☞ 07hr_CRule_06-032_SC-LEUA_pt04

Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2007-08

(session year)

Senate

(Assembly, Senate or Joint)

Committee on ... Labor, Elections and Urban Affairs (SC-LEUA)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (October/2010)

Jim Doyle
Governor

Roberta Gassman
Secretary

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Packet

State of Wisconsin
Department of Workforce Development

Rule Analysis for Legislative Review

Proposed Rules Relating to Unemployment Insurance and Temporary Help Employers
Chapter DWD 133
CR 06-032

Basis and Purpose of the Proposed Rules

For the purpose of unemployment insurance, an employment relationship normally ends when an employee is laid off without a definite return-to-work date, even if recall is anticipated. If a subsequent offer is refused, it is considered a refusal of new work. The employment relationship between a temporary help agency and its employees does not follow the patterns that apply to most other employment relationships. In the temporary help industry, it is common for employees to be assigned to a series of assignments at different locations with different duties, wages, and other conditions. It is also common for these assignments to end with little or no notice to either the employee or the employer. While the parties may fully intend to continue the relationship, the short notice that an assignment has ended may require that a short period of time pass before the employer is able to send the employee to the next assignment. This proposed rules establish standards for determining whether the employment relationship continues or is terminated for the purpose of unemployment insurance benefit eligibility.

Public Hearing Summary

A public hearing was held in Madison on May 1, 2006. A summary of the hearing comments and the department's responses is attached.

Response to Legislative Council Staff Recommendations

The Department's response is attached.

Changes to Analysis Prepared under s. 227.114 (2), Stats.

The Department corrected a cross-reference and made several non-substantive wording changes in the subsection on continuation of the employment relationship. In addition, a minor substantive change was added for clarify to provide that if a temporary help employer offers an assignment that does not conform to the conditions under which the employee offered to work, the employment relationship ends as a separation by the employer.

Final Regulatory Flexibility Analysis

The proposed rule affects small businesses but does not have a significant economic impact on a substantial number of small businesses.

Department Contacts

Carla Breber
Disputed Benefit Claims
Unemployment Insurance Division
266-7564

Elaine Pridgen
Administrative Rules Coordinator
Office of Legal Counsel
267-9403

State of Wisconsin

Department of Workforce Development
Unemployment Insurance Division

Unemployment Insurance and Temporary Help Employers
Chapter DWD 133

The Wisconsin Department of Workforce Development proposes an order to create Chapter DWD 133, relating to unemployment insurance and temporary help employers and affecting small businesses.

Analysis Prepared by the Department of Workforce Development

Statutory authority: Sections 108.14 (2) and 227.11, Stats.
Statutes interpreted: Sections 108.04 (7), 108.04 (8)
Related statutes: Sections 108.02 (24m) and 108.065, Stats.

Explanation of agency authority. Section 108.14 (2), Stats., provides that the Department may adopt and enforce all rules which it finds necessary or suitable to carry out Chapter 108, Stats., regarding unemployment insurance. Section 108.04 (7), Stats., provides that if an employee terminates work with an employing unit, the employee is ineligible for unemployment insurance except under certain conditions. Section 108.04 (8), Stats., provides that if an employee fails, without good cause, to accept suitable work when offered, the employee is ineligible for unemployment insurance except under certain conditions.

Summary of proposed rule. For the purpose of unemployment insurance, an employment relationship normally ends when an employee is laid off without a definite return-to-work date, even if recall is anticipated. If a subsequent offer is refused, it is considered a refusal of new work under s. 108.04 (8), Stats. The employment relationship between a temporary help agency and its employees does not follow the patterns that apply to most other employment relationships. In the temporary help industry, it is common for employees to be assigned to a series of assignments at different locations with different duties, wages, and other conditions. It is also common for these assignments to end with little or no notice to either the employee or the employer. While the parties may fully intend to continue the relationship, the short notice that an assignment has ended may require that a short period of time pass before the employer is able to send the employee to the next assignment. This proposed rule establishes standards for determining whether the employment relationship continues or is terminated for the purpose of unemployment insurance benefit eligibility.

When an assignment from a temporary help employer ends, an employee is eligible for unemployment insurance benefits while the employment relationship continues between assignments, if he or she is otherwise qualified. Under the proposed rule, the

employment relationship between a temporary help employer and the employee is considered to be a continuing relationship if all of the following conditions are met:

- Prior to the end of the first full business day after the end of the assignment, the employee contacts the employer, or the employer contacts the employee, and informs the other that the assignment has ended or will end on a certain date. The department may waive the requirement for the deadline or notice, or both, if it determines that the employee's failure to so contact the employer was for good cause and the employer and employee have otherwise acted in a manner consistent with the continuation of the employment relationship.
- Prior to the end of the first full business day after the end of the assignment, or prior to the end of the first full business day after the date the notice of the end of the assignment was given if the deadline for the notice was waived, the employer informs the employee that the employer will provide a new assignment that will begin within 7 days and either 1) the employer provides a new assignment that begins within 7 days; 2) a new assignment does not begin in 7 days but the employer notifies the employee that the start of the assignment will be delayed for a period not to exceed an additional 7 days and the delayed assignment begins within these 7 days; or 3) a new assignment does not begin within 7 days but the employer notifies the employee that the employer will provide another assignment that will begin within 7 days and the assignment does begin.
- The assignment offered by the employer meets the conditions under which the individual offered to work, including the type of work, rate of pay, days and hours of availability, distance willing to travel to work, and available modes of transportation, as set forth in the individual's written application for employment with the employer submitted prior to the first assignment, or as subsequently amended by mutual agreement. The employer has the burden of proof to show that the assignment meets these requirements. If the employer offers an assignment that does not conform to these requirements, the employment relationship ends as a separation by the employer.

Chapter 108, Stats., provides that an employee is ineligible for unemployment insurance if the employee voluntarily separated from the employment, unless certain exceptions apply. Under the proposed rule, the employment relationship between a temporary help employer and the employee is considered to be voluntarily separated by the employee when any of the following occur:

- The employee fails to notify the employer that an assignment has ended if the employer's policy requires such notification and the employee had notice of this policy prior to the end of the assignment, provided that the employer is not aware that the assignment has ended.
- The employee refuses an assignment while the employment relationship continues.
- The employee fails to respond to an offer of work by the employer within a reasonable time period, while the employment relationship continues.
- The employer is unable to communicate an offer of work to the employee because of the employee's failure to provide the employer with a correct address,

telephone number, or other contact information while the employment relationship continues.

- Any other circumstances that would be considered separation by the employee under Chapter 108, Stats.

If an employment relationship does not continue under the terms of the proposed rule, the employment shall be considered separated by the employer unless the employee has voluntarily separated from the employment as provided in the list above or any other provision of Chapter 108, Stats.

When the employment relationship terminates, the employee's application for employment shall expire. If the employee returns to work for the employer, a new application for employment will be required for this chapter to be applicable. If the employee agrees in writing, the original application may be treated as a new application for employment.

Summary of factual data and analytical methodologies. In 1994 the Department responded to concerns expressed by temporary help employers and adopted a policy that considers the employment relationship between a temporary help employer and its employee to continue for a maximum of 14 days after the last day of work while the employer looks for another assignment for the employee, provided the employer guaranteed the employee an assignment to begin within that time period. Refused assignments during that 14-day extension period are considered separations by the employee.

The proposed Chapter DWD 133 codifies the informal policy that is currently in place, with minor adjustments. The proposed rule provides for an extension of the employment relationship while the employer finds a new assignment for the employee, provided that future offers of work are within the confines of the application for employment. The application for employment will be treated as a quasi-employment contract. This provides protection for the employer and the employee as both parties are put on notice as to what type of work will continue the employment relationship. If a subsequent assignment made within the confines of the application for employment is refused during the extension period, the employee is considered to have separated because the employment relationship is considered to still exist.

Comparison with federal law. There is no federal unemployment insurance law that specifically covers treatment of employees of temporary help companies.

Comparison with rules in adjacent states. Minnesota. An individual who within 5 calendar days after completion of a suitable temporary job assignment fails without good cause to affirmatively request an additional job assignment or refuses without good cause an additional suitable job assignment offered shall be considered to have quit employment. This provision applies only if at the beginning of employment with the temporary help company, the applicant signed and was provided a copy of a separate

document that informed the applicant of this paragraph and that unemployment benefits may be affected.

Iowa. An individual who fails without good cause to notify the temporary help company of the completion of an assignment and seek reassignment within 3 working days shall be considered to have voluntary quit employment, unless the individual was not advised in writing of the duty to notify the temporary help company of the completion of an assignment.

Michigan. An individual is disqualified from receiving benefits if the temporary help company provided the employee with written notice before the employee began performing services stating that within 7 days after completion of an assignment the employee must notify the temporary help company and failure to provide notice of completion of an assignment constitutes a voluntary quit that will affect the employee's eligibility for unemployment insurance and the employee did in fact not notify the temporary help company of completion of the assignment within 7 days.

Illinois. There is a rebuttable presumption that an individual is not actively seeking work if the individual was last employed by a temporary help company and the temporary help company alleges that during the week for which the individual claimed benefits, he or she did not contact the temporary help company for an assignment. The presumption is rebutted if the individual shows that he or she did contact the temporary help company or that he or she had good cause for failure to contact the temporary help company for an assignment.

Effect on small business. The proposed rule will affect temporary help employers, some of which are small businesses. Using the best data available, the Department estimates that the number of temporary help employers in 2004 was 721. Of these, 203 had a monthly average of 1-25 employees but may involve a larger number of individuals given the temporary nature of employment provided.

