

## 2013 DRAFTING REQUEST

### Bill

Received: 1/16/2013 Received By: gmalaise  
Wanted: As time permits Same as LRB:  
For: Erik Severson (608) 267-2365 By/Representing: AJ Scholz  
May Contact: Drafter: gmalaise  
Subject: Employ Priv - worker's comp Addl. Drafters:  
Unemployment Insurance Extra Copies:

Submit via email: YES  
Requester's email: Rep.Severson@legis.wisconsin.gov  
Carbon copy (CC) to:

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### Pre Topic:

No specific pre topic given

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### Topic:

Exclusion of individuals working from their homes from worker's compensation and unemployment insurance laws

---

### Instructions:

See attached--exclude "cottage industry" workers from coverage under the worker's compensation and unemployment insurance laws

---

### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	jkuesel 2/28/2013	evinz 3/4/2013	rschluet 3/4/2013	_____			
/1	gmalaise 6/27/2013			_____	lparisi 3/4/2013		
/2		evinz 7/2/2013	rschluet 7/3/2013	_____	sbasford 7/3/2013	mbarman 8/8/2013	

FE Sent For:

↳ Not  
Needed

<END>

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Topic:

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Instructions:

See attached--exclude "cottage industry" workers from coverage under the worker's compensation and unemployment insurance laws

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1/?	gmalaise	1 rev 3/4/13		==			

FE Sent For:

<END>

# Bill Request Form

Legislative Reference Bureau  
One East Main Street, Suite 200  
Legal Section 266-3561

Gordon Malaise.

You may use this form or talk directly with the LRB attorney who will draft the bill.

Date

1/15/13

Legislator, agency, or other person requesting this draft

Rep Severson

Person submitting request (name and phone number)

AJ Scholz 7-2365

Persons to contact for questions about this draft (names and phone numbers)

AJ Scholz

Describe the problem, including any helpful examples. How do you want to solve the problem?

Certain individuals engaged in a "cottage industry" such as home sewing, light assembly, transcription from home, etc have been defined by various admin agencies as employees instead of independent contractors, even though both parties have taken steps under current law to fit within the definition of "independent contractor". This legislation is intended to solve that problem, addressing both unemployment insurance & worker's compensation. The proposal amends UI statute by exempting from the term employee certain cottage industry independent contractors, and clarifies under worker's comp that the term employee doesn't cover independent contractors.

Please attach a copy of any correspondence or other material that may help us. If you know of any statute sections that might be affected, list them or provide a marked-up copy.

Please see Attached Redline

You may attach a marked-up copy of any LRB draft or provide its number (e.g., 2010 LRB-2345/1 or 2009 AB-67).

Requests are confidential unless stated otherwise. May we tell others that we are working on this for you?

YES  NO

If yes:

Anyone who asks? YES NO

Any legislator? YES NO

Only the following persons \_\_\_\_\_

Do you consider this request urgent?

YES  NO

Should we give this request priority over any pending request of this legislator, agency, or person?

YES  NO

**MODIFICATION TO UMEMPLOYMENT INSURANCE STATUTE:**

**Excluding Cottage Industry or People Working from Home (Cottage Industry).**

Wis. Stat. Section 108.02(12)(a) is modified and amended as follows:

"Employee" means any individuals who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly or by the employing unit, except as provided in par. (bm), (c), (d), (dm), (dn) or (do).

Wis. Stat. Section 108.02(12) is modified and amended to insert a new section (do) between section (dn) and (e) as follows:

"(do) Paragraph (a) does not apply to an individual who performs the services (i) pursuant to a written agreement with the employing unit pursuant to which the individual (or an entity owned by the individual) has agreed or represented that the services are being performed as an independent contractor; and (ii) primarily at the individual's residence mostly using the individual's own tools and equipment if such services are performed free from control or direction of the employing unit, other than initial training, and quality control."

**MODIFICATION TO WORKER'S COMPENSATION STATUTE:**

Wis. Stat. Section 102.07(a) is modified and amended as follows:

(8) (a) Except as provided in par. (b) or (bn), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession or occupation of such employer at the time of the injury.

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the

relationship of business receipts to expenditures.

