



State of Wisconsin
2015 - 2016 LEGISLATURE

LRB-2263/1
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2015 ASSEMBLY BILL 192

April 24, 2015 – Introduced by Representatives ROHRKASTE, KNODL, JAGLER, GANNON, A. OTT, MURPHY, R. BROOKS, KERKMAN, QUINN, T. LARSON, EDMING, MACCO, PETERSEN, KLEEFISCH, KAPENGA and KREMER, cosponsored by Senator OLSEN. Referred to Committee on Public Benefit Reform.

1 **AN ACT to amend** 108.04 (8) (a), 108.14 (8n) (e), 108.141 (7) (a) and 108.16 (6m)
2 (a); and **to create** 20.445 (1) (ak), 20.445 (1) (aL), 108.04 (8) (b) and 108.133 of
3 the statutes; **relating to:** requiring certain unemployment insurance
4 claimants to submit to drug tests, eligibility for unemployment insurance
5 benefits following a drug test, granting rule-making authority, and making an
6 appropriation.

Analysis by the Legislative Reference Bureau

Under federal law, a state may require a claimant to submit to a test for the unlawful use of controlled substances (drug test) as a condition of receiving unemployment insurance (UI) benefits if the claimant: 1) was terminated from employment with his or her most recent employer because of the unlawful use of controlled substances; or 2) is an individual for whom suitable work, as defined under a state's UI law, is only available in an occupation that regularly conducts drug testing, as determined in regulations issued by the United States Secretary of Labor (federal regulations). As of April 20, 2015, final federal regulations have not been issued.

This bill requires the Department of Workforce Development (DWD) to establish a program to require claimants who apply for regular UI benefits to submit to drug tests. The bill requires DWD to determine, when a claimant applies for regular UI benefits, whether the claimant is an individual for whom suitable work

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is only available in an occupation described in the federal regulations. If DWD determines that the claimant is such an individual, DWD must conduct a screening on the claimant to determine whether there is a reasonable suspicion that the claimant has engaged in the unlawful use of controlled substances. If the screening indicates such a reasonable suspicion, DWD must require the claimant to submit to a drug test.

The bill provides that, if the claimant declines to submit to such a test, the claimant is ineligible for UI benefits for 52 weeks or until a subsequent claim for benefits, whichever is later. If the claimant submits to the drug test, but does not test positive for any controlled substance without a valid prescription, the claimant may receive UI benefits if otherwise eligible and may not be required to submit to any further drug test until a subsequent claim for benefits. If the claimant submits to the drug test and tests positive for one or more controlled substances without a valid prescription, the bill provides that the claimant is ineligible for UI benefits for 52 weeks or until a subsequent claim for benefits, whichever is later, except that following the positive test, the claimant may maintain his or her eligibility for UI benefits by enrolling in a state-sponsored substance abuse treatment program and undergoing a state-sponsored job skills assessment. The claimant remains eligible for benefits for each week the claimant is in full compliance with any requirements of the substance abuse treatment program and job skills assessment.

The bill also requires DWD to conduct, every ten years, a survey of employers to identify occupations for which employers require pre-employment, random, or reasonable suspicion drug testing as a condition of obtaining or continuing employment. The bill then requires DWD to promulgate rules identifying occupations for which more than 50 percent of employers so surveyed indicated that drug testing is required as a condition of obtaining or continuing employment, as well as additional rules identifying occupations in certain specified categories listed in the bill. The bill then requires that DWD likewise apply the above provisions related to screening, drug testing, substance abuse, and eligibility for benefits to claimants for whom suitable work is only available in an occupation identified by DWD in either set of rules.

In addition, the bill allows an employing unit to voluntarily submit to DWD the results of a drug test that was conducted on an individual as preemployment screening or notify DWD that an individual declined to submit to such a test. If the results of the test indicate that the individual has tested positive for one or more controlled substances without a valid prescription, or if the individual declined to submit to such a test, the bill provides that there is a presumption, rebuttable as provided in rules promulgated by DWD, that the claimant has failed to accept suitable work when offered. If the presumption is not rebutted, the claimant is ineligible for UI benefits as if the claimant had tested positive in or declined to submit to a drug test conducted by DWD, beginning with the week in which DWD receives the report.