There are no reporting, bookkeeping, or other procedures required for compliance with the proposed rule and no professional skills are required. The proposed rule was developed in consultation with the temporary help industry and reflects current best practices in the industry. It is not expected to qualify or disqualify more claimants of employers following these practices.

Analysis and supporting documents used to determine effect on small business. There is no data available that allows the Department to accurately determine the number of temporary help employers that meet the definition of small business in s. 227.114 (1), Stats. The data that is available on a business entity's number of employees is from the Quarterly Census of Employment and Wages (QCEW) program, which is based on UI reports and Multiple Worksite Reports (MWR). When available, MWRs provide a disaggregation of data. The data does not identify if a business is independently owned and operated, if employees are full-time or part-time, or if a business is dominant in its field.

The Department requested information on the number of temporary help employers that have gross annual sales of less than $5 million from the Department of Revenue, but DOR was unable to provide it.

Agency contact person. Daniel LaRocque, Director, UI Bureau of Legal Affairs. (608) 267-1406; daniel.larocque@dwd.state.wi.us.

Place where comments are to be submitted and deadline for submission. Comments may be submitted to Elaine Pridgen, Office of Legal Counsel, Dept. of Workforce Development, P.O. Box 7946, Madison, WI 53707-7946 or elaine.pridgen@dwd.state.wi.us. The comment deadline is May 3, 2006.

Chapter DWD 133
TEMPORARY HELP EMPLOYERS

DWD 133.001 Definitions. (1) Except as provided in sub. (2) and unless the context clearly indicates a different meaning, the definitions in ch. DWD 100 apply to this chapter.

(2) Notwithstanding ch. DWD 100 and unless the context clearly indicates a different meaning, in this chapter:

(a) "Assignment" means work assigned by an employer to an employee to be performed for a client company of the employer. An assignment ends when it is completed or when the employee is removed from the assignment.

(b) "Client company" means an entity that contracts with an employer for the employer to provide labor for a determinate or indeterminate time.

(c) "Employer" has the same meaning given "temporary help company," in s. 108.02 (24m), Stats., and does not include a "professional employer organization" as defined in s. 108.02 (21e), Stats.

Note: Section 108.02 (24m), Stats., provides that "temporary help company" means "an entity which contracts with a client to supply individuals to perform services for the client on a temporary basis to support or supplement the workforce of the client in situations such as personnel absences, temporary personnel shortages, and workload changes resulting from seasonal demands or special assignments or projects, and which, both under contract and in fact:
(a) Negotiates with clients for such matters as time, place, type of work, working conditions, quality, and price of the services;
(b) Determines assignments or reassignments of individuals to its clients, even if the individuals retain the right to refuse specific assignments;
(c) Sets the rate of pay of the individuals, whether or not through negotiation;
(d) Pays the individuals from its account or accounts; and
(e) Hires and terminates individuals who perform services for the clients."

DWD 133.01 Purpose. The purpose of this chapter is to recognize that the employment relationship between a temporary help employer and an employee is, in

limited circumstances, unlike that of other employment relationships. An employee of a temporary help employer commonly performs multiple assignments for one or more client companies. An assignment may end with little or no advance notice. While the employer and employee may intend to continue the employment relationship, the employer may not immediately be able to provide a new assignment to the employee. This chapter establishes standards for determining whether the employment relationship continues or is terminated for the purpose of unemployment insurance benefit eligibility.

DWD 133.02 Employment relationship. (1) CONTINUATION OF EMPLOYMENT RELATIONSHIP. When an assignment ends, the employment relationship between an employer and an employee shall be considered a continuing relationship if all of the following conditions are met:

(a) Prior to the end of the first full business day after the end of the assignment, the employee contacts the employer, or the employer contacts the employee, and informs the other that the assignment has ended or will end on a certain date. The department may waive the requirement for the deadline or notice, or both, if it determines that the employee's failure to so contact the employer was for good cause and the employer and employee have otherwise acted in a manner consistent with the continuation of the employment relationship.

(b) Prior to the end of the first full business day after the end of the assignment, or prior to the end of the first full business day after the date notice was given under par. (a) if the deadline for the notice was waived, the employer informs the employee that the employer will provide a new assignment that will begin within 7 days and any of the following occur:

1. The employer provides a new assignment that begins within 7 days of the date of the notice.

2. A new assignment does not begin within the 7-day period specified in par. (b) (intro.), but within that same 7-day period, the employer notifies the employee that the start of the assignment will be delayed for a period not to exceed an additional 7 days. The delayed assignment begins within 7 days of the date that the employer notified the employee of the delay.

3. A new assignment does not begin within the 7-day period specified in par. (b) (intro.), but within that same 7-day period, the employer notifies the employee that the employer will provide another assignment that will begin within 7 days. This assignment begins within 7 days of the date that the employer notified the employee of the assignment.

(c) The assignment offered by the employer meets the conditions under which the individual offered to work, including the type of work, rate of pay, days and hours of availability, distance willing to travel to work, and available modes of transportation, as set forth in the individual's written application for employment with the employer submitted prior to the first assignment, or as subsequently amended by mutual agreement. The employer shall have the burden of proof to show that the assignment meets the requirements of this paragraph. If the employer offers an assignment that does not conform to the requirements of this paragraph, the employment relationship ends under sub. (2).

(2) SEPARATION OF EMPLOYMENT BY EMPLOYER. If the employment relationship does not continue under sub. (1), the employment shall be considered

separated by the employer unless the employee has voluntarily separated from the employment under sub. (3).

(3) SEPARATION OF EMPLOYMENT BY EMPLOYEE. (a) An employee voluntarily separates from the employment when any of the following occur:

1. The employee fails to notify the employer that an assignment has ended if the employer's policy requires such notification and the employee had notice of this policy prior to the end of the assignment, provided that the employer is not aware that the assignment has ended, and provided that the notice requirement was not waived under sub. (1) (a).

2. The employee refuses an assignment while the employment relationship continues.

3. The employee fails to respond to an offer of work by the employer within a reasonable time period, while the employment relationship continues.

4. The employer is unable to communicate an offer of work to the employee because of the employee's failure to provide the employer with his or her correct address, telephone number, or other contact information while the employment relationship continues.

(b) Nothing in this chapter shall preclude the application of other provisions of ch. 108, Stats., to determine whether the employee separated from the employment.

DWD 133.03 Treatment of time between assignments. An employee shall be eligible for unemployment insurance benefits while the employment relationship continues between assignments pursuant to s. DWD 133.02 (1), if the employee is otherwise qualified for those benefits.

DWD 133.04 Relationship following termination. When an employee's employment relationship with an employer terminates, his or her application for employment with that employer shall expire. If the employee returns to work for the employer, a new written application for employment shall be required for this chapter to be applicable. If the employee agrees in writing, the original application may be treated as a new application for employment.

SECTION 2. INITIAL APPLICABILITY. This rule first applies to an action or inaction by an employee or employer that may affect the employee's eligibility for benefits under this chapter beginning with the Sunday following the effective date of this chapter.

SECTION 3. EFFECTIVE DATE. This rule shall take effect the first day of the month following publication in the Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **06-032**

AN ORDER to create chapter DWD 133, relating to unemployment insurance and temporary help employers and affecting small businesses.

Submitted by **DEPARTMENT OF WORKFORCE DEVELOPMENT**

03-31-2006 RECEIVED BY LEGISLATIVE COUNCIL.

04-26-2006 REPORT SENT TO AGENCY.

RNS:DLS

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☐ NO ☑

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☐ NO ☑

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☐ NO ☑

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

Ronald Sklansky
Clearinghouse Director

Richard Sweet
Clearinghouse Assistant Director

Terry C. Anderson
Legislative Council Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE RULE 06-032

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated January 2005.]

2. Form, Style and Placement in Administrative Code

a. In s. DWD 133.001, in sub. (1) and (2), is it necessary to add "and unless the context clearly indicates a different meaning"? Are there instances in this new chapter where the context of the defined terms clearly indicates a different meaning? If not, this phrase can be deleted. Also, since the second sentence in the definition of "Assignment" in sub. (2) (a) is a substantive provision that should not be part of the definition; it should be placed outside the definitions section. Section DWD 133.001 could be restructured and rewritten as follows:

> **DWD 133.001 General provisions. (1)** DEFINITIONS. (a) Except under par. (b) and unless the context clearly indicates a different meaning, the definitions in ch. DWD 100 apply to this chapter.
>
> (b) Notwithstanding ch. DWD 100 and unless the context clearly indicates a different meaning, in this chapter:
>
> 1. "Assignment" means work assigned…for a client company of the employer.
>
> 2. "Client company" means….
>
> 3. "Employer" has the same meaning….
>
> **(2)** END OF ASSIGNMENT. For purposes of this chapter, an assignment ends when the employee completes it or when the employee is removed from the assignment.

b. Since the term "employee" is so significant to, and is used throughout, the new chapter, it appears that the definitions section should include a definition of "employee" (e.g., "Employee" means a temporary help employee--with any necessary cross-references to the definition of "temporary help employee" elsewhere in the code or the statutes).

c. In s. DWD 133.02 (1) (intro.), "the employer and the employee" should be "an employer and an employee." In par. (a), the first part of the last sentence should read: "The department may waive the requirement for the deadline or notice, or both, if it determines that the employee's failure to so contact the employer was for good cause...." In par. (b) 1., "begins" should replace "does in fact begin." In par. (b) 2., second sentence, it appears that "shall" should be substituted for "does in fact." In sub. (3) (a) (intro.), "An employee" should replace "The employee." In par. (a) 4., "his or her correct address" should replace "a correct address."

d. In s. DWD 133.03, "The employee" should be "An employee." Also, "for those benefits" should be inserted after "otherwise qualified."

e. The first sentence of s. DWD 133.04 would be clearer if it read: "When an employee's employment relationship with an employer terminates, his or her application for employment with that employer shall expire."