(RM) Wis. Stat. 102.07(8)<sup>(a)</sup> is modified and amended to include a new section <sup>(b)</sup> after section (b) as follows:

(RM) (b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor: *meets all of the following conditions:*

1. Has signed, or an entity owned by such person has signed, a written agreement with the employer which states that the independent contractor is performing the work or services as an independent contractor, and

2. The independent contractor performs the work or services primarily at the individual's residence mostly using the individual's own tools and equipment if such services are performed free from control or direction of the employing unit, other than initial training and quality control. *hierarchy* *the independent contractor* *hierarchy* *§ 3. The work or services*

~~direction control~~

control or direction provided for purposes of initial training or quality control

~~equipment, materials,~~

## Duchek, Michael

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**From:** Scholz, AJ  
**Sent:** Monday, January 28, 2013 9:59 AM  
**To:** Duchek, Michael  
**Subject:** RE: Bill request

Hello Mike,

Feel free to contact DWD and work with them on the issue, we certainly want to know if we are running into federal law. If you could keep which member of the legislature you are working on this for confidential that would be appreciated. Also, I appreciate the heads up about UI Council, I will certainly talk to the representative about sharing it with them sometime in the future.

Thanks for your help with this

### AJ Scholz

Office of Representative Erik Severson  
608-267-2365  
221 North, State Capitol

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**From:** Duchek, Michael  
**Sent:** Monday, January 28, 2013 9:47 AM  
**To:** Scholz, AJ  
**Cc:** Kuesel, Jeffery  
**Subject:** Bill request

AJ,

My name is Mike Duchek, and I am drafting unemployment insurance with Jeff Kuesel here at the LRB. I received your request from Gordon Malaise to add provisions to exclude certain individuals from unemployment insurance coverage as employees. Before proceeding with this request, it is our practice to ask your permission to consult with the Department of Workforce Development (DWD). Because the unemployment insurance program is heavily controlled by federal law, we ask to consult with DWD so that they can gauge and consult if necessary with the federal government whether the proposal is in accord with federal law and does not, for example, jeopardize employers' entitlement to tax credits. May we have your permission to contact DWD about your proposal?

I also want to note that, traditionally, changes to the unemployment insurance law are reviewed by the Unemployment Insurance Advisory Council and that the legislature has historically been reluctant to consider proposals that are not reviewed by the Council. Therefore, we recommend, at some point, forwarding your proposal to the Council for their review.

Thank you very much.

**Mike Duchek**

**Legislative Attorney  
Wisconsin Legislative Reference Bureau  
(608) 266-0130**



State of Wisconsin  
2013 - 2014 LEGISLATURE



LRB-119277①  
GMM&JTK.....  
Leev

In 2-28-13  
SOON

D-note

SAJ  
refv

Gen

law

1

AN ACT...; relating to: exclusion of certain independent contractors from coverage under the worker's compensation and unemployment insurance laws

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**Analysis by the Legislative Reference Bureau**

Under current law, for purposes of coverage under the worker's compensation law, an independent contractor is not an employee of an employer for whom the independent contractor performs work if the independent contractor: 1) maintains a separate business with his or her own office, equipment, materials, and other facilities; 2) holds a federal employer identification number or has filed business or self-employment income tax returns based on that work; 3) operates under contracts to perform specific work for specific amounts of money and under which he or she controls the means of performing the work; 4) incurs the main expenses related to the work; 5) is responsible for the satisfactory completion of the work and is liable for a failure to complete the work; 6) receives compensation on a commission, per job, or competitive bid basis; 7) may realize a profit or suffer a loss; 8) has continuing or recurring business liabilities or obligations; and 9) succeeds or fails depending on the relationship of business receipts to expenditures.

This bill, in addition, excludes from coverage under the worker's compensation law an independent contractor who: 1) has signed a written agreement with the employer for whom he or she performs work stating that he or she is performing the work as an independent contractor; 2) performs the work primarily at his or her own residence and mostly using his or her own tools and equipment; and performs the

work free from the control or direction of the employer, other than control or direction provided for purposes of initial training or quality control.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

1 SECTION 1. 102.07<sup>x</sup> (8) (a) of the statutes is amended to read:

2 102.07 (8) (a) Except as provided in ~~par.~~ pars. (b) and (b<sup>v</sup>m), every independent  
3 contractor is, for the purpose of this chapter, an employee of any employer under this  
4 chapter for whom he or she is performing service in the course of the trade, business,  
5 profession, or occupation of such employer at the time of the injury.

