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Michael H. Gillick
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State of Wisconsin
Labor and Industry Review Commission

October 11, 2019

THE HONORABLE TONY EVERS
GOVERNOR OF WISCONSIN
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JEFFREY RENK
CHIEF CLERK OF THE SENATE
c/o Erin Gillitzer
Via Email: Erin.Gillitzer@legis.wisconsin.gov

PATRICK E. FULLER
CHIEF CLERK OF THE ASSEMBLY
c/o Julie Martyn
Via Email: Julie.Martyn@legis.wisconsin.gov

Dear Governor and Chief Clerks:

On behalf of the Labor & Industry Review Commission (LIRC), I am pleased to submit the agency 2017-2019 Biennial Report in accordance with Wis. Stat. § 15.04(1)(d). The report provides an overview of the agency structure and workload, and highlights program improvements made in the biennium. Additional information is available on our agency website at <http://lirc.wisconsin.gov>.

I am proud to lead the commission as it works each day to provide expertise and a cost-effective process to review disputes in key employment-related programs for employers and employees of the State of Wisconsin.

Sincerely,

A handwritten signature in blue ink that reads "Michael H. Gillick".

Michael H. Gillick
Chairperson

cc: Wisconsin Department of Administration
(Via Email c/o: Tracy.Williamson@wisconsin.gov)
Wisconsin Document Depository Program
(Four Hard Copies and Via Email: statedocuments@dpi.wi.gov)

Labor & Industry Review Commission

Biennial Report

2017-2019



This report is designed to provide an overview of the organizational structure and highlight program improvements of the Wisconsin Labor & Industry Review Commission (LIRC) from 2017-2019. We encourage you to visit our website at <http://lirc.wisconsin.gov/> for more detailed information about the commission.

Tony Evers, Governor

Michael H. Gillick, Chairperson

David B. Falstad, Commissioner

Georgia E. Maxwell, Commissioner

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Agency Functions and Organization

The Wisconsin Labor and Industry Review Commission (LIRC) is an independent agency established to provide a fair and impartial review of the employment law decisions of the administrative law judges (ALJs)¹ of the Department of Workforce Development (DWD), in cases involving Unemployment Insurance (UI), and Equal Rights (ER), and decisions of the ALJS of the Department of Administration (DOA) Division of Hearings and Appeals (DHA) in cases involving Worker's Compensation (WC).² LIRC's independent review of ALJ decisions serves the vital role of providing consistent expertise in decision-making that stabilizes these employment-related programs for employers and employees in the State of Wisconsin. LIRC provides a cost-effective process to correct errors and maintain consistency and stability in these programs.

LIRC's mission is the independent and impartial resolution of these appeals. In carrying out this mission, LIRC seeks to ensure that:

- All employers and employees are provided a neutral and efficient quasi-judicial forum for the resolution of disputes.
- All parties have been afforded a full and fair opportunity to be heard, and all proceedings have been carried out in a manner respecting the requirements of due process and the dignity of each individual.
- All parties receive the benefits or protections to which they are entitled by law.
- The interpretation and application of the law, as enacted by the Wisconsin Legislature, is correctly and consistently interpreted and applied.
- The public trust and confidence conferred on LIRC by the Wisconsin Legislature is respected.
- As a separate and independent state agency, LIRC's decisions are rendered free from any influence by the Department of Workforce Development or DOA Division of Hearings and Appeals, the agencies whose decisions it is reviewing.
- Its actions contribute to the continuing stability and consistency of the unemployment insurance, worker's compensation, and equal rights programs.³

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LIRC conducts a *de novo* review of the evidence submitted at the hearing before the ALJ, considers any arguments submitted on behalf of the parties, consults with the ALJ when required, and then issues a written decision which may affirm, reverse, or modify the decision of the ALJ, or direct further hearing or other proceedings.⁴ LIRC examines the entire record to determine the facts in the case. In each case, LIRC reviews the transcript or synopsis of the hearing testimony, the hearing exhibits, the recording of the hearing when necessary, and the arguments in briefs from the parties before the commission. LIRC reviews the ALJ decision and challenges that parties make to the actions of the ALJ (e.g., rulings on admissibility of evidence). Where the facts found by the ALJ are supported in the record by credible and substantial evidence and the application of the law is correct, LIRC makes the same findings of fact and conclusions of law and affirms the decision of the ALJ. Where a case record made by an ALJ is not complete, however, and only a few facts are missing, LIRC may remand a case to an ALJ to take the needed additional testimony on behalf of LIRC. See Wis. Stat. §§ 102.18(4)(c), 108.09(6)(d). The additional testimony is then provided to LIRC and LIRC will make its findings of fact and conclusions of law based on the totality of the record.