Response to Legislative Council Recommendations

Proposed Rules Relating to Unemployment Insurance and Temporary Help Employers
Chapter DWD 133
CR 06-032

All recommendations were accepted, except the following:

Comment 2.a. In s. DWD 133.001, in sub. (1) and (2), is it necessary to add "and unless the context clearly indicates a different meaning"? Are there instances in this new chapter where the context of the defined terms clearly indicates a different meaning? If not, this phrase can be deleted. Also, since the second sentence in the definition of "Assignment" in sub. (2) (a) is a substantive provision that should not be part of the definition; it should be placed outside the definitions section. Section DWD 133.001 could be restructured and rewritten as follows:

DWD 133.001 General provisions. (1) DEFINITIONS. (a) Except under par. (b) and unless the context clearly indicates a different meaning, the definitions in ch. DWD 100 apply to this chapter.

(b) Notwithstanding ch. DWD 100 and unless the context clearly indicates a different meaning, in this chapter:

1. "Assignment" means work assigned...for a client company of the employer.
2. "Client company" means....
3. "Employer" has the same meaning....

(2) END OF ASSIGNMENT. For purposes of this chapter, an assignment ends when the employee completes it or when the employee is removed from the assignment.

Department response: The definitions section of the department's unemployment rules are generally written to include the phrase "unless the context clearly indicates a different meaning." The department prefers this cautious approach. The department does not agree that the suggested placement of "end of assignment" is preferable to the department's proposal.

Comment 2.b. Since the term "employee" is so significant to, and is used throughout, the new chapter, it appears that the definitions section should include a definition of "employee" (e.g., "Employee" means a temporary help employee--with any necessary cross-references to the definition of "temporary help employee" elsewhere in the code or the statutes).

Department response: The department does not agree that defining the term "employee" as an employee of a temporary help company is necessary. The proposed rule explains when the employment relationship between an employer and an employee continues for the purpose of unemployment insurance eligibility and "employer" is defined as a temporary help company. It is obvious that the term "employee" applies to an employee of the defined term "employer."

2005 Session

FISCAL ESTIMATE
DOA-2048 N(R03/97)

☒ ORIGINAL ☐ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB or Bill No./Adm. Rule No.
DWD 133

Amendment No. if Applicable

Subject
Unemployment insurance and temporary help employers

Fiscal Effect

State: ☒ No State Fiscal Effect

Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.

☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs - May be possible to Absorb Within Agency's Budget ☐ Yes ☐ No

☐ Decrease Costs

Local: ☒ No local government costs

1. ☐ Increase Costs ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected:
☐ Towns ☐ Villages ☐ Cities
☐ Counties ☐ Others _____
☐ School Districts ☐ WTCS Districts

Fund Sources Affected
☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate

The rule reflects current best practices in the temporary help industry and is not expected to qualify or disqualify more claimants of employers following these practices.

Long-Range Fiscal Implications
none

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Elaine Pridgen 608/267-9403	266-9427 3/31/06	3/31/06

FISCAL ESTIMATE WORKSHEET

2005 Session

Detailed Estimate of Annual Fiscal Effect DOA-2047 (R10/94)	☒ ORIGINAL ☐ UPDATED ☐ CORRECTED ☐ SUPPLEMENTAL	LRB or Bill No./Adm. Rule No. DWD 133	Amendment No.

Subject
Unemployment insurance and temporary help employers

I. One-time Costs or Revenue Impacts for State and/or Local Government (do not include in annualized fiscal effect):

0

II. Annualized Costs:	**Annualized Fiscal impact on State funds from:**	
	Increased Costs	**Decreased Costs**
A. State Costs by Category		
State Operations - Salaries and Fringes	**$0**	**$0 -**
(FTE Position Changes)	0 (FTE)	0
State Operations - Other Costs	0	0 -
Local Assistance	0	0 -
Aids to Individuals or Organizations	0	0 -
TOTAL State Costs by Category	**$0**	**$0**
B. State Costs by Source of Funds	**Increased Costs**	**Decreased Costs**
GPR	**$0**	**$0-**
FED	0	0
PRO/PRS	0	0 -
SEG/SEG-S	0	0 -
III. State Revenues - Complete this only when proposal will increase or decrease state revenues (e.g., tax increase, decrease in license fee, etc.)	**Increased Rev.**	**Decreased Rev.**
GPR Taxes		$ -
GPR Earned		-
FED		-
PRO/PRS		-
SEG/SEG-S		-
TOTAL State Revenues		**$0-**

NET ANNUALIZED FISCAL IMPACT

	STATE	LOCAL
NET CHANGE IN COSTS	0	0
NET CHANGE IN REVENUES	0	0

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Elaine Pridgen (608) 267-9403	266-9427	3/31/06

Department of Workforce Development

Proposed Rules Relating to Unemployment Insurance and Temporary Help Employers

Chapter DWD 133/CR06-032

Public Hearing Summary

A public hearing was held in Madison on May 1, 2006.

The following individuals commented in support or registered support for the proposed rules:

1. Ray Odya, Director of Human Resources & Legal Affairs
   Seek Careers/Staffing
   Grafton
   (Also representing Wisconsin Association of Staffing Services)

2. David Cornwell, President
   Cornwell Staffing Services
   Milwaukee

3. Troy Hartman
   FirstSite Staffing
   Hudson
   (with one suggested modification)

4. Melissa Manley, Human Resource Supervisor
   QPS Companies
   Brookfield

5. Bobbi Curtis, Human Resource Manager
   QPS Companies
   Brookfield

6. David Silverberg, Management
   QualiTemps, Inc.
   Madison

7. MaryLynn Shirshac, Safety and Compliance Supervisor
   QualiTemps, Inc
   Madison

The following individual requested modifications to the proposed rules:

William Sample
Attorney at Law
Madison

Comment Summary and Department Response

Ray Odya, Seek Careers

- I support the proposed rule. Employees should not be able to refuse work that they initially said they would and could do and still be eligible to collect unemployment benefits.
- The employee agrees when applying to accept a stated range of assignments, pay rates, shifts, and locations. It is on that basis that the temporary help company accepted their application. There is also mutual understanding that employment is intermittent and there will often be a brief time of unemployment between assignments.
- The evolution of this proposed rule goes back to meetings with DWD staff in 1993. The issues has been discussed at length with the UI Advisory Council. The Advisory Council has stood steadfast on this issue even when threatened with a suspension of federal FUTA dollars totaling nearly $1 billion. Both employee and management representatives have endorsed the idea of a joint contract of hire to which both parties are bound and which encompasses the intermittent nature of the assignments in our industry. The department has issued administrative directives, but these directives have not been followed by all administrative law judges.

Department response: The comment displays general support for the approach taken by the Department in the proposed rule.

Troy Hartman, FirstSite Staffing

- I am in support of the majority of this proposal.
- I think DWD should explain the rules to the claimant when they first sign up for unemployment insurance. I have lost many great employees because they felt cheated or misled when they were disqualified for benefits for turning down a temp job. The proposed rules are fair and reasonable as long as everyone is aware of the rules. I do not feel that is should be the responsibility of the employment agency to communicate to each and every stipulation to every employee on our time and at our expense.

Department response: The comment does not meet the substance of the proposed rule, yet asserts support for it.

William Sample, Attorney at Law

Mr. Sample's comments and attachments are 26 pages long. A copy is attached.

Requested modifications:

1. Put in "good cause" exceptions for the otherwise-disqualifying situations listed in s. DWD 133.02 (3) (a).
2. Add a provision to the rule expressly recognizing that the so-called labor standards provisions, 26 U.S.C. 3304(a)(5)(B) and s. 108.04(9)(b), Stats., are applicable to subsequent assignments (and not just first ones) from temporary help employers to their employees.

Rationale for requesting modification to allow good cause exceptions:

- The proposed rule places great emphasis upon a temporary employee's contractual agreement to certain conditions of employment. This raises the issue of procedural unconscionability. Procedural unconscionability bears upon factors related to the meeting of the minds of the parties to the contract: age, education, intelligence, business acumen and experience, relative bargaining power of the parties, and whether the terms were explained to the weaker party.
  - Temporary help employer has more business acumen and experience and superior bargaining power than prospective employee.
  - This superior position is strengthened by the access that the industry has had to both DWD and the UI Advisory Council (UIAC).
    - August 6, 1998 letter from president of Cornwell Staffing to Greg Frigo, then Director of Bureau of Legal Affairs for UI. Letter discusses meeting with UI staff and preparing agenda.
    - UIAC records show significant, ongoing access.
  - Temporary help employees had no such access.
- Greater bargaining power, along with other advantages employers have over employees, necessitate that a rule provide some protection for employees and the proposed rule does not.
- Because the proposed rule does not provide protection for employees, the contractual provisions it envisions could be substantively unconscionable as well, that is unreasonable as applied to a temporary help employee.
- Proposed rule should have a "good cause" provision for refusal of an assignment for each of the scenarios that proposed s. DWD 133.02 (3) (a) defines as a quit of employment.
  - DWD's analysis of adjacent states indicates that Minnesota, Iowa, and Illinois each have good cause provisions.
  - Example from a LIRC case: EE can work first or second shift when she begins employment because ex-partner has physical custody of their children. She does some second shift work and then works only first shift assignments for approximately one year and, in the interim, obtains custody of her children. She can no longer work second shift because she needs to be home with them in the evenings. The proposed rule would treat a refusal of second shift work as a quit while UI laws and rules

currently in place generally do not require that a UI claimant be available for second or third shift work as a condition of eligibility. The disqualification in the proposed rule is grossly unfair to the employee, and it would be avoided by a good cause provision.