History: 1975 c. 147 s. 54; 1975 c. 224; 1977 c. 29; 1979 c. 278; 1981 c. 325; 1983 a. 27, 98; 1985 a. 29, 83, 135; 1985 a. 150 s. 4; 1985 a. 176, 332; 1987 a. 63; 1989 a. 31, 64, 359; 1993 a. 16, 81, 112, 399; 1995 a. 24, 77, 96, 117, 225, 281, 289, 417; 1997 a. 35, 38, 118; 1999 a. 14, 162; 2001 a. 37; 2005 a. 96; 2007 a. 130; 2009 a. 28, 42, 288; 2011 a. 123.

6 SECTION 2. 102.07<sup>v</sup> (8) (bm) of the statutes is created to read:

7 102.07 (8) (bm) An independent contractor is not an employee of an employer  
8 for whom the independent contractor performs work or services if the independent  
9 contractor meets all of the following conditions:

10 1. Has signed, or an entity owned by the independent contractor has signed,  
11 a written agreement with the employer stating that the independent contractor is  
12 performing the work or services as an independent contractor.

13 2. Performs the work or services primarily at his or her own residence and  
14 mostly using his or her own tools and equipment.

15 3. Performs the work or services free from the control or direction of the  
16 employer, other than control or direction provided for purposes of initial training or  
17 quality control.

18

(END)

D-note →

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1192/1dn

MED:1:.....

eev

date

Rep. Severson:

We are waiting to hear back from DWD on the proposed changes to the definition of "employee" in the Unemployment Insurance (UI) law to exclude certain "cottage industry" workers, including any issues with regards to federal law. However, we wanted to get this version out to you with the changes made by drafter Gordon Malaise to the Worker's Compensation law. We will update you when we hear back from DWD about the changes to the UI law. Please contact us with any questions or concerns in the meantime. Thank you.

Michael Duchek  
Legislative Attorney  
Phone: (608) 266-0130  
E-mail: michael.duchek@legis.wisconsin.gov

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-1192/1dn  
MED:eev:rs

March 4, 2013

Rep. Severson:

We are waiting to hear back from DWD on the proposed changes to the definition of "employee" in the Unemployment Insurance (UI) law to exclude certain "cottage industry" workers, including any issues with regards to federal law. However, we wanted to get this version out to you with the changes made by drafter Gordon Malaise to the Worker's Compensation law. We will update you when we hear back from DWD about the changes to the UI law. Please contact us with any questions or concerns in the meantime. Thank you.

Michael Duchek  
Legislative Attorney  
Phone: (608) 266-0130  
E-mail: [michael.duchek@legis.wisconsin.gov](mailto:michael.duchek@legis.wisconsin.gov)

## **Duchek, Michael**

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**From:** Scholz, AJ  
**Sent:** Wednesday, May 22, 2013 1:34 PM  
**To:** Duchek, Michael  
**Subject:** LRB 1192

Hey Mike,

Couple things regarding the changes you are making to LRB 1192 for us. It was our intent that the legislation would affect workers comp and unemployment insurance, both Chapter 102 and 108. I believe the current draft only applies to 102. We have been working through that issue as well as the issues raised by DWD and had the following thoughts in addition to what I sent you previously. The Chapter 108 section is formulated in such a way that it should accommodate the concerns of DWD that we are addressing in the changes for the Chapter 102 in the current draft of the bill.

### **Chapter 102:**

In the bill LRB prepared, in new Section 102.07(8)(bm)(2) change the word "mostly" to primarily and at the end of that same section, add a new sentence that reads: "For purposes of this Subsection (do), "primarily" means seventy five percent (75%) or more."

### **Chapter 108:**

Excluding Cottage Industry or People Working from Home (Cottage Industry).

Wis. Stat. Section 108.02(12)(a) is modified and amended as follows:

"Employee" means any individuals who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly or by the employing unit, except as provided in par. (bm), (c), (d), (dm), (dn) or (do).