The bill provides that if a claimant continues to receive benefits after testing positive for the unlawful use a controlled substance, the claimant's benefits are charged to the balancing account of the unemployment reserve fund, which is a

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1 controlled substances and for related expenses under s. 108.133, other than
2 providing substance abuse treatment under s. 108.133 (2) (c).

3 **SECTION 4.** 108.04 (8) (a) of the statutes is amended to read:

4 108.04 (8) (a) ~~If Except as provided in par. (b), if~~ an employee fails, without good
5 cause, to accept suitable work when offered, the employee is ineligible to receive
6 benefits until the employee earns wages after the week in which the failure occurs
7 equal to at least 6 times the employee's weekly benefit rate under s. 108.05 (1) in
8 employment or other work covered by the unemployment insurance law of any state
9 or the federal government. For purposes of requalification, the employee's weekly
10 benefit rate shall be that rate which would have been paid had the failure not
11 occurred. This paragraph does not preclude an employee from establishing a benefit
12 year during a period in which the employee is ineligible to receive benefits under this
13 paragraph if the employee qualifies to establish a benefit year under s. 108.06 (2) (a).
14 ~~The Except as provided in par. (b), the~~ department shall charge to the fund's
15 balancing account any benefits otherwise chargeable to the account of an employer
16 that is subject to the contribution requirements under ss. 108.17 and 108.18
17 whenever an employee of that employer fails, without good cause, to accept suitable
18 work offered by that employer.

19 **SECTION 5.** 108.04 (8) (b) of the statutes is created to read:

20 108.04 (8) (b) There is a rebuttable presumption that an employee has failed,
21 without good cause, to accept suitable work when offered if the employee declines to
22 submit to a test for the presence of controlled substances in a test conducted on the
23 employee as preemployment screening or the employee tests positive for one or more
24 controlled substances in such a test without evidence of a valid prescription, as
25 evidenced by a report submitted to the department by an employing unit in

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1 accordance with s. 108.133 (4). If the employee declines to submit to such a test, the
2 employee shall be ineligible for benefits as if the employee had declined to submit to
3 a test under s. 108.133 (3) (a), beginning with the week in which the department
4 receives the report. If the employee tests positive in such a test without evidence of
5 a valid prescription, the employee shall be ineligible for benefits as if the employee
6 had tested positive under s. 108.133 (3) (c), beginning with the week in which the
7 department receives the report, except as provided under s. 108.133 (3) (d). The
8 department shall promulgate rules specifying how a claimant may overcome the
9 presumption in this paragraph. The department shall charge to the fund's balancing
10 account any benefits otherwise chargeable to the account of an employer that is
11 subject to the contribution requirements under ss. 108.17 and 108.18 whenever an
12 employee of that employer fails, without good cause, to accept suitable work as
13 described in this paragraph.

14 **SECTION 6.** 108.133 of the statutes is created to read:

15 **108.133 Testing for controlled substances. (1) DEFINITIONS.** In this
16 section:

17 (a) Notwithstanding s. 108.02 (9), "controlled substance" has the meaning
18 given in 21 USC 802.

19 (b) "Job skills assessment" means an assessment conducted by the department
20 under sub. (2) (d).

21 (c) "Occupation that regularly conducts drug testing" means an occupation
22 identified in the regulations issued by the federal secretary of labor under 42 USC
23 503 (l) (1) (A) (ii).

24 (d) "Screening" means the screening process created by the department under
25 sub. (2) (a) 3.

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1 (e) "Substance abuse treatment program" means the program provided by the
2 department under sub. (2) (c).

3 (f) "Valid prescription" means a prescription, as defined in s. 450.01 (19), for a
4 controlled substance that has not expired.