- If an employee had private transportation at the time of the original contract of employment and then loses that transportation due to accident or breakdown, the employee remains bound by the original agreement unless the employer agrees to modification of that provision. In this context, the proposed rule essentially places in the hands of the employer determination of the employee's eligibility for unemployment insurance.

Rationale for requesting modification so rule expressly recognizes that the labor standards provisions are applicable to subsequent assignments and not just the first one:

- 26 U.S.C. 3304(a)(5)(B) requires states to adopt a law that provides that UI may not be denied for refusal of new work if the wages, hours, or other conditions of the work offered are "substantially less favorable to the individual than those prevailing for similar work in the locality." Wisconsin has adopted this provision at s. 108.04 (9) (b), Stats.
- Federal Dept. of Labor (DOL) and the State agree that the labor standards provision applies to new offers of work from a temporary help employer but disagree on whether it applies to subsequent offers.
- State position is laid out in *Cornwell Personnel Associates v. LIRC*, 175 Wis. 2d 537 (Ct. App. 1993) (hereinafter *Cornwell*). The court held that subsequent assignments from a temporary help employer were not new work within the meaning of s. 108.04 (9) (b), Stats. This means a temporary help employee does not have cause to refuse a subsequent assignment even if the work offered does not meet prevailing labor standards.
- DOL has disputed the State's position.
  - 7/17/94 DOL letter to DWD UI Division in response to notification of *Cornwell* decision.
    - Purpose of labor standards law is to prevent depression of conditions of employment below those prevailing in the locality. Purpose not accomplished if new assignments by temporary help firm were not subject to the labor standards law.
    - An assignment from a temporary help agency would be new work if it changed job duties, number of hours worked per day, or wages.
  - 8/17/98 Formal DOL Program Letter 41-98 to States on Application of the Prevailing Conditions of Work Requirement
    - Released in part due to increase in temporary workers.
    - "A refusal of temporary work in the form of a new assignment from a temporary help firm is also subject to the prevailing conditions requirement."
    - "No contract granting the employer the right to change working conditions may act as a bar to determining that 'new work' exists."
  - 7/19/2000 Change to DOL Program Letter 41-98
    - Changes in a job situation would have to be material for the subsequent

assignment to be considered new work.
    - Examples of material changes include a change from $10 per hour to $8 per hour or an assignment as a secretary to an assignment as an accounting clerk. It is immaterial whether there is a break between assignments.
  - 3/15/01 DOL letter to DWD UI Division
    - Both regional and national offices of DOL have discussed issue of application of prevailing conditions of work requirement repeatedly with DWD and DOL's position remains the same.
    - Failure to move on issue could result in conformity proceedings for failure to comply with requirements of 26 U.S.C. 3304(a)(5)(B).
  - 5/31/01 DOL letter to DWD UI Division
    - When employer materially changes the condition of work, an offer of "new work" exists. "New work" is not, as the *Cornwell* court stated, limited to indefinite lay-offs. Federal law does not permit temporary help agencies to be treated any differently in this regard than other employers.
    - Failure by Wisconsin to enact legislation conforming with the federal position on what constitutes new work in the temporary employment context "will lead to conformity proceedings."
- DOL pronouncements are "interpretive rules" under the Administrative Procedure Act and under *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) are entitled to judicial deference.
- It is one thing for DWD to ignore this law because they believe they are bound by the *Cornwell* decision. It is another to affirmatively enact an administrative rule in violation of that law.

Department response:

The "good cause" exceptions suggested by the comment are contrary to existing law and policy applicable to employees generally. The comment cites hypothetical cases of employees whose restrictions (childcare-related or transportation restrictions) arise during the course of employment and prior to employer's offer. Such circumstances are personal to the employee and not "good cause attributable to the employer" and thus do not constitute and exception to a voluntary separation from employment. The Department does not believe there is reason to create a special exception for temporary employment of the sort the comment seeks.

The Department disagrees with the notion that employers have any greater "access" than employees to either the Department of to the Unemployment Insurance Advisory Council (UIAC). Access to the UIAC is afforded to the public through regular public meetings. The UIAC consists of equal numbers of employee and employer representatives. Consideration and development of the rule have occurred in an open and fair manner over a very lengthy period of time, during which the opportunity for input to the process was equally available to employees and their representatives. The fact that access to the Department is or was made by the public through direct communications to the Department does not mean that access favors any particular interest. The Department does not believe that employees have been disadvantaged by the process.

The comment correctly asserts that "new work" triggers the application of labor standards. However, the Wisconsin Court of Appeals in *Cornwell Personnel Associates v. LIRC*, 175 Wis. 2d 537 (1993) held that a temporary employer's offer of a second of subsequent assignment is not "new work" where the assignment is within the terms of the employee's contract.

The commenter contends *Cornwell* can be safely ignored by the Department and notes the record of objection to *Cornwell* by the U.S. Department of Labor. The comment suggests that the Department ought not to follow *Cornwell* and that continuing to follow *Cornwell* will subject the State of Wisconsin to legal proceedings by DOL to force conformity with DOL's position regarding its definition of "new work" in the temporary employment context.

Notwithstanding DOL's contrary interpretation of the term "new work," the Department considers itself bound by the decision in *Cornwell.* DOL has not formally interpreted "new work" but has instead merely issued informal opinions and Unemployment Insurance Program Letters (UIPLs), which do not necessarily contain legally correct interpretations and ordinarily do not have the force of formally promulgated rules. It appears that there is no judicial authority on the issue other than the *Cornwell* decision.

In response to a letter from Wisconsin Governor Scott McCallum on July 27, 2001, in support of the *Cornwell* decision, DOL promised to review the matter. In addition, the Department notified DOL of its intention to promulgate the proposed rule on temporary help employers. In response, DOL acknowledged in January 2005 that its "review" of the *Cornwell* matter remained undone. DOL has not otherwise acted in the matter. Thus the threat of "conformity proceedings" has not been realized. More importantly, the Department believes it is not only proper that it follow *Cornwell*, but, in the absence of legislation overruling *Cornwell*, it is required to follow it. It is far from clear that the State has not conformed to federal law. Indeed, under the circumstances, one view is that *Cornwell* insulates the State from nonconformity.

Furthermore, the proposed rule neither alters nor affirms the specific analysis of what constitutes "new work." Rather, the proposed rule establishes with greater precision and clarity the conditions under which employment either continues or ends following the end of an initial assignment. The rule addresses the actions required of the employer and employee, respectively. The Department believes that the proposed rule properly accounts for the unique circumstances involved in temporary employment. The rule balances the competing interests of temporary employers and employees in the manner in which it determines the issue of termination of the temporary employment relationship.

Will Sample

Comment on proposed DWD 133

The proposed rule places great emphasis upon a temporary employee's contractual agreement to certain conditions of employment. In the context of an employer/individual employee negotiation, this immediately raises the issue of procedural unconscionability. *See Wisconsin Auto Title Loans, Inc. v. Jones,* 2005 WI App. 86, 280 Wis. 2d 823, 696 N.W.2d 214 (Ct. App. 2005). Whether a contract provision is procedurally unconscionable depends upon the age, education, intelligence, business acumen and experience, relative bargaining power of the parties, and whether the terms were explained to the weaker party. *Wisconsin Auto Title Loans,* 280 Wis. 2d 823, 833. In the temporary employment arena, the employer almost always possesses more business acumen and experience than prospective employees, and superior bargaining power as well. And this superior position is only strengthened by the access the temporary help industry has had both to the Department of Workforce Development in general and to the Unemployment Insurance Advisory Council in particular.

Attached is a copy of an August 6, 1998 letter from the president of Cornwell Staffing Services to Greg Frigo, then director of the Bureau of Legal Affairs in the Department of Workforce Development's (DWD) Unemployment Insurance Division. In that letter he refers to a meeting he and Mr. Frigo would be conducting with Mr. Frigo's staff on September 1, and he suggests that he and Mr. Frigo prepare an agenda. Temporary help employers have also had ongoing, significant access in recent years to the Unemployment Insurance Advisory Council, as can be seen by even cursory examination of the records of that body.

Temporary help employees, by contrast, have had no such access, either to DWD or to the Advisory Council. This disparity translates to significantly greater bargaining power in the hands of temporary help employers, than in those of temporary help employees. In turn that greater bargaining power, along with the other advantages employers have over employees, necessitate that a rule in this context provide some protection for employees, and the proposed rule does not do so. Because it does not do so, the contractual provisions it envisions could be substantively unconscionable as well, that is, unreasonable as applied to a temporary help employee. *See Wisconsin Auto Title Loan,* 280 Wis. 2d 823, 833.