Wis. Stat. Section 108.02(12) is modified and amended to insert a new section (do) between section (dn) and (e) as follows:

"(do) Except for individuals who are employed by non-profit organizations, Indian tribes or a unit of state and local government, Paragraph (a) does not apply to an individual who performs the services (i) pursuant to a written agreement with the employing unit pursuant to which the individual (or an entity owned by the individual) has agreed or represented that the services are being performed as an independent contractor; and (ii) primarily at the individual's residence primarily using the individual's own tools and equipment if such services are performed free from control or direction of the employing unit, other than initial training, and quality control. For purposes of this Subsection (do), "primarily" means seventy five percent (75%) or more."

Feel free to give me a call if you have any questions.

**AJ Scholz**

Office of Representative Erik Severson  
608-267-2365  
221 North, State Capitol

Department of Workforce Development  
Secretary's Office  
201 East Washington Avenue  
P.O. Box 7946  
Madison, WI 53707-7946  
Telephone: (608) 266-3131  
Fax: (608) 266-1784  
Email: sec@dwd.wisconsin.gov



Scott Walker, Governor  
Reginald J. Newson, Secretary

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# Memorandum

**To:** Representative Erik Severson

**From:** Scott Sussman (Research Attorney, Bureau of Legal Affairs)

**CC:** Connie Schultz (Legislative Liaison, Office of the Secretary) &  
Janell Knutson (Director, Bureau of Legal Affairs)

**Date:** 05/16/2013

**Re:** DISCUSSION OF COTTAGE INDUSTRY EXCLUSION PROPOSAL

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Wisconsin Statute Section 108.02 (12) (a) provides the definition of "employee" for purposes of the unemployment insurance program. There currently are five statutory categories of broad types of work that are excluded from the definition of "employee."<sup>1</sup> These include independent contractors, individuals performing services for a governmental unit or nonprofit organization, a contractor who employs another individual for whom the individual is covered by the unemployment insurance laws, an individual who owns a business that operates as a sole proprietorship, and a partner in a business that operates as a partnership. The proposed statutory language would create an additional exclusion that would cover individuals who perform services in a cottage industry.

To be covered by the cottage industry exclusion the individual's work would need to satisfy two general requirements. First, the individual must have a written agreement that his or her work is being done as an independent contractor. Second, the work must be performed primarily at the individual's residence mostly using the individual's own equipment and the work must be performed free from control or direction of the employer, other than initial training, and quality control. The Department has a number of concerns with this proposal.

The first concern is that this proposal would expose these employers to additional federal taxation pursuant to the Federal Unemployment Tax Act (FUTA). Under the provisions of FUTA, a Federal tax is levied on employers covered by the Unemployment Insurance program at a current rate of 6.0 percent on wages up to \$7,000 a year paid to a worker. However, the

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<sup>1</sup> There are further exclusion to an employees work being considered "employment" for the unemployment insurance program and these are contained in s. 108.02 (15) (k). These exclusions exclude work by an employee as for instance a caddy on a golf course, a newspaper boy, or a real estate agent if the money earned is solely through commission sales.

federal law provides a credit against federal tax liability of up to 5.4 percent to employers who pay state unemployment taxes timely under an approved state UI program. Accordingly, employers pay an effective federal tax of 0.6 percent.<sup>2</sup>

Yet, if an employer is excluded by state law from paying the state payroll tax for an employee, the employer is then subject to the full federal taxation without receiving the credit. Thus, this proposal would disadvantage employers hiring individuals who work in the cottage industry by exposing them to the full federal tax of 6.0 percent instead of having an effective tax rate of 0.6 percent. This is the reason that state laws tend to cover employers or employment subject to the federal tax because, while there is no compulsion to do so, failure to do so is of no advantage to the state and a disadvantage to the employers involved in terms of FUTA taxes due.

On a related note, the federal law does require that states do provide coverage to certain employees. FUTA requires that states provide coverage for employees of nonprofit organizations, service performed for Indian tribes, and employees of state and local governments. As a result if this proposal were to be enacted, it should be modified to conform to this federal requirement.