In cases where the deficiencies in the record are too great, LIRC will remand the entire case for a new hearing and decision. In many cases, the decisions of the ALJ do not contain all of the findings of fact necessary to support the ALJ's legal conclusions even though the facts are contained in the record. In those cases, the commission rewrites the decision entirely, making the findings of fact necessary to ensure that all of the relevant facts are set forth in the decision and support the commission's legal conclusions. The existing process allows cases to be decided

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completely, correctly, and as quickly as possible. The decisions of LIRC may be appealed to circuit court.⁵

Although LIRC was created as a distinct agency in 1977,⁶ its history of decision-making in employment cases dates back over one hundred years. In 1911, the State Industrial Commission was created to administer Wisconsin's new Workmen's Compensation Act.⁷ The Industrial Commission replaced the Wisconsin Bureau of Labor Statistics, which had been created in 1883 to collect non-agricultural statistics and given authority to enforce laws regulating the employment of women and children that had been passed as early as 1867.⁸

At the time the Industrial Commission was created, Wisconsin's law was the first constitutional worker's compensation law in the nation.⁹ In 1932, the Industrial Commission was given the added responsibility of administering Wisconsin's newly enacted Unemployment Compensation Act. Wisconsin's Unemployment Compensation Act was also the first of its kind in the nation.¹⁰ From its inception, the Industrial Commission held a prestigious role in the country for many years as a model for other states interpreting these laws.¹¹

The Industrial Commission was renamed in 1967 and became the Department of Industry, Labor and Human Relations (DILHR). Administration of the Unemployment Compensation Act was handled by the Unemployment Compensation Division of DILHR, while the Worker's Compensation Act was administered by DILHR's Worker's Compensation Division. DILHR was also given responsibility for the Governor's Commission on Civil Rights, which became the DILHR Equal Rights Division (ERD). DILHR continued to be headed by three commissioners, who decided appeals of decisions made by these three Divisions.

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In 1977, DILHR became a cabinet-level agency headed by a Secretary who was appointed by the Governor.¹² DILHR handled the administrative functions of the programs. LIRC was created as a separate agency to handle the quasi-judicial functions that the commissioners previously handled at the Industrial Commission and DILHR. The name of DILHR was changed to the Department of Workforce Development (DWD) in 1996.¹³

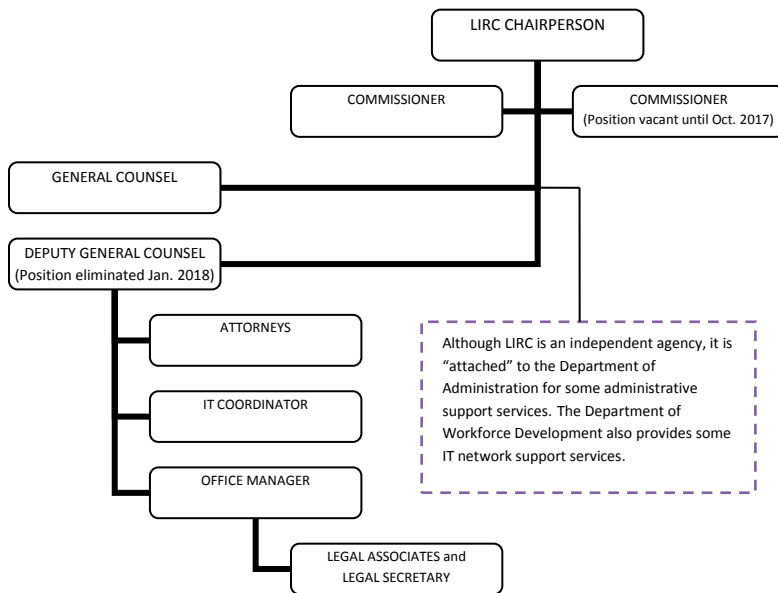
The commission is composed of three commissioners who are appointed by the Governor, subject to confirmation by the Senate, and who serve staggered 6-year terms.¹⁴ In odd-numbered years, the commissioners elect a chairperson to serve a 2-year term.¹⁵ During the first part of the 2017-2019 biennium, LIRC functioned with only two commissioners, Laurie McCallum, Chairperson, and David Falstad, Commissioner. In October of 2017, Georgia Maxwell joined the commission and became the Chairperson. In January of 2018, Commission McCallum retired, and in March of 2019, Michael Gillick was appointed to the commission. David Falstad was elected Chairperson at that time, but chose to step aside shortly thereafter. Commissioner Gillick became Chairperson in April of 2019 and continues in that role.