The protection the proposed rule should have would take the form of a "good cause" provision for refusal of an assignment. DWD's analysis of similar rules in adjacent states indicates that Minnesota, Iowa, and Illinois each have good cause provisions applicable to failures by employees that would otherwise be disqualifying for unemployment insurance purposes. There is no reason why DWD 133 should not have such a provision for each of the scenarios proposed DWD 133.02 (3)(a) defines as a quit of employment.

Consider an employee who, when she first begins working for a temporary help employer, can work first or second shift. She can work second shift because her ex-partner has physical custody of their children. In fact, she does work a second shift assignment at or near the beginning of her employment. She then works only first shift assignments for the employer over the course of approximately a year and, in the interim, obtains custody of her children and so can no longer work second shift assignments because she needs to be home with them in the evenings. If, at this point, the employer offers the employee a second shift assignment, should she be penalized for declining it? The unemployment insurance laws and rules as currently in place generally do not require, as a condition of unemployment insurance eligibility, that a claimant be available for second (or third) shift work. Under the proposed rule the employee will be penalized, because the rule treats her failure to accept the assignment as a quit of employment (because the employee at the time of hire was willing to work second shift). The employee cannot be said, however, to have intended to quit the employment, when her refusal of second shift work was in order to be home with her children in the evenings. The disqualification called for by the proposed rule is grossly unfair to the employee, and it would be avoided by a good cause provision. Nor is this a hypothetical example: the case is *Smith v. Cornwell Personnel Associates, Ltd.*, UI Dec. Hearing No. 04603593MW (LIRC March 2, 2005).

One of the areas of contractual agreement specifically mentioned in the proposed rule is mode of transportation. Suppose a prospective employee has private transportation at the time of the original contract of employment, and then subsequently loses that transportation due to accident or breakdown. This scenario does happen. Under the proposed rule, the employee remains bound by his or her original agreement to provide transportation unless the temporary help employer agrees to modification of that provision of the agreement. The proposed rule, in this context, essentially places in the hands of the employer determination of the employee's eligibility for unemployment insurance.

The kind of contractual agreement called for by the rule is substantively unfair in a much larger context as well: that of labor standards as contemplated by Wis. Stat. § 108.09(b). That statute is one of the so-called "conformity" provisions in every state's unemployment insurance law; that is, it is a provision required by federal law, in this instance 26 U.S.C. § 3304(a)(5)(B). The statute requires that unemployment benefits not be denied for refusal of new work if the wages, hours, or other conditions of the work offered are "substantially less favorable to the individual than those prevailing for similar work in the locality" (I will use "non-prevailing" as a shorthand term for an offer of work one or more conditions of which falls within the quoted language). All agree that this notion governs the first offer of work a temporary help employer makes to a prospective employee. There is conflict between the State and federal government, however, as to its applicability to subsequent offers of work

from the employer. Everyone connected with this issue knows that the State's position is laid out in *Cornwell Personnel Associates, Ltd. v. LIRC,* 175 Wis. 2d 537, 499 N.W.2d 705 (Ct. App. 1993)(hereafter *Linde*). There the court held that subsequent assignments from a temporary help employer were not new work within the meaning of Wis. Stat. § 108.04(9)(b). The effect of this ruling was that a temporary help employee would not have cause to refuse a subsequent assignment even if the work offered were "non-prevailing."

The Department of Labor has vigorously disputed the State's position on this issue, both informally and formally. Informally, it has done so by letters, including a July 17, 1994 letter (attached) from DOL Regional Director Despenza to Bruce Hagen, then director of DWD's Unemployment Insurance Division. The regional director first reiterated previous federal pronouncements, such as that an employee cannot lose compensation rights for refusals of substandard work; that the purpose of the labor standards law is to prevent depression of conditions of employment below those prevailing for similar work in the locality; and that new work includes an offer of work from a current employer of a. different duties from those in the existing contract of employment, or b. different terms or conditions of employment from those in the existing contract.

The regional director indicated that the purpose of the law would not be accomplished if new assignments by temporary help firms were not subject to the labor standards law. She noted the argument that the "existing contract" between the temporary help firm and the individual contemplates constantly changing working conditions for the employee, such that the "contractual test" does not immediately lead to the conclusion that each new assignment from a temporary help agency is "new work." She noted the need to revise the "new work" test of Program Letter No. 984 and that, with regard to transfers or new assignments, "the test would include an additional provision that any material change in working conditions will be viewed as a new contract (regardless of the 'existing contract') and, therefore, new work." p.3. An assignment from a temporary help agency would constitute new work if it changed the job duties, number of hours worked per day, or wages. The regional director concluded by suggesting that Wisconsin treat the analysis in question in *Linde* as dicta. That of course is not possible, since the language in fact is not dicta.

Formally, the Department of Labor issued Program Letter No. 41-98 on August 17, 1998 (attached). This letter was a reminder to the States of the prevailing conditions of work provision of the Federal Unemployment Tax Act (26 U.S.C. § 3304(a)(5)). Another factor that led to the issuance of the letter was the increase in temporary workers in the workforce. The letter noted: "It does not matter why the individual refused new work not meeting the prevailing conditions requirement; if the work does not meet the prevailing conditions requirement, compensation may not be denied." p.3 Letter 41-98 then reiterated the analyses of Program Letter No. 984, prior to discussion of

assignments from temporary help employers. Letter 41-98 indicated that Letter 984

> did not . . . recognize that, if an employer requires a contract providing for constantly changing conditions, then the prevailing conditions requirement would be nullified.
>
> A common-sense understanding of the term 'new work' includes performing different work, even if the employment contract provides for performing such work. Further, by accepting this as a condition of employment, the individual would, in effect, be forced to waive the protections under the prevailing conditions requirement as a condition of accepting a job. For these reasons, **UIPL 984 is supplemented by the following: No contract granting the employer the right to change working conditions may act as a bar to determining that 'new work' exists** (p.5, emphasis added).

The letter then reiterated the circumstances in which there must be a prevailing conditions analysis. The letter noted that the fact that the work is temporary "should generally be sufficient to trigger a prevailing conditions inquiry" (p. 10, emphasis added). And since "new work" may not be limited by an employment contract, "a refusal of temporary work in the form of a new assignment from a temporary help firm is also subject to the prevailing conditions requirement." Id. The letter noted also that, since what constitutes similar work depends on the responsibilities involved, the operations performed, and the skill, ability, and knowledge required (p.6), temporary work should not be compared only to similar temporary work but instead "must be compared with all work, temporary and permanent, in a similar occupational category." p.10.

The Department of Labor issued a change to Program Letter No. 41-98, in which it indicated that changes in a job situation would have to be material for the subsequent assignment to be considered new work. Program Letter No. 41-98 Change 1 (July 19, 2000). As examples of material changes, the letter gave: an assignment as a secretary to an assignment as an accounting clerk; and a change from a $10 per hour secretarial assignment to an $8 per hour secretarial assignment. The letter noted that it was immaterial whether there is a break between assignments.

Attached is a March 15, 2001 letter from then-Regional Director Despenza to Bruce Hagen, then-Administrator of DWD's Unemployment Insurance Division. Ms. Despenza noted that DOL had discussed with the state agency the issue of legislation to "correct" *Linde* at both the regional and national office levels of DOL, that DOL's position remained the same, and that the State's Advisory Council's "failure to move on this issue could result in implementation of conformity proceedings." Ms. Despenza followed this letter up with a May 31, 2001 letter (attached), which indicated essentially that

failure by Wisconsin to enact legislation conforming with the federal position on what constitutes new work in the temporary employment context "will lead to conformity proceedings."

These pronouncements by DOL are what are known as "interpretive rules" under the Administrative Procedure Act (5 U.S.C. §§ 551 et seq.). Section 553(b)(3)(A) of that Act exempts such rules from the same section's "notice and comment" requirements for substantive rules. It used to be the case that, because of the less formal procedures governing their issuance, interpretive rules were not entitled to any weight. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). More recently, however, the Court has expressly indicated that such interpretive rules are entitled to judicial deference despite their not having been adopted via notice and comment rulemaking. *See Barnhart v. Walton,* 535 U.S. 212, 221 (2002). It is one thing for the administrative agencies of the State to ignore this law because they believe they are bound by the *Linde* decision. It is another to affirmatively enact an administrative rule in violation of that law, but that is what this proposed rule is.

In its 1968 Program Letter No. 984, in fact, DOL exactly stated the problem that the current proposed rule not only does not fix, but instead codifies: " . . . prevailing wage and conditions-of-work standard could be substantially impaired by employers who hired workers at prevailing wages and conditions, and thereafter reduced the wages or changed the conditions, thereby depriving workers of the protections intended to be given them by the prevailing wage and conditions-of-work standard." UIPL 984, p. 4.

It is possible that DOL unfairly judges temporary help employers and that those employers would not engage in the practice of hiring workers at prevailing conditions of employment and then depress the labor market by offering continuing workers non-prevailing work. If DOL's fears are wrong, then neither the temporary help industry nor DWD should have any objection to my recommended changes to the proposed rule: 1. put in "good cause" exceptions for the otherwise-disqualifying situations listed in 133.02(3)(a); and 2. add a provision to the rule expressly recognizing that the so-called labor standards provisions, 26 U.S.C. § 3304(a)(5)(B) and Wis. Stat. § 108.04(9)(b), are applicable to subsequent assignments (and not just first ones) from temporary help employers to their employees.