If an individual's service to an employer is classified as the work of an independent contractor there is no requirement to pay unemployment insurance taxes; whereas, if the work is classified as being performed by an employee there is generally a requirement to pay unemployment insurance taxes. Recently the Legislature amended the definition as to when an individual, who performs service for an employer, is classified as an independent contractor versus an employee for purposes of unemployment insurance law. This change became effective January 1, 2011.

The recent change resulted from the Legislature passage of 2007 Wisconsin Act 59 that required the Unemployment Insurance Advisory Council (Council) to form a committee to study the definition of "employee" for purposes of the unemployment insurance program. The committee performed extensive research that resulted in a new definition for when an individual who performs work for an employer is or is not considered an "employee" for purposes of unemployment insurance coverage. The committee listened to various groups regarding how the unemployment insurance law should define "employee" and what should or should not be included in this definition. The amendments, which became effective January 1, 2011, have not been interpreted by the courts.

The new definition was meant to track what representatives from labor and management and state legislators thought should be covered by the system. The committee attempted to create a definition of employee that would accomplish the goal of unemployment law separating those individuals who will bear the risk of their unemployment (sometimes called "independent contractors") from those whose risk of unemployment properly belongs with the employing unit

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<sup>2</sup> If a state has an outstanding loan balance on January 1 for two consecutive years, the full amount of the loan must be repaid before November 10 of the second year, or the federal tax on employers in that state will be increased for that year and further increased for each subsequent year that the loan has not been repaid. For states, such as Wisconsin, that are under this circumstance, the federal tax on employers in the state are generally increased at the rate of 0.3% for each year that the loan from the federal government remains unpaid after the two consecutive year grace period.

("employees"). Both the Legislature and Wisconsin Supreme Court have consistently held that the underlying policy of the unemployment law is to afford broad coverage of workers who become unemployed through no fault of their own. Additional exclusions only serve to undermine this policy and cause those employers whose employees' work is not excluded to bear the additional burden of the system.

In fact, in many ways the proposed exclusion parallels the current definition of whether or not a worker is considered an employee pursuant to s. 108.02 (12) of the Wisconsin Statutes. Section 108.02 (12) provides a two-part test to determine if an individual is classified as an employee for purposes of unemployment insurance. The first test is whether the worker is free of the employer's direction and control to be considered an independent contractor. The proposed exclusion parallels this language by providing that it is only applicable if the services performed by the employee are "performed free from control or direction of the employing unit, other than initial training, and quality control." The second part of the test is more fact specific to the particular situation of the individual performing the service for the employer. Yet, there is a great likelihood that many of the employers within the cottage industry with minor tweaks to their business arrangement would be excluded from having to pay state unemployment insurance taxes for their employees. In fact, while the Department is hesitant to guarantee results since every case is very fact specific, with some minor tweaking of the contract language for individuals who perform services in the cottage industry there could be a solution to this problem that would classify these individuals as independent contractors pursuant to s. 108.02 (12).

In addition, there are significant concerns over the proposed statutory language within this proposal. The language states that for an individual to qualify under this exception he or she must be "mostly using the individual's own tools and equipment . . ." The issue raised by this ambiguous and subjective language is that it will create confusion in the employer community as to when an employer must pay unemployment insurance for the work performed by an individual for the employer. The language also states that the individual performing the services for the employer must be "free from control or direction of the employing unit, **other than the initial training and quality control.**" (emphasis added) This language again will lead to confusion as to when instructions from the employing unit is considered control or direction versus simple quality control over the individual's work. The confusion created by these two aspects of the legislation will likely result in litigation and potential penalties to employers if their determination is different from the determination made by the Department as to whether an individual's work should or should not be covered by the exclusion.

Finally; the language is not specific with respect to which jobs may potentially be covered by this exclusion. As more individuals work from home, this exclusion could create a loophole that would make some individuals who were meant to be covered by the system not be covered by it. If this proposal were to be moved forward, the Department would request amendments to its language to ensure that the exclusion is only applicable to the employees of the industry that was intended to be covered by it.

