. **Fiscal:** We currently assume that there is not a SUTA dumping problem in Wisconsin and that therefore there will be little or no fiscal effect from the proposal.

## **6. State and Federal Issues.**

- a. **Chapter 108:** No effect on other provisions of Chapter 108.
- b. **Rules:** May need to amend DWD 115.08(1) which defines "substantial" common ownership or control to be 50% or more. USDOL has indicated informally that they consider "substantial" to be much less than 50%. They will be adopting regulations to implement the federal legislation and may include a definition that we will then be required to follow.
- c. **Conformity:** Except for the two "strongly encouraged" items already explained, all provisions of the proposal are required to be enacted and be effective as of January 1, 2006 for Wisconsin to remain in conformity with federal law.

**Draft Language**  
**SUTA Dumping Changes to Wisconsin UI Law**

**Sec. 108.16**

(8)(a) For purposes of this subsection a business is deemed transferred if any asset or any activity of an employer, whether organized or carried on for profit, nonprofit or governmental purposes, is transferred in whole or in part by any means, other than in the ordinary course of business.

(b) If the business of any employer is transferred, the transferee is deemed a successor for purposes of this chapter if the department determines that all of the following conditions have been satisfied:

1. The transferee has continued or resumed the business of the transferor, in the same establishment or elsewhere; or the transferee has employed substantially the same employees as those employed by the transferor in connection with the business transferred.
2. The transfer included at least 25% of the transferor's total business as measured by comparing the payroll experience assignable to the portion of the business transferred with the transferor's total payroll experience for the last 4 completed quarters immediately preceding the date of the transfer.
3. The same financing provisions under s. 108.15, 108.151, 108.152, or 108.18 apply to the transferee as applied to the transferor on the date of the transfer.
4. The department has received a written application from the transferee requesting that it be deemed a successor. Such application must be received by the department on or before the contribution report and payment due date for the first full quarter following the date of transfer.

(c) Notwithstanding par. (b), if the business of an employer is transferred, the transferee is deemed a successor for purposes of this chapter if the department determines that all of the following conditions have been satisfied:

1. The transferee is a legal representative or trustee in bankruptcy or receiver or trustee of a person, partnership, limited liability company, association or corporation, or guardian of the estate of a person, or legal representative of a deceased person.

2. The transferee has continued or resumed the business of the transferor, either in the same establishment or elsewhere, or the transferee has employed substantially the same employees as those the transferor had employed in connection with the business transferred.

3. The same financing provisions under s. 108.15, 108.151, 108.152, or 108.18 apply to the transferee as applied to the transferor on the date of transfer.

(cm) The filing of a voluntary petition in bankruptcy by an employer or the filing of an involuntary petition in bankruptcy against an employer under 11 USC 1101 to 1330 or the confirmation of a plan under 11 USC 1101 to 1330 does not render the employer filing the petition or against whom the petition is filed a successor under par. (c).

(d) Notwithstanding par. (b), if the business of an employer of a kind specified in par. (c) 1. is transferred, the transferee is deemed a successor for purposes of this chapter if the transferee would have been a successor under par. (e) but for the intervening existence of the successor employer under par. (c).

(e) Notwithstanding par. (b), a transferee is deemed a successor for purposes of this chapter, if the department determines that all of the following conditions are satisfied:

1. At the time of business transfer, the transferor and the transferee are owned, managed or controlled in whole or in substantial part, either directly or indirectly by legally enforceable means or otherwise, by the same interest or interests. Without limitation by reason of enumeration, it is presumed unless shown to the contrary that the "same interest or interests" includes the spouse, child or parent of the individual who owned or controlled the business, or any combination of more than one of them.

2. The transferee has continued or resumed the business of the transferor, either in the same establishment or elsewhere; or the transferee has employed substantially the same employees as those the transferor had employed in connection with the business transferred.

3. The same financing provisions under s. 108.15, 108.151, 108.152, or 108.18 apply to the transferee as applied to the transferor on the date of the transfer.

(em) If, after a transferee has been deemed a successor under par. (e), the department determines that a substantial purpose of the transfer of business was to obtain a reduced rate of contributions, then such transfer shall be of no effect for purposes of this chapter and all aspects of the transferor's account experience and liability which had been assigned to the transferee, together with all aspects of the transferee's account experience related to the transferred business from the date of the transfer of business, shall be assigned to the transferor and the transferor's contribution rate shall be recomputed accordingly under par. (h).