Commissioners McCallum, Falstad and Gillick are all attorneys, lending over 100 years of combined legal experience to the decision-making function of the commission, while Commissioner Maxwell comes from DWD and has a background in and familiarity with employment law as it affects Wisconsin workers. Both attorney and non-attorney commissioners rely on staff attorneys for guidance with respect to the legal issues presented to the commission. Biographical information about current commissioners is available on the commission's website at <http://lirc.wisconsin.gov/commissioners.htm>.

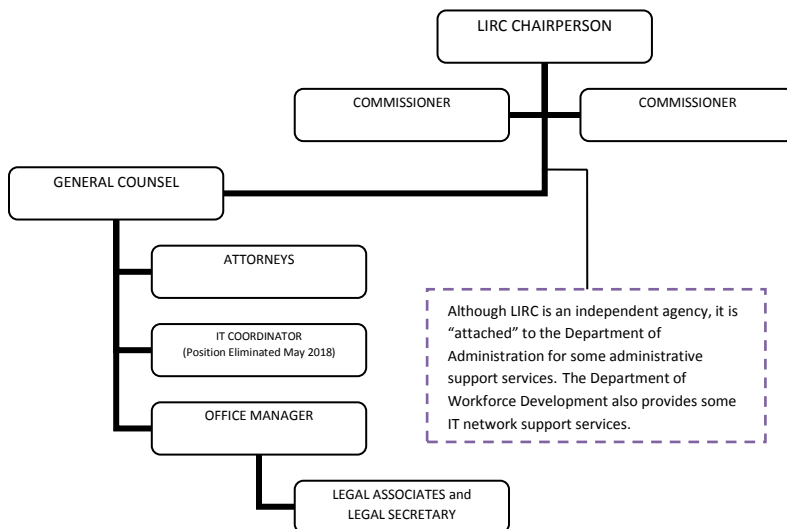
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LIRC had 15.7 full-time equivalent positions (attorneys, office support staff, and, until May of 2018, an information technology specialist) to assist the commissioners in their work. The following two schematics represent LIRC's functional organizational structure during the 2017-2019 biennium:

July 2017 - December 2017



January 2018 - June 2019



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Performance and Operations During the Biennium

The majority of the decisions the commission issues are UI decisions. In recessionary times, the commission may issue up to 4,000 UI decisions in a year. Because LIRC is the final administrative appeal for UI cases, the increase in appeals during a recession affects LIRC later than it does DWD. For instance, during the Great Recession, the years with LIRC's highest numbers of appeals were in 2010-2013. Only in 2014 did LIRC's UI caseload begin to return to pre-recessionary levels. The commission also issues approximately 200 WC decisions and 90 ER decisions in a year. Statistical information about LIRC's decision-making for the past 20 years is available on the commission website: http://lirc.wisconsin.gov/lirc_stats.htm.

The 2017-2019 biennium was a period of transition at LIRC. Budget cuts and retirements left the commission with a smaller staff than in the previous biennium (15.7 full-time equivalent positions, as compared to 23.5 in 2015-2017). However, a combination of lower UI appeals and streamlined commission procedures have enabled LIRC to continue to meet its goals with regard to both the quality and quantity of decisions issued.

In addition, beginning in June of 2019, the U.S. Department of Labor advised the commission that, while it takes a "snap-shot" every March 31 to ensure that LIRC is meeting or exceeding the timeliness requirements imposed for UI benefit cases (a procedure discussed more fully below in the section entitled "Performance Measures"), it would also be reviewing case aging averages monthly and would expect the commission to meet standards on an ongoing basis. The commission has implemented a variety of strategies and efficiencies

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designed to ensure that it can meet this new expectation. One such innovation, intended to both speed up the workload and save resources, is a move towards paperless files.