## Duchek, Michael

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**From:** Scholz, AJ  
**Sent:** Monday, May 20, 2013 12:29 PM  
**To:** Duchek, Michael  
**Subject:** RE: LRB 1192  
**Attachments:** 20130516121506477.pdf

Hey Mike,

We heard back from DWD and we would like to incorporate two of their suggestions. I have attached the document they sent us in order to provide you with any necessary background information. But the two things we would like to change would be:

- 1) FUTA requires the states provide coverage for employees of nonprofit organizations, service performed for Indian tribes, and employees of state and local governments. DWD suggestions conforming the proposal to this federal requirement which makes sense to us
- 2) DWD expressed concern that the phrase "mostly using the individual's own tools and equipment" as being too vague. We certainly would agree to clarifying this language. I'm not sure if you have a suggestion for language that has been used in other portions of statute, but would using the word majority clarify it more than mostly. It would at least imply that 50% of the tools and equipment belongs to the individual. If you have other suggestions please let me know.

Thanks for your help on this proposal as well as everything else that you are working on for us.

### AJ Scholz

Office of Representative Erik Severson  
608-267-2365  
221 North, State Capitol

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**From:** Duchek, Michael  
**Sent:** Tuesday, May 14, 2013 9:13 AM  
**To:** Scholz, AJ  
**Subject:** RE: LRB 1192

AJ,

DWD wrote back that they have approval to get you their feedback about the cottage industry proposal. However, they wanted to formally address their memo to your office. I did not respond yet. Do you want me to tell them that the memo can be addressed to Rep. Severson, or should I tell them just to address it to an unnamed legislator? Please let me know.

-Mike

---

**From:** Scholz, AJ  
**Sent:** Tuesday, May 07, 2013 9:16 AM  
**To:** Duchek, Michael  
**Subject:** LRB 1192

Hey Mike,

I was wondering if you had heard anything back from DWD on LRB 1192 yet. If not let me know and I will follow up with them.

Thanks!

**AJ Scholz**

Office of Representative Erik Severson

608-267-2365

221 North, State Capitol



IN 8/27



LRB-1192/4  
GMM:eev:rs

12  
PWR

stays

# 2013 BILL

SAJ  
xref

Reger

and the unemployment insurance law

1 AN ACT to amend 102.07 (8) (a); and to create 102.07 (8) (bm) of the statutes;  
2 relating to: exclusion of certain independent contractors from coverage under  
3 the worker's compensation law

### Analysis by the Legislative Reference Bureau

Under current law, for purposes of coverage under the worker's compensation law, an independent contractor is not an employee of an employer for whom the independent contractor performs work if the independent contractor: 1) maintains a separate business with his or her own office, equipment, materials, and other facilities; 2) holds a federal employer identification number or has filed business or self-employment income tax returns based on that work; 3) operates under contracts to perform specific work for specific amounts of money and under which he or she controls the means of performing the work; 4) incurs the main expenses related to the work; 5) is responsible for the satisfactory completion of the work and is liable for a failure to complete the work; 6) receives compensation on a commission, per job, or competitive bid basis; 7) may realize a profit or suffer a loss; 8) has continuing or recurring business liabilities or obligations; and 9) succeeds or fails depending on the relationship of business receipts to expenditures.

This bill, in addition, excludes from coverage under the worker's compensation law an independent contractor who: 1) has signed a written agreement with the employer for whom he or she performs work stating that he or she is performing the work as an independent contractor; 2) performs the work primarily at his or her own residence and mostly using his or her own tools and equipment; and performs the

primarily

**BILL**

The bill provides

that, for purposes of the bill,

"primarily" means 75 percent or more.

work free from the control or direction of the employer, other than control or direction provided for purposes of initial training or quality control.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

INS Analysis

**SECTION 1.** 102.07 (8) (a) of the statutes is amended to read:

102.07 (8) (a) Except as provided in ~~par.~~ par. (b) and (bm), every independent contractor is, for the purpose of this chapter, an employee of any employer under this chapter for whom he or she is performing service in the course of the trade, business, profession, or occupation of such employer at the time of the injury.

**SECTION 2.** 102.07 (8) (bm) of the statutes is created to read:

102.07 (8) (bm) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Has signed, or an entity owned by the independent contractor has signed, a written agreement with the employer stating that the independent contractor is performing the work or services as an independent contractor.

2. Performs the work or services primarily at his or her own residence and ~~mostly~~ using his or her own tools and equipment.

3. Performs the work or services free from the control or direction of the employer, other than control or direction provided for purposes of initial training or quality control.