(f) The successor shall take over and continue the transferor's account, including its positive or negative balance and all other aspects of its experience under this chapter in proportion to the payroll assignable to the transferred business and the liability of the successor shall be proportioned to the extent of the transferred business. The transferor and the successor shall be jointly and severally liable for any amounts owed by the transferor to the fund and to the administrative account at the time of the transfer, but a successor under par. (c) is not liable for the debts of the transferor except in the case of fraud or malfeasance.

(g) If not already subject to this chapter, a successor shall become an employer subject to this chapter on the date of the transfer and shall become liable for contributions or payments in lieu of contributions, whichever is applicable, from and after that date, using the contribution rate assigned or assignable to the transferor on the date of transfer.

(h) The contribution rates of the transferor and the successor shall be respectively determined or redetermined as of the date of transfer of business and shall apply from that date for a successor subject to this chapter immediately prior to the date of the transfer shall be redetermined, as of the applicable computation date, to apply to the calendar year following the date of transfer and shall thereafter be redetermined whenever required by s. 108.18. For the purposes of s. 108.18, the department shall determine the experience under this chapter of the successor's account by allocating to the successor's account for each period in question the respective proportions of the transferor's payroll and benefits which the department determines to be properly assignable to the business transferred.

(i) The account taken over by the successor shall remain liable with respect to accrued benefit and related rights based on employment in the transferred business, and all such employment is deemed employment performed for the successor.

(im) Notwithstanding (b) – (i), a transferee who is not already subject to this chapter immediately prior to the date of the transfer of business shall

not be deemed a successor for purposes of this chapter if the department determines that the transfer occurred solely or primarily for the purpose of the transferee obtaining a lower rate of contributions than that which would apply to a new employer. Such a transferee shall be assigned the applicable new employer rate under s.108.18(2)(a) or (c) but s.108.18(2)(d) shall not apply. In determining whether the business was transferred solely or primarily for the purpose of obtaining a lower rate of contributions, the department shall use objective factors which may include the cost of acquiring the business, whether the transferee continued the business enterprise of the transferred business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to transfer.

(j) If not already subject to this chapter, a transferee that is not a successor shall become an employer subject to this chapter on the date of the transfer and shall become liable for contributions or payments in lieu of contributions, whichever is applicable, from and after that date.

(k) Any time a business is transferred, as provided in par. (a), both the transferor and the transferee shall notify the department in writing of the transfer, within 30 days after the date of transfer; and both shall promptly submit to the department in writing such information as the department may request relating to the transfer.

(L) A professional employer organization is not considered to be the successor to the employer account of its client under this section by virtue of engaging the prior employees of the client to perform services for the client under an employee leasing agreement.

(m) If a person knowingly violates or attempts to violate subsections (e) and (im) or any other provision of this chapter related to determining the assignment of a contribution rate, or if a person knowingly advises another person in a way that results in a violation of such provision, the person shall be subject to the following penalties:

1. If the person is an employer, then such employer shall be assigned the highest rate assignable under this chapter for the rate year during which such violation or attempted violation occurred and the three rate years immediately following this rate year. However, if the person's business is already at such highest rate for any year, or if the amount of increase in the person's rate would be less than 2 percent for such year, then a penalty rate of contributions of 2 percent of taxable wages shall be imposed for such year.

2. If the person is not an employer, such person shall be subject to a civil money penalty of not more than \$5,000. Any such fine shall be deposited in the penalty and interest account established under s. 108.20.

3. For purposes of this section, the term "knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

4. For purposes of this section, the term "violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation or willful nondisclosure.

5. In addition to the penalties imposed by subparagraph (m), any violation of this section may be prosecuted as a Class A misdemeanor under s.939.51 of the criminal code.

(n) The department shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(o) For purposes of this section:

1. "Person" has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986, and

2. "Asset" shall include an employing unit's workforce.

(p) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.

 <p><b>EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D. C. 20210</b></p>	<b>CLASSIFICATION</b>
	SUTA Dumping
	<b>CORRESPONDENCE SYMBOL</b>
	DL
	<b>ISSUE DATE</b>
	August 13, 2004
<b>RESCISSIONS</b>	<b>EXPIRATION DATE</b>
None	Continuing

**ADVISORY : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 30-04**

**TO : STATE WORKFORCE AGENCIES**

**FROM : CHERYL ATKINSON s/s  
Administrator  
Office of Workforce Security**

**SUBJECT : SUTA Dumping – Amendments to Federal Law affecting the Federal-State  
Unemployment Compensation Program**

1. **Purpose.** To advise states of the amendments to Federal law designed to prohibit "SUTA Dumping."
2. **Reference.** Public Law (P.L.) No. 108-295, the "SUTA Dumping Prevention Act of 2004," signed by the President on August 9, 2004; the Social Security Act (SSA); the Internal Revenue Code (IRC), including the Federal Unemployment Tax Act (FUTA); and Unemployment Insurance Program Letters (UIPLs) 29-83 (56 Fed. Reg. 54891 (October 23, 1991)), 29-83, Change 3 (61 Fed. Reg. 39156 (July 26, 1996)), 30-83, 15-84, and 34-02.
3. **Background.**
  - a. **In General.** Some employers and financial advisors have found ways to manipulate state experience rating systems so that these employers pay lower state unemployment compensation (UC) taxes than their unemployment experience would otherwise allow. This practice is called SUTA dumping. ("SUTA" refers to state unemployment tax acts, but has also been said to stand for, among other things, "State Unemployment Tax Avoidance.") Most frequently, it involves merger, acquisition or restructuring schemes, especially those involving shifting of workforce/payroll. The legality of these SUTA dumping schemes varies depending on state laws. P.L. 108-295 amended the SSA to add a new Section 303(k) establishing a nationwide minimum standard for curbing SUTA dumping. All states will need to amend their UC laws to conform with the new legislation.
  - b. **Experience Rating.** All states operate experience rating systems in order for employers in the state to receive the additional credit against the Federal unemployment tax. (The tax credit scheme is explained in UIPL 30-83 and experience rating in UIPL 29-83.) Under experience rating, the state unemployment tax rate of an employer is, in most states, based on the amount of UC paid to former employees. The more UC paid to its former employees, the higher the tax rate of the employer, up to a maximum established by state law. Experience rating helps ensure an equitable distribution of costs of the UC program among employers, encourages employers to stabilize their workforce, and provides an incentive for employers to

fully participate in the UC program. SUTA dumping thwarts these purposes.

c. SUTA Dumping and the Amendments Made by P.L. 108-295. The amendments to the SSA made by P.L. 108-295 are intended to prohibit the following two methods of SUTA dumping:

- An employer escapes poor experience (and high experience rates) by setting up a shell company and then transferring some or all of its workforce (and the accompanying payroll) to the shell company after the shell has earned a low experience rate. The transferred payroll is then taxed at the shell's lower rate.
- An entity commencing a business purchases an existing small business with a low UC tax rate. Instead of being assigned the higher new employer rate, the entity receives the small business's lower rate. Typically, the new business ceases the business activity of the purchased business and commences a different type of business activity.

Among other things, the SSA, as amended, requires state laws to prohibit these forms of SUTA dumping as a condition of states receiving administrative grants for the UC program. It also requires states to impose penalties for knowingly violating (or attempting to violate) these provisions of state law.

A more detailed discussion of these amendments, including effective dates, is contained in Attachment I. Draft language for use in crafting state legislation is contained in Attachment II. Attachment III contains a checklist for assisting states in determining the conformity of their laws with these amendments. Attachment IV contains the text of P.L. 108-295.

P.L. 108-295 also requires the Secretary of Labor to conduct a study "of the implementation of" the amendments "to assess the status and appropriateness of State actions to meet" their requirements. P.L. 108-295 also requires the Secretary to submit to the Congress, not later than July 15, 2007, a report that (1) assesses the statute and appropriateness of state actions to meet its new requirements, and (2) recommends any further Congressional action that the Secretary considers necessary to improve the effectiveness of the amendments. (See Section 2(b) of P.L. 108-295.)

d. Access to the National Directory of New Hires. P.L. 108-295 also amended the SSA to permit the use of certain information in the National Directory of New Hires to be used by state UC agencies in the administration of Federal and state UC laws. The Department of Labor (Department) will provide more information on this amendment and its implementation in the future. It is not anticipated that this amendment will require states to amend their UC laws.

4. **Action.** State administrators should distribute this advisory to appropriate staff. States must adhere to the requirements of Federal law contained in this advisory.

5. **Inquiries.** Questions should be addressed to your Regional Office.

6. **Attachment.**

ATTACHMENT I – DETAILED EXPLANATION OF SECTION 303(k), SSA – QUESTIONS AND ANSWERS

ATTACHMENT II – DRAFT LEGISLATIVE LANGUAGE

ATTACHMENT III – CONFORMITY CHECKLIST FOR STATE SUTA DUMPING LAWS

ATTACHMENT IV – TEXT OF P.L. 108-295