William S. Sample
Attorney at Law
State Bar No. 1019393

CORNWELL STAFFING SERVICES

D.L. CORNWELL
PRESIDENT

August 6, 1998

Mr. Greg Frigo
Director, Bureau of Legal Affairs
Unemployment Compensation
Department of Workforce Development
201 E. Washington Avenue
Madison, WI 53708

Dear Greg:

In preparation for our meeting with your staff personnel on September 1st I thought it would be appropriate to enclose file copies of the cases we discussed a month ago regarding the conclusion by various Administrative Law Judges and the Review Commission that subject employment contracts between my firm and employees are not valid and binding.

You will recall that at the time of the Linde claim we did not employ a contract of hire as a governing employment agreement with our employees. After Linde the Department appealed the Leighton decision, Hearing No. 93605582MW to the Review Commission for clarification regarding definition of new work and the application of prevailing labor standards to subsequent offers of continued employment pursuant to the presence of a contract of hire. The Department further issued a UCD governing refusals to continued offers of employment which are not new work when a contract of hire is agreed upon as a condition of employment. Subsequent job offers which do not violate that contract of hire would not be deemed cause attributable to the employer should an employee refuse to accept same and thus voluntarily terminate his employment relationship. The Department in issuing the UCD determined that the good cause provision cannot be supplied to second or subsequent assignments unless the assignments are deemed to be new work. Further, the department established that quit good cause attributable may apply only if the offered assignment violates the original contract of hire and the employee quits for that reason. Subsequent job offers would be deemed new work if the offer includes wages, hours and conditions which were outside the scope of the original contract of hire. Conversely, you will note in the Decision issued by the Review Commission involving the claim of Shannon Brannan, Hearing No. 98601471MW, the Commission, other than Pamela Anderson, concluded that our contract of hire is a private agreement between parties and as such cannot supercede the legal principles operative in the analysis of Chapter 108. In addition, the Department has

concluded that parties are free to enter into a contract of hire agreement, however that employee does not contract away his right to benefits by signing such a document, nor is the Department bound by said document when determining the employee's benefit eligibility. This is certainly contrary to the position established by the Department that if a contract of hire is agreed to that subsequent offers of employment which are not deemed to be new work are not subject to labor standard provisions of statute if they meet the contract of hire established by the employer and employee.

We should perhaps prepare an agenda, Greg. I would look to you for suggestion and guidance in this regard when we talk to legal personnel representing the Review Commission. Please advise.

On a different note, I reviewed my file this morning regarding the correspondence when we contacted the Department of Labor in late '94 and early '95 regarding the pending UIPL which we thought the Department of Labor would issue as a follow up to the Linde decision. At that time WMC was actively involved as was our national association in Alexandria, VA. I believe Bruce Hagen met with Ed Lenz, legal counsel for our national industry association. Following the meetings of that time this issue was placed on the back burner pending further review by the Department of Labor. Today I recontacted John Metcalf at WMC and Ed Lenz of our national association to invite their review and interest again regarding this issue. Perhaps a suggestion ought to be raised that we meet with Department of Labor personnel as was attempted in 1994, reference the Chicago region, to provide further information regarding the impact of a decision to reclassify all future assignments as new work.

In closing, I would appreciate your comments on both above issues. Thanks again for your support and concern.

Best regards,

David L. Cornwell
President

DLC/laj

Encl.

U.S. Department of Labor

Employment and Training Administration
230 South Dearborn Street
Chicago, Illinois 60604

Reply to the Attention of: 5 TGU - LEG-1(WI)

JUL 1 7 1994

Mr. Bruce Hagen, UI Director
Department of Industry, Labor
and Human Relations
P.O. Box 7905
Madison, WI 53707

SUBJECT: Whether Employees of a Temporary Help Firm are Subject to the "New Work" Requirement

Dear Mr. Hagen:

This is in response to your March 14 letter concerning the case of Cornwell Personnel Associates, Ltd., v. Labor and Industry Review Commission, 175 Wis. 2d 537, 499 N.W. 2d 705 (Wis. Ct. App. 1993). You asked for our review of the case to assure that it did not interpret the court's position inconsistently with Federal law.

1. The Cornwell Case. In Cornwell, the court found that an individual's refusal of three assignments offered by a temporary help firm constituted a quit for good cause under subparagraphs (a) and (b) of Section 108.04(7) of Wisconsin's unemployment compensation (UC) law. The reasoning of the court was that each of the three assignments provided for a wage reduction of fifteen to twenty percent from the claimant's previous assignment and was significantly less favorable than those prevailing for similar work in the labor market. 175 Wis. 2d at 547-548.

   The court went on to address the issue of "new work." The court determined that "[e]ach new assignment from a temporary help agency to its employee is not to be regarded as 'new work'." Id. at 550. Although the court considered the acceptance of the initial assignment for the temporary help firm to be "new work," the next three job offers made by the temporary help firm were not considered "new work." Thus, the court found that Section 108.04(9) of the State's UC law, which implements the requirements of Section 3304(a)(5) of the Federal Unemployment Tax Act (FUTA), was not applicable. Id. at 551.

2. Federal position on offer of "new work". Although the Wisconsin Agency is well aware of the basic Federal statue and our issuances pertaining to "new work," we will repeat some important points in the interest of giving a complete analysis. Section 3304(a)(5), FUTA, requires that "compensation shall not be denied . . . to any otherwise eligible individual for refusing to accept new work" under any of three conditions. One of these conditions is that "the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality."

UIPL 984, dated September 20, 1968, discusses the underlying purpose of Section 3304(a)(5)(B), FUTA. The UIPL notes that the purpose is "for the protection of workers." It also notes that the Director of the Committee on Economic Security testified before Congress that the "employee cannot lose his compensation rights because he refuses to accept substandard work. . . . [I]f the conditions are such that they are substandard, that they are lower than those prevailing for similar work in the locality, the employee cannot be denied compensation." UIPL 984 concludes that the purpose of Section 3304(a)(5)(B), FUTA, is to prevent the Federal tax credit--

> from being available in support of State unemployment compensation laws which are used, among other things, to depress wage rates or other working conditions to a point substantially below those prevailing for similar work in the locality. The provision, therefore, requires a liberal construction in order to carry out the Congressional intent and the public policy embodied therein.

UIPL 984 established a contractual test to determine what constitutes an offer of "new work." "New work" includes "an offer by an individual's present employer of (a) different duties from those he has agreed to perform in his existing contract of employment, or (b) different terms or conditions of employment from those in his existing contract." The UIPL states that "an attempted change in the duties, terms or conditions of the work, not authorized by the existing employment contract, is in effect a termination of the existing contract and the offer of a new contract." Several examples are provided of new work for the employer for whom the individual is working at the time of the offer. Among the examples are a change in job duties from a bookkeeper to a typist; a change in hours worked per day from 8 to 10; and a change in wages from $3 to $2 an hour.

As we noted above, the purpose of Section 303(a)(5)(B), FUTA, is to protect the worker and to prevent the UC system from being used to depress wage rates and other conditions of work. We believe that this purpose would not be accomplished if new assignments by temporary help firms were not subject to its requirements. Temporary help workers are no less subject than other workers to changes in job duties, number of hours worked per day and wages. Given the recent growth of the temporary help industry, this is a matter of special concern.

As noted above, the UIPL provides that "an attempted change in the duties, terms or conditions of the work, not authorized by the existing employment contract, is in effect a termination of the existing contract and the offer of a new contract." When UIPL 984 was issued in 1968, this test was believed to apply to all employers who might change the working conditions of employees. However, it may be argued that the "existing contract" between the temporary help firm and the individual contemplates constantly changing working conditions for the employee. Thus, the contractual test does not immediately lead to the conclusion that each new assignment for a temporary help firm is an offer of "new work."

Given the changes in the job market, we believe a need exists to revise the test of "new work" found in UIPL 984. We have not yet determined what the final form of the new test will be. However, at this time, we are considering maintaining the basic contractual test since it is applicable whenever there is a quit, discharge or indefinite layoff from employment. However, for purposes of determining "new work" when a transfer or new assignment is offered, the test would include an additional provision that any material change in working conditions will be viewed as a new contract (regardless of the "existing contract") and, therefore, new work. Some new assignments from temporary help firms would constitute a material change in working conditions and, therefore, would be considered offers of new work under this new test. Thus, whenever a temporary help firm offers an assignment calling for a change in job duties, number of hours worked per day or wages, an offer of "new work" occurs. We hope to further develop this test and issue it as a UIPL.

3. Conclusion. We believe that new assignments from temporary help firms fall within the meaning of "new work" under Section 3304(a)(5), FUTA. Therefore, we believe the court's view with respect to such assignments is erroneous. However, since UIPL 984 does not provide a test which plainly finds this view to be a problem, we will not raise any issue at this time. However, we do recommend that the Agency not give any effect to these views as this would likely create issues once our revised interpretation is issued. This could be done, as the Agency suggests, by treating the language concerning "new work" as dicta.

Two final points need to be made. First, despite its rejection of a new assignment for a temporary firm as an offer of new work, the Cornwell court did apply the prevailing conditions of work requirement as part of a determination of whether the individual quit with good cause. If prevailing conditions of work are used to determine if a quit with good cause occurred, then there is obviously no need to determine if there was an offer of "new work." Even though this may be the case, we do not believe a state may limit its definition of "new work" in provisions implementing Section 3304(a)(5), FUTA. Second, we note that "new work" also applies to subparagraphs (A) and (C) of Section 3304(a)(5), FUTA, concerning labor disputes and union membership. If the State's definition of "new work" is more limited than the Federal definition, then we would also raise an issue on the application of these subparagraphs.