(END)

INS 2-17

In this subdivision, "primarily" means 75 percent or more.



1           108.02 (12) (bg) Paragraph (a) does not apply to an individual performing  
2 services for an employing unit other than a government unit, nonprofit organization,  
3 or Indian tribe in a capacity other than as a logger or trucker if all of the following  
4 apply to the individual:

5           1. The individual performs the services pursuant to a written agreement with  
6 the employing unit under which the individual or an entity owned by the individual  
7 has agreed or represented that the services are being performed as an independent  
8 contractor.

9           2. The individual performs the services primarily at the individual's residence  
10 and primarily using the individual's own tools and equipment. In this subdivision,  
11 "primarily" means 75 percent or more.

12           3. The individual performs the services free from control or direction of the  
13 employing unit, other than initial training and quality control.

14           **SECTION 3.** 108.02 (12) (bm) (intro.) of the statutes is amended to read:

15           108.02 (12) (bm) (intro.) Paragraph (a) does not apply to an individual  
16 performing services for an employing unit other than a government unit or nonprofit  
17 organization in a capacity other than as a logger or trucker, if the individual is not  
18 excluded under par. (bg) and the employing unit satisfies the department that the  
19 individual meets the conditions specified in subs. 1. and 2., by contract and in fact:

History: 1971 c. 53; 1971 c. 213 s. 5; 1973 c. 247; 1975 c. 223, 343; 1975 c. 373 s. 40; 1977 c. 29, 133; 1979 c. 52, 221; 1981 c. 36, 353; 1983 a. 8 ss. 4 to 12, 54; 1983 a. 168; 1983 a. 189 ss. 158 to 161, 329 (25), (28); 1983 a. 384, 477, 538; 1985 a. 17, 29, 332; 1987 a. 38 ss. 6 to 22, 134; 1987 a. 255; 1989 a. 31; 1989 a. 56 ss. 151, 259; 1989 a. 77, 303; 1991 a. 89; 1993 a. 112, 213, 373, 497; 1995 a. 27 ss. 3777, 9130 (4); 1995 a. 118, 225; 1997 a. 3, 27, 39; 1999 a. 15, 82, 83; 2001 a. 35, 103, 105; 2003 a. 197; 2005 a. 25, 86, 149, 441; 2007 a. 20 s. 9121 (6) (a); 2007 a. 59; 2009 a. 180, 287; 2011 a. 32, 123.

20           **SECTION 4.** 108.09 (2) (bm) of the statutes is amended to read:

21           108.09 (2) (bm) In determining whether an individual meets the conditions  
22 specified in s. 108.02 (12) (bg) or (bm) 2. b. or c. or (c) 1., the department shall not

1 consider documents granting operating authority or licenses, or any state or federal  
2 laws or federal regulations granting such authority or licenses.

History: 1971 c. 147; 1973 c. 247; 1975 c. 343; 1977 c. 29, 418; 1979 c. 52, 221; 1981 c. 36; 1985 a. 17, 29; 1987 a. 38 ss. 81 to 86, 136; 1989 a. 56 s. 259; 1989 a. 77; 1991 a. 89, 269; 1993 a. 373; 1995 a. 118; 1997 a. 35, 39; 1999 a. 15; 2001 a. 35; 2003 a. 197; 2005 a. 86, 253; 2007 a. 59; 2009 a. 287; 2011 a. 32, 198, 236.

3 **SECTION 5. 108.09 (4s) of the statutes is amended to read:**

4 108.09 (4s) EMPLOYEE STATUS. In determining whether an individual meets the  
5 conditions specified in s. 108.02 (12) (bg) or (bm) 2. b. or c. or (c) 1., the appeal tribunal  
6 shall not take administrative notice of or admit into evidence documents granting  
7 operating authority or licenses, or any state or federal laws or federal regulations  
8 granting such authority or licenses.

History: 1971 c. 147; 1973 c. 247; 1975 c. 343; 1977 c. 29, 418; 1979 c. 52, 221; 1981 c. 36; 1985 a. 17, 29; 1987 a. 38 ss. 81 to 86, 136; 1989 a. 56 s. 259; 1989 a. 77; 1991 a. 89, 269; 1993 a. 373; 1995 a. 118; 1997 a. 35, 39; 1999 a. 15; 2001 a. 35; 2003 a. 197; 2005 a. 86, 253; 2007 a. 59; 2009 a. 287; 2011 a. 32, 198, 236.