5 **(2) DRUG TESTING PROGRAM.** The department shall establish a program to test
6 claimants who apply for regular benefits under this chapter for the presence of
7 controlled substances in accordance with this section and shall, under the program,
8 do all of the following:

9 (a) Promulgate rules to establish the program. The department shall do all of
10 the following in the rules promulgated under this paragraph:

11 1. Establish a process to test claimants for the presence of controlled
12 substances. In establishing the process, the department shall adhere to any
13 applicable federal requirements regarding drug testing.

14 2. Identify the parameters for a substance abuse treatment program for
15 claimants who engage in the unlawful use of controlled substances and specify
16 criteria that a claimant must satisfy in order to be considered in full compliance with
17 requirements of the substance abuse treatment program.

18 3. Create a screening process for determining whether there is a reasonable
19 suspicion that a claimant has engaged in the unlawful use of controlled substances.

20 4. Identify the parameters for a job skills assessment for claimants who engage
21 in the unlawful use of controlled substances and specify criteria that a claimant must
22 satisfy in order to be considered in full compliance with the requirements of the job
23 skills assessment.

24 (am) Promulgate rules identifying occupations for which more than 50 percent
25 of employers surveyed under par. (e) indicated that pre-employment, random, or

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1 reasonable suspicion drug testing is required as a condition of obtaining or
2 continuing employment.

3 (ar) Promulgate rules identifying occupations in all of the following categories:

- 4 1. Those that regularly involve work that with or around children.
- 5 2. Those that regularly require the operation of a motorized vehicle.
- 6 3. Those in the field of construction.
- 7 4. Those that require the operation of heavy machinery.
- 8 5. Those in which persons regularly carry a firearm, as defined in s. 167.31 (1)

9 (c).

10 (b) When a claimant applies for regular benefits under this chapter, do all of
11 the following:

12 1. Determine whether the claimant is an individual for whom suitable work is
13 only available in an occupation that regularly conducts drug testing.

14 2. Determine whether the claimant is an individual for whom suitable work is
15 only available in an occupation identified in the rules promulgated under par. (am).

16 2m. Determine whether the claimant is an individual for whom suitable work
17 is only available in an occupation identified in the rules promulgated under par. (ar).

18 3. If the claimant is determined by the department under subd. 1. to be an
19 individual for whom suitable work is only available in an occupation that regularly
20 conducts drug testing, conduct a screening on the claimant.

21 4. If the claimant is determined by the department under subd. 2. to be an
22 individual for whom suitable work is only available in an occupation identified in the
23 rules promulgated under par. (am), conduct a screening on the claimant if a
24 screening is not already required under subd. 3.

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1 4m. If the claimant is determined by the department under subd. 2m. to be an
2 individual for whom suitable work is only available in an occupation identified in the
3 rules promulgated under par. (ar), conduct a screening on the claimant if a screening
4 is not already required under subd. 3. or 4.

5 5. If a screening conducted as required under subd. 3., 4., or 4m. indicates a
6 reasonable suspicion that the claimant has engaged in the unlawful use of controlled
7 substances, require that the claimant submit to such a test.

8 (c) Create and provide a substance abuse treatment program in accordance
9 with the rules promulgated under par. (a) 2.

10 (d) Create and conduct job skills assessments in accordance with the rules
11 promulgated under par. (a) 4.

12 (e) Conduct a survey of employers to identify occupations for which employers
13 require pre-employment, random, or reasonable suspicion drug testing as a
14 condition of obtaining or continuing employment. The department shall conduct a
15 new survey under this paragraph every 10 years.

16 **(3) DRUG TESTING.** (a) If a claimant is required under sub. (2) (b) 5. to submit
17 to a test for the presence of controlled substances and the claimant declines to submit
18 to such a test, the claimant is ineligible for benefits under this chapter until 52 weeks
19 after the date of the declining or until the claimant qualifies for benefits in a
20 subsequent benefit year, whichever occurs later.

21 (b) If a claimant who is required under sub. (2) (b) 5. to submit to a test for the
22 presence of controlled substances submits to the test and does not test positive for
23 any controlled substance or the claimant presents evidence satisfactory to the
24 department that the claimant possesses a valid prescription for each controlled
25 substance for which the claimant tests positive, the claimant may receive benefits

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1 under this chapter if otherwise eligible and may not be required to submit to any
2 further test for the presence of controlled substances until a subsequent benefit year.