We wish to thank your Agency for bringing this matter of our attention. We would appreciate being advised of any action the Agency takes concerning the Cornwell decision.

If you have any questions, please contact me or Thomasina Smith at 312/353-2592.

Sincerely,

Barbara M. Despenza

BARBARA M. DESPENZA
Regional Director
Unemployment Insurance

U. S. Department of Labor Employment and Training Administration Washington, D.C. 20210	CLASSIFICATION UI
	CORRESPONDENCE SYMBOL TEUL
	DATE August 17, 1998

DIRECTIVE : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 41-98

TO : ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM : GRACE A. KILBANE Grace A. Kilbane
Director
Unemployment Insurance Service

SUBJECT : Application of the Prevailing Conditions of Work Requirement

1. Purpose. To remind States of the requirements of the prevailing conditions of work provision of the Federal Unemployment Tax Act (FUTA) and to provide additional guidance.

2. References. Section 3304(a)(5)(B), FUTA; Unemployment Compensation Program Letter (UCPL) No. 130; and Unemployment Insurance Program Letter (UIPL) No. 984.

3. Background. Section 3304(a)(5)(B), FUTA, requires, as a condition of employers in a State receiving credit against the Federal unemployment tax, that unemployment compensation (UC) shall not be denied to any otherwise eligible individual for refusing to accept new work--

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> If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;[1]

The Department previously issued guidance on the prevailing conditions requirement in 1947 in UCPL 130[2] and in 1968 in UIPL No. 984. Although both issuances remain in effect, the Department is concerned that, because they were issued a long time ago, not all States remain aware of them or properly apply them. This concern arises from several training sessions and conferences where the prevailing conditions requirement was discussed. The Department also learned of a State-conducted survey on the prevailing conditions requirement which indicated that many States were not examining fringe benefits. When the Advisory Council on Unemployment Compensation queried States on their eligibility provisions, it notably did not ask about the prevailing conditions requirement and only a few States mentioned that requirement in their responses. Also, in the 30 years since the most recent UIPL was issued, the labor market has undergone significant changes, notably in the increase in temporary workers and the importance of fringe benefits. Therefore, this UIPL is being issued.

Section 4 of this UIPL offers a brief summary of UCPL 130 and UIPL 984 (both attached). It also emphasizes that the prevailing conditions requirement applies to certain voluntary quits and clarifies UIPL 984's discussion of a

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[1] Two other requirements exist in Section 3304(b)(5), FUTA: UC may not be denied for refusing new work if the position offered is vacant due directly to a strike, lockout or other labor dispute or if "as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

[2] UCPL 130 was later incorporated in the Department's Benefit Series, 1-BP-1, BSSUI, September 1950.

"contract of employment." Section 5 discusses one aspect of adjudicating prevailing conditions issues. Section 6 addresses a change in the labor market - the increase in temporary work - and its relation to the prevailing conditions requirement. Except for the discussion of the contract of employment, this UIPL does not modify UCPL 130 or UIPL 984, both of which remain in effect.

This UIPL contains the minimum requirements States must meet to conform with the prevailing conditions requirement. Nothing prohibits States from interpreting State law provisions implementing the prevailing conditions requirement in a manner more favorable to the individual worker.

4. Discussion.

a. In General. To determine if the offered work is suitable, States conduct a two-tiered analysis. First, the work must be suitable to the individual considering his or her previous wage and skill levels. Whether the work is suitable under this test is generally a matter of State law.[3] Second, the work must meet the requirements of Section 3304(a)(5)(B), including the "prevailing conditions of work" requirement. As discussed below, the prevailing conditions requirement applies not only to refusals of work, but also to separations from employment involving a refusal of "new work." It does not matter why the individual refused new work not meeting the prevailing conditions requirement; if the work does not meet the prevailing conditions requirement, compensation may not be denied.

According to UIPL 984, the prevailing conditions requirement is designed to assure that an individual cannot lose rights to compensation because of a refusal of substandard work. Also according to UIPL 984, the purpose of the requirement

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[3] The exception is for extended benefits where "suitable work" must meet the requirements of Section 202(a)(3)(C) of the Federal-State Extended Unemployment Compensation Act.

Also according to UIPL 984, the purpose of the requirement is to prevent, among other things, depressing wage rates or other working conditions to a point substantially below those prevailing for similar work in the locality. The provision requires a liberal construction to effectuate its purpose.

b. Definition of New Work. The prevailing conditions of work requirement applies whenever an offer of "new work" is refused. Under UIPL 984, "new work" includes:

> (1) An offer of work to an individual by an employer with whom the worker has never had a contract of employment,
>
> (2) An offer of reemployment to an individual by a previous employer with whom the individual does not have a contract of employment at the time the offer is made, and
>
> (3) An offer by an individual's present employer of:
>
> > (a) Different duties from those the individual has agreed to perform in the existing contract of employment; or
> >
> > (b) Different terms or conditions of employment from those in the existing contract.[4]

UIPL 984 further provides that "an attempted change in the duties, terms, or conditions of the work, not authorized by the existing employment contract, is in effect a termination of the existing contract and the offer of a new contract." (Emphasis added.) UIPL 984 did not, however, recognize that, if an employer requires a contract providing for constantly changing conditions, then the prevailing

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[4] The basis for this position is discussed in UIPL 984.

conditions requirement would be nullified. A common-sense understanding of the term "new work" includes performing different work, even if the employment contract provides for performing such different work. Further, by accepting this as a condition of obtaining employment, the individual would, in effect, be forced to waive the protections under the prevailing conditions requirement as a condition of accepting a job. For these reasons, UIPL 984 is supplemented by the following: No contract granting the employer the right to change working conditions may act as a bar to determining that "new work" exists.

A refusal of new work may occur when the individual is already unemployed or it may be the cause of an individual's separation from employment. When the refusal is the cause of an individual's unemployment, States must assure that issues adjudicated as "voluntary quits" under State law are also adjudicated, when appropriate, under the prevailing conditions of work requirement. An individual may not be disqualified for voluntarily quitting or for refusing an offer of otherwise suitable work when the new work does not meet the prevailing conditions of work in the locality.

c. When States Must Investigate Prevailing Conditions. The State has an affirmative duty to assure an offer of new work meets the prevailing conditions requirement before denying UC if:

(1) The individual specifically raises the issue,

(2) The individual objects on any grounds to the suitability of wages, hours, or other offered conditions of new work, or

(3) Facts appear at any stage of the administrative proceedings which put the agency or hearing officer on notice that the conditions of the new work might be substantially less favorable to the individual than those prevailing for similar work in the locality.

To conduct a prevailing conditions inquiry, States must determine what constitutes "similar work" and "prevailing wages, hours, or other conditions," and whether the offered work is "substantially less favorable" to the particular claimant than the prevailing wages, hours, or conditions of similar work in the locality.

d. Similar Work. Under UCPL 130, similarity of work is determined by examining the "operations performed, the skill, ability, and knowledge required, and responsibilities involved." States should not rely on job titles alone, which are sometimes misleading. In some occupations the similarity of the work cuts across industry lines. (For example, many accounting functions are similar regardless of the industry.) The nature of the services within an occupation may vary depending on the degree of skill and knowledge required. UCPL 130 continues--

> "[s]imilar work" is basically a common sense test .... On the one hand, the comparison should not be so broad as to result, for example, in the finding of a prevailing wage which bears no relation to those generally paid for some of the kinds of work being compared. On the other hand, the distinctions should not be so fine as to leave no basis for comparison with other work done in the locality ....

The UCPL goes on to say that the question of what is similar work should not be determined on the basis of what constitutes conditions of work such as the hours of employment, the permanency of the work, unionization, or benefits, since such factors beg the question at issue: what is "similar work?" Rather, the determination of what constitutes similar work will be made on the basis of the similarity of the operations performed, the skill, ability and knowledge required, and the responsibilities involved.

The determination of similar work applies to work performed in the "locality". Under UCPL 130, the locality consists of

work in the competitive labor market area in which the conditions of work offered by an employer affect the conditions offered for similar work by other employers because they draw upon the same labor supply. If no similar work exists in the locality, the State may, but is not required to, examine work outside the competitive labor market.

e. Prevailing Wages, Hours and Conditions of Employment. Once similar work is identified for the locality, the State must focus on what wages or hours are most prevalent and what conditions are most common for similar work in the locality.

Under UCPL 130, the phrase "conditions of work" refers to the express and implied provisions of the employment agreement and the physical conditions under which the work is performed, as well as conditions that arise at work as a result of laws and regulations, such as coverage for workers' compensation. The phrase "conditions of work" encompasses fringe benefits such as life and group health insurance; paid sick, vacation, and annual leave; provisions for leaves of absence and holiday leave; pensions, annuities and retirement provisions; and severance pay. It also encompasses job security and reemployment rights; training and promotion policies; wage guarantees; unionization; grievance procedures; work rules, including health and safety rules; medical and welfare programs; physical conditions such as heat, light and ventilation; shifts of employment; and permanency of work.

States may not disregard any of these factors when investigating a "prevailing conditions" issue. An individual may not be denied UC for refusal of work if the wages, hours, or any other material condition or combination of conditions of the work offered is substantially less favorable to the individual than those prevailing in the locality for similar work.

f. Substantially Less Favorable to the Individual. UCPL 130 describes the language "substantially less favor-

able to the individual" as presenting a definite but not inflexible standard based on the conditions under which the greatest number of employees in an occupation are working in the locality. It does not preclude the denial of benefits because of the existence of minor or purely technical differences that would not undermine the existing labor market conditions or would not have an appreciable adverse effect on the individual. In borderline cases where it is not clear whether the difference is material or the facts cannot be precisely determined, the general rule of liberal interpretation of remedial legislation indicates that the claimant should be given the benefit of the doubt.