9 **SECTION 6. Initial applicability.**

10 (1) The treatment of sections 108.02 (12) (a), (bg), and (bm) (intro.) and 108.09  
11 (2) (bm) and (4s) of the statutes first applies to services performed after the December  
12 31 that follows the effective date of this subsection.

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1192/2dn

MED:..f:....

CV

(date)

We have prepared this version of the bill in accordance with the instructions. However, please note the following regarding the changes to the unemployment insurance (UI) law:

1. I drafted the exclusion so that the independent contractor exclusion under current s. 108.02 (12) (bm), stats., still applies if the individual is not excluded under the exclusion created in the bill. Is that OK?

2. The created independent contractor exclusion could prove difficult to administer because there will be two separate independent contractor provisions that contain overlapping language. For example, the proposed language uses some of the same language found in current s. 108.02 (12) (bm) 1., stats., but does not list the factors in s. 108.02 (12) (bm) 1. a. to e., stats. Language in current law s. 108.02 (12) (bm) 2. b. also overlaps somewhat with the proposed language: the proposed language uses "the individual's residence" instead of an "office or facility or location chosen by the individual" and uses "tools and equipment" instead of "equipment or materials." Because courts usually presume that by using different language, the legislature intends a distinctly different meaning, courts may struggle with how to apply the proposed language differently from the language in current s. 108.02 (12) (bm), stats. I would therefore recommend determining whether it would be possible to instead modify the current law independent contractor exclusion in some way to accomplish the desired result. Δ Δ Δ

3. As described in the memo from Scott Sussman at DWD dated May 16, 2013, creating an additional exception from the definition of "employee" for independent contractors under the UI law could result in higher taxes for those businesses because they would then be subject to the full Federal Unemployment Tax Act (FUTA) tax without the benefit of the credit against the tax that is currently available. I am advised that this is because federal law generally uses a common law standard for determining who is an independent contractor, and the proposed language could exclude from state UI law coverage businesses that do not qualify as independent contractors under federal law. In that case, the businesses would lose credits against state taxes they would have otherwise paid, as well as an additional credit amounts provided to employers with favorable employment experiences. \*

4. As requested, the bill provides that "primarily" means 75 percent or more, for purposes of the created provisions regarding: 1) whether the individual performs

services at his or her own residence and 2) whether the individual uses his or her own tools and equipment. However, while the time an individual performs the services at the individual's residence can be quantified as a percentage, I do not think that the use of tools can be easily quantified. I would recommend clarifying this or having the word "primarily" only apply to whether the individual performs services at his or her own residence.

5. As with the current law independent contractor exclusion, I provided that the exclusion in the bill does not apply to loggers or truckers. Let me know if you would not like this language included.

6. Current law, s. 108.09 (2) (bm) and (4s), stats., provides that, in determining whether an individual meets the conditions to be considered an independent contractor under current law, DWD or an ALJ hearing an appeal may not consider documents granting operating authority or licenses, or any state or federal laws or federal regulations granting such authority or licenses. I amended these provisions as well to add references to the provision being created.

7. As is our uniform practice for changes to employment coverage under the UI law, I included an initial applicability so that the exclusion will first apply beginning in the year after the bill's effective date.

8. Finally, I would note that changes to our UI law are reviewed by the federal Department of Labor to ensure that Wisconsin's law is in conformity with requirements under federal law for participation in the state/ federal UI program. You may wish to ask DWD to send the proposed legislation for a preliminary review before passage of the bill to try to ensure that no such issues arise after passage of the bill. You may also wish to offer the proposal to the Council on Unemployment Insurance for its consideration.

Michael Duchek  
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**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-1192/2dn  
MED:eev:rs

July 2, 2013

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**Rose, Stefanie**

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**From:** Scholz, AJ  
**Sent:** Wednesday, August 07, 2013 4:35 PM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB -1192/2 Topic: Exclusion of individuals working from their homes from worker's compensation and unemployment insurance laws

Please Jacket LRB -1192/2 for the ASSEMBLY.