Major Program Goals and Objectives

LIRC is an independent agency established to provide a fair and impartial review of the employment law decisions of the ALJs of the DWD and DOA's DHA, primarily in cases involving UI, WC, and ER. LIRC's mission is the independent and impartial resolution of these appeals. See "Agency Functions and Organization" above.

The major program goals and objectives have not changed.

Flexible Time Work Schedules and Alternative Work Patterns

LIRC first adopted a Flextime Policy for its staff in 1980. This was updated as an "Alternate Work Pattern and Procedures" most recently in 2004. LIRC first adopted a Telework Policy in 2011.

In 2014, LIRC conducted a comprehensive review of all of its policies, eliminated outdated policies, and updated all policies. On September 25, 2014, the commission adopted a new Hours and Flextime Policy and amended its Telework Policy. The commission's Hours and Flextime Policy allows employees, with supervisor approval, to work a nonstandard or flextime hours schedule in order to maximize personal and production efficiency, remove artificial barriers to employment, improve employee morale, enhance job satisfaction and the spirit of cooperation between management and employees, and provide for a more economical and efficient use of energy, highways, and other transit systems. Supervisors may designate core

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hours when all employees in work status must be present. Employees must notify supervisors when flexing their work schedule.

The Telework Policy allows employees, with approval of the employee's supervisor and the chairperson, to work at home on a regular or as-needed basis. Employees must sign a telework agreement to be able to work at home. During the biennium, LIRC had one legal associate who permanently worked at home typing summaries of hearings. Many other LIRC employees, including attorneys and support staff, have telework agreements. Several attorneys work at home one day per week, but must be available for case discussions with commissioners in the LIRC offices when needed. Teleworking allows for uninterrupted work time and work continuation during inclement weather, and ensures that employees have the tools and are familiar with remote working in the event of an emergency situation. Supervisors monitor employees through reviews and performance standards to ensure accountability for flextime hours and teleworking. LIRC commissioners also work at home a day or more each week as the workload permits.

Caseload Summary

Statistical information about LIRC's decision-making for the past 20 years is available on the commission website: http://lirc.wisconsin.gov/lirc_stats.htm.

Performance Measures

The U.S. Department of Labor (DOL) requires¹⁶ that the average age of pending UI single-claimant benefit cases as of March 31st of each year must be 40 days or less for higher authorities. If the average age of LIRC's pending UI cases is more than 40 days on March 31st of

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any year, the DOL may find the agency out of compliance with federal regulations and the agency has to file a corrective action plan with DOL. DOL will provide federal oversight until the agency is brought back into compliance. In addition, federal funding for the UI program is based on a Resource Justification Model that takes into account timeliness of appeals in calculating the amount of UI funding a state receives. When the average case age does not meet the federal standards, a state may expect to get less in UI grant funds from DOL. As indicated above, DOL has recently begun reviewing case aging averages monthly with the expectation that the 40 day average will be met on an ongoing basis.

LIRC has met federal timeliness requirements as of March 31st each year since 2004. LIRC's average UI benefit case age as of March 31, 2017, was 27 days, with a yearly average of 38 days. On March 31, 2018, the average case age was 27 days, with a yearly average of 45 days. On March 31, 2019, the average case age was 23 days, and the yearly average from January 1 to June 30, 2019, was 37 days.

There are no federal performance standards for worker's compensation or equal rights cases. LIRC aims to issue these decisions in an average of 6 months, however, the time to issue these decisions is affected by delays in obtaining transcripts and briefing extension requests from parties.

¹ Note that some statutes refer to the lower level decision-makers as "hearing examiners." The commission reviews decisions of both ALJs and hearing examiners. For simplicity and readability, this report will refer to all of the lower level decision-makers as ALJs.

² Wis. Stat. § 103.04(1).

³ Mission statement approved by commissioners on March 24, 2015, modified to note that the ALJs for the WC program are now located in the DOA Division of Hearings and Appeals.