3 (c) If a claimant who is required under sub. (2) (b) 5. to submit to a test for the
4 presence of controlled substances submits to the test and tests positive for one or
5 more controlled substances without presenting evidence satisfactory to the
6 department that the claimant possesses a valid prescription for each controlled
7 substance for which the claimant tested positive, the claimant is ineligible for
8 benefits under this chapter until 52 weeks after the date of the test or until the
9 claimant qualifies for benefits in a subsequent benefit year, whichever occurs later,
10 except as provided in par. (d).

11 (d) A claimant who tests positive for one or more controlled substances without
12 presenting evidence of a valid prescription as described in par. (c) may maintain his
13 or her eligibility for benefits under this chapter by enrolling in the substance abuse
14 treatment program and undergoing a job skills assessment. Such a claimant
15 remains eligible for benefits under this chapter, if otherwise eligible, for each week
16 the claimant is in full compliance with any requirements of the substance abuse
17 treatment program and job skills assessment, as determined by the department in
18 accordance with the rules promulgated under sub. (2) (a) 2. and 4.

19 (e) The department shall charge to the fund's balancing account the cost of
20 benefits paid to an individual that are otherwise chargeable to the account of an
21 employer that is subject to the contribution requirements of ss. 108.17 and 108.18
22 if the individual receives benefits based on the application of par. (d).

23 **(4) PREEMPLOYMENT DRUG TESTING.** (a) An employing unit may, in accordance
24 with the rules promulgated by the department under par. (b), voluntarily submit to
25 the department the results of a test for the presence of controlled substances that was

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1 conducted on an individual as preemployment screening or notify the department
2 that an individual declined to submit to such a test as a condition of employment,
3 along with information necessary to identify the individual. Upon receipt of any such
4 results of a test conducted and certified in a manner approved by the department or
5 notification that an individual declined to submit to such a test, the department shall
6 determine whether the individual is a claimant receiving benefits. If the individual
7 is a claimant receiving benefits, the department shall, in accordance with rules
8 promulgated by the department under par. (b), use that information for purposes of
9 determining eligibility for benefits under s. 108.04 (8) (b).

10 (b) The department shall promulgate rules necessary to implement par. (a).

11 **(5) APPLICATION OF THIS SECTION.** (a) Notwithstanding subs. (2) (b) 1., 3., and
12 5., (c), and (d) and (3), subs. (2) (b) 1., 3., and 5., (c), and (d) and (3) do not apply until
13 the rules required under sub. (2) (a) take effect. The department shall submit to the
14 legislative reference bureau for publication in the Wisconsin administrative register
15 a notice identifying the date on which subs. (2) (b) 1., 3., and 5., (c), and (d) and (3)
16 will be implemented.

17 (b) Notwithstanding sub. (2) (b) 2. and 4., sub. (2) (b) 2. and 4. do not apply until
18 the rules required under sub. (2) (am) take effect. The department shall submit to
19 the legislative reference bureau for publication in the Wisconsin administrative
20 register a notice identifying the date on which sub. (2) (b) 2. and 4. will be
21 implemented.

22 (bm) Notwithstanding sub. (2) (b) 2m. and 4m., sub. (2) (b) 2m. and 4m. do not
23 apply until the rules required under sub. (2) (ar) take effect. The department shall
24 submit to the legislative reference bureau for publication in the Wisconsin

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1 administrative register a notice identifying the date on which sub. (2) (b) 2m. and 4m.
2 will be implemented.

3 (c) Notwithstanding sub. (4) (a) and s. 108.04 (8) (b), sub. (4) (a) and s. 108.04
4 (8) (b) do not apply until the rules required under sub. (4) (b) take effect. The
5 department shall submit to the legislative reference bureau for publication in the
6 Wisconsin administrative register a notice identifying the date on which sub. (4) (a)
7 and s. 108.04 (8) (b) will be implemented.