In the prevailing conditions context, the question is whether any material condition or combination of conditions render the work substantially less favorable to the worker than similar work in the locality. Factors to be considered are the actual conditions in question, the extent of difference between the offered work and similar work, and the effect such differences have on the worker. When conditions can be converted into a monetary value, these can be compared as part of the wage package or wage rate. The value to the worker of health insurance, pension, paid vacations, and holidays, for example, is readily ascertainable and provides an objective basis for comparing the conditions of employment and determining the prevailing labor standards and thus the suitability of the offered work.

5. Adjudicating a Prevailing Conditions Issue. Before an individual is disqualified from the receipt of UC due to a refusal of suitable work, the State must determine:

(1) That there was a bona fide offer of work;

(2) That, under State law, the work is suitable to the individual in terms of the individual's previous wage and skill levels;

(3) That the wages, hours, and other conditions of the work were not substantially less favorable to

the individual than those prevailing in the locality; and,

(4) That, under State law, there was not good cause for refusing the offer.

The information needed to determine items (1), (2) and (4) is usually readily available. As a result, the State may be able to decide that an individual is eligible without adjudicating the often time-consuming prevailing conditions issue. For example, if the job offer was not bona fide, the work was not reasonably suitable to the individual, or there was good cause for refusing work, then there is no need to adjudicate prevailing conditions issues. Conversely, if the State determines the individual would be ineligible under any of items (1), (2) or (4), then it must adjudicate any prevailing conditions issue before denying the individual.

Similarly, when the refusal of an offer of new work involves the application of a State's voluntary quit provisions, there is no need to adjudicate a prevailing conditions issue when the individual is determined to be otherwise eligible. However, the State must adjudicate any prevailing conditions issue before denying the individual.

6. Temporary Work. Since UCPL 130 and UIPL 984 were issued, the use of temporary or contingent workers has greatly expanded. One of the incentives for employers to use temporary workers is that these workers reduce employer costs since they often do not enjoy the wages, hours, and other conditions enjoyed by their permanent counterparts. Temporary workers may be ineligible for fringe benefits and they may not be trained for higher-skilled jobs. By avoiding the costs associated with permanent workers, employers could be depressing precisely those factors considered "prevailing conditions" within the FUTA labor standards: fringe benefits, health insurance, promotion policies, etc.

Just as it applies to other refusals of work, the prevailing conditions requirement applies to refusals of offers of temporary work. The fact that the work is temporary should generally be sufficient to trigger a prevailing conditions inquiry. Also, as noted in item 4.b., "new work" may not be limited by an employment contract which grants the employer the right to change employment conditions. Therefore, a refusal of temporary work in the form of a new assignment from a temporary help firm is also subject to the prevailing conditions requirement.

As noted in item 4.d., what constitutes similar work is not determined on the basis of the conditions of work such as the hours of employment, the permanency of the work, or benefits. (These factors are considered only after the question of similar work has been decided.) Accordingly, temporary work should not be compared only to similar temporary work. Instead, it must be compared with all work, temporary and permanent, in a similar occupational category.

Temporary work is not per se unsuitable under the prevailing conditions requirement. If, for example, the norm for a particular occupation in a locality is temporary work, then temporary work is the prevailing condition of such work. As another example, when temporary help firms are involved, an individual so desiring may work continuously. The State must collect the necessary facts to determine the specifics in each case.

Also, the short-term duration of temporary work may be a voluntary or favorable condition for some individuals. If the State establishes through fact finding that this is the case for an individual, than the work offered is "not less favorable to the individual" than the work prevailing in the locality.

7. Action. Appropriate staff, including higher and lower appellate authorities, should be provided with copies of this UIPL. Action should be taken to assure that the

prevailing conditions requirement is applied as described in this UIPL, UIPL 984 and UCPL 130.

8. Inquiries. Please direct inquiries to the appropriate Regional Office.

Attachments

UCPL 130
UIPL 984

U.S. Department of Labor

Employment and Training Administration
REGION V - The Great Heartland

John C. Kluczynski Building
230 South Dearborn Street, 6th floor
Chicago, IL 60604-1505

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1100 Main - Suite 1050
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A proud member of America's Workforce Network

March 15, 2001

Mr. Bruce C. Hagen, Administrator
Unemployment Insurance Division
Wisconsin Department of Workforce Development
P.O. Box 7905
Madison, WI 53707

SUBJECT: Pending Wisconsin Issues (Your Letter dated February 6, 2001)

Dear Mr. Hagen:

We have received your letter dated February 6, 2001, which was written in response to our letter dated December 4, 2000, regarding three issues pending in Wisconsin. The three issues are prevailing conditions of work, availability and alien status, and UI funds for employment services.

Prevailing conditions of work - You had previously reported that your Advisory Council was considering corrective legislation which could be introduced in the Fall of 2001. In your recent letter you report that UIPL 41-98, Change1, has been reviewed with the Advisory Council, and they will develop its next bill on UI change for introduction in the fall. However, you add that the Advisory Council has not decided what they will recommend to your Legislature regarding the application of the prevailing conditions of work requirement. This issue has been discussed repeatedly with your agency at both, the Regional and National Office levels and our position remains the same. The Advisory Council's failure to move on this issue could result in implementation of conformity proceedings.

Availability and aliens - We have reviewed a copy of the draft rule and the memorandum which explains the proposed changes. Although you report you plan to begin the formal rulemaking process and fully develop the rule in the future, we request that you provide a timeline for resolving this matter.

UI funds for employment services - As you know, we have already informed you that the MOU between the UI Division and the Division of Workforce Excellence is not a permissible use of UI funds. We have had numerous discussions with you regarding this issue and we appreciate your position regarding the use of these funds. However, the Department's position has not

changed regarding the allowability of these expenditures. It was our understanding that your response to our December 4th letter would outline the action taken by your agency for adjusting the $250,000 expenditure of FY2000 UI grant funds by December 31, 2000. We would appreciate hearing from you on this as well as a timeline for resolving the expenditure issue itself.

Please provide my office with a written response on the three issues detailed above within 30 days from the date of this letter. Thank you for your continuing cooperation in resolving these issues. Do not hesitate to contact me (312-353-3425), or John Montague (312-886-2923) if you have any questions.

Sincerely,

Barbara M. Despenza

BARBARA M. DESPENZA
Regional Director
Office of Workforce Security

U.S. Department of Labor

Employment and Training Administration
REGION V - The Great Heartland

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5 TGU-LEG-1(6)(WI)

May 31, 2001

Mr. Bruce C. Hagen
UI Administrator
Wisconsin Department of Workforce Development
201 East Washington Avenue
P.O. Box 7905
Madison, Wisconsin 53707

Dear Mr. Hagen:

I am writing to express my concern that Wisconsin's UI Advisory Council has not yet agreed to seek legislation correcting a long-standing issue related to offers of "new work" by temporary help firms.

At issue is the decision in Cornwell Personnel Associates, Ltd., v. Labor and Industry Review Commission, 175 Wis. 2d 537, 499 N.W. 2d 705 (Wis. CT. App. 1993). In that case, the court found that, after an individual accepted an initial assignment from a temporary help agency, none of the subsequent offers of new assignments was "new work" for purposes of Wisconsin law. The court limited "new work" in such situations to recalls from indefinite lay-offs. In 1994, we raised an issue under the "new work" provisions of Section 3304(a)(5) of the Federal Unemployment Tax Act (FUTA).

As you know, this matter has been extensively studied over the last seven years. The Department has demonstrated its willingness to discuss this matter and to consider all arguments. We held this issue in abeyance until 1998, when UIPL 41-98, which dealt broadly with the "prevailing conditions" requirement, was issued. Following questions from you and others, UIPL 41-98, Change 1, was issued in 2000. Significantly, the latter UIPL clarified that offers of new work existed only when "material" changes occurred in the new assignments.

When an employer materially changes the conditions of work, an offer of "new work" exists. Thus, "new work" is not, as the Cornwell court stated, limited to indefinite lay-offs. As explained in UIPL 984, dated September 20, 1968, if "new work" were limited to lay-offs, the purpose of FUTA's "new work" provision--which is to prevent the unemployment insurance system from being used to depress wages or other working conditions--would be largely nullified. If the material change in conditions is a new assignment from a temporary help agency, the change is still an offer of "new work." Federal law does not permit temporary help agencies to be treated any differently in this regard than other employers.

Based on your letters during the past year, I had believed we were close to resolving this matter. Given the time that has passed since this matter first arose, I see no basis for Wisconsin failing to enact a conforming law change this year. We know that you have to obtain the agreement of your Advisory Council in the next few weeks, and we strongly encourage you to have them approve the introduction of this conforming legislation. Failure by your State to enact the required legislation this year will lead to conformity proceedings. As you know, if a State is not certified as meeting Federal law requirements, the employers in the State will lose credit against the Federal unemployment tax and the State will lose administrative grants for its UI program.

Thank you for your efforts in working to resolve this matter. Please keep me updated on any developments relating to the corrective legislation. If you have any questions, please do not hesitate to contact me.

Sincerely,

Barbara M. Despenza

Barbara M. Despenza
Regional Director
Office of Workforce Security