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⁴ The Legislature established LIRC's *de novo* review authority in WC cases in Wis. Stat. § 102.18(3), providing that the commission shall affirm, reverse, set aside, or modify the findings or order, in whole or in part, or direct the taking of additional evidence. The legislature established LIRC's *de novo* review authority in ER cases in Wis. Stat. § 111.39(5), providing that the commission, on review, may either affirm, reverse or modify the findings or order in whole or in part, or set aside the findings and order and remand to the department for further proceedings. The legislature established LIRC's *de novo* review authority in UI cases in Wis. Stat. § 108.09(6)(d), indicating that in any case before the commission, the commission may affirm, reverse, modify, or set aside the decision on the basis of evidence previously submitted; order the taking of additional evidence as to such matters as it may direct; or remand the matter to the department for further proceedings.

⁵ Wis. Stat. §§ 102.23(1), 103.06(6)(d), 108.09(7), 108.10(4), 111.395.

⁶ LIRC was created in Chapter 29, Laws of 1977, or 1977 Wis. Act 29.

⁷ Historical information taken generally from LIRC's website, lirc@wisconsin.gov, and DWD's website: http://dwd.wisconsin.gov/dwd/dwdhistory/Year_Pages/wis_indstrl_comm.htm.

⁸ See, *Wisconsin Department of Workforce Development Timeline History: Bureau of Labor Statistics*, http://dwd.wisconsin.gov/dwd/dwdhistory/Year_Pages/wis_bls.htm.

⁹ See, *Wisconsin Department of Workforce Development Timeline History: Wisconsin Industrial Commission*, http://dwd.wisconsin.gov/dwd/dwdhistory/Year_Pages/wis_indstrl_comm.htm. For additional information about the history of the WC law in Wisconsin, see *Wisconsin's Worker's Compensation Centennial 1911-2011, The Nation's 1st Constitutional Worker's Compensation Law, A Legacy of Cooperation and Innovation*, published by DWD 2011.

¹⁰ See, *Wisconsin Department of Workforce Development Timeline History: Wisconsin Industrial Commission*, http://dwd.wisconsin.gov/dwd/dwdhistory/Year_Pages/wis_indstrl_comm.htm.

¹¹ See generally, Blaustein, Saul J., *Unemployment Insurance in the United States, The First Half Century*, W.E. Upjohn Institute for Employment Research, Kalamazoo, MI 1993. The Social Security Act, of which the federal UI program is a part, was adopted in 1935, three years after Wisconsin's Unemployment Compensation Act was adopted. See also, Raushenbush, Paul A. and Brandeis, Elizabeth, *Our "U.C." Story, 1930-1967*, Madison, Wisconsin, 1968 (an edited oral history).

¹² Chapter 29, Laws of 1977, or 1977 Wis. Act 29.

¹³ 1995 Wis. Acts 27 and 289. DILHR was renamed the "Department of Industry, Labor and Job Development," but was allowed to use the name "department of workforce development" for any official purpose in Act 289:

SECTION 275. Nonstatutory provisions; industry, labor and job development.

(1t) ALTERNATIVE NAME FOR THE DEPARTMENT. Notwithstanding section 15.22 of the statutes, during the period beginning on July 1, 1996, and ending on the day after publication of the 1997-99 biennial budget act, the department of industry, labor and job development may use the name "department of workforce development" for any official purpose.

¹⁴ Wis. Stat. §§ 15.06 and 15.105(15) (formerly Wis. Stat. § 15.225, as amended by 2015 Wis. Act 55).

¹⁵ Wis. Stat. § 15.06(2).

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¹⁶ Unemployment Insurance Program Letter (UIPL) 14-05 and UIPL 14-05 Change 1 describe changes to the UI Performs performance management system used by DOL. The DOL specifies the “Acceptable Level of Performance” or ALP for lower authority appeals like the ALJs and the higher authority appeals boards like LIRC. For higher authority appeals boards, the Core Measure for what constitutes an ALP is the “Average Age of Pending Appeals.” This is the measure of all pending single-claimant appeals at the end of the measurement period. The average age of unresolved cases is calculated by first determining the number of days each unresolved case has been pending; the number of days pending for all cases is totaled and divided by the number of unresolved cases to produce the average case age. The ALP for lower authority appeals is an average of 30 days; for higher authority appeals it is 40 days. DOL determines if the ALPs have been met when the average age of pending appeals is measured as of March