8 (d) The secretary may waive compliance with any provision under this section
9 and s. 108.04 (8) (b) if the secretary determines that waiver of the provision is
10 necessary to permit continued certification of this chapter for grants to this state
11 under Title III of the federal Social Security Act or for maximum credit allowances
12 to employers under the federal Unemployment Tax Act.

13 **SECTION 7.** 108.14 (8n) (e) of the statutes is amended to read:

14 108.14 (8n) (e) The department shall charge this state's share of any benefits
15 paid under this subsection to the account of each employer by which the employee
16 claiming benefits was employed in the applicable base period, in proportion to the
17 total amount of wages he or she earned from each employer in the base period, except
18 that if s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b), 108.07
19 (3), (3r), or (5) (b), or 108.133 (3) (e) would have applied to employment by such an
20 employer who is subject to the contribution requirements of ss. 108.17 and 108.18,
21 the department shall charge the share of benefits based on employment with that
22 employer to the fund's balancing account, or, if s. 108.04 (1) (f) or (5) or 108.07 (3)
23 would have applied to an employer that is not subject to the contribution
24 requirements of ss. 108.17 and 108.18, the department shall charge the share of
25 benefits based on that employment in accordance with s. 108.07 (5) (a) and (b). The

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1 department shall also charge the fund's balancing account with any other state's
2 share of such benefits pending reimbursement by that state.

3 **SECTION 8.** 108.141 (7) (a) of the statutes is amended to read:

4 108.141 (7) (a) The department shall charge the state's share of each week of
5 extended benefits to each employer's account in proportion to the employer's share
6 of the total wages of the employee receiving the benefits in the employee's base
7 period, except that if the employer is subject to the contribution requirements of ss.
8 108.17 and 108.18 the department shall charge the share of extended benefits to
9 which s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b), 108.07
10 (3), (3r), or (5) (b), or 108.133 (3) (e) applies to the fund's balancing account.

11 **SECTION 9.** 108.16 (6m) (a) of the statutes is amended to read:

12 108.16 (6m) (a) The benefits thus chargeable under s. 108.04 (1) (f), (5), (5g),
13 (7) (h), (8) (a) or (b), (13) (c) or (d) or (16) (e), 108.07 (3), (3r), (5) (b), (5m), or (6), 108.133
14 (3) (e), 108.14 (8n) (e), 108.141, 108.151, or 108.152 or sub. (6) (e) or (7) (a) and (b).

15 **SECTION 10. Nonstatutory provisions.**

16 (1) UNEMPLOYMENT INSURANCE; DRUG TESTING.

17 (a) *Scope statements for rules.* The department of workforce development shall
18 present the statements of scope of the rules required under sections 108.04 (8) (b) and
19 108.133 (2) (a), (am), and (ar) and (4) (b) of the statutes, as created by this act, to the
20 governor for approval under section 227.135 (2) of the statutes no later than the
21 180th day after the effective date of this paragraph.

22 (b) *Emergency rule authority.* Using the procedure under section 227.24 of the
23 statutes, the department of workforce development may promulgate any rules
24 required under sections 108.04 (8) (b) and 108.133 (2) (a), (am), and (ar) and (4) (b)
25 of the statutes, as created by this act, for the period before the effective date of any

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1 corresponding permanent rules, but not to exceed the period authorized under
2 section 227.24 (1) (c) of the statutes, subject to extension under section 227.24 (2) of
3 the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes,
4 the department is not required to provide evidence that promulgating a rule under
5 this paragraph as an emergency rule is necessary for the preservation of the public
6 peace, health, safety, or welfare and is not required to provide a finding of emergency
7 for a rule promulgated under this paragraph.

8 (c) *Employer survey.* The department of workforce development shall conduct
9 and compile the results of the survey required under section 108.133 (2) (e) of the
10 statutes, as created by this act, no later than the first day of the 6th month beginning
11 after the effective date of this paragraph.

SECTION 11. Effective date.

12 (1) This act takes effect on the day after publication, or on the 2nd day after
13 publication of the 2015-17 biennial budget act, whichever is later.
14

15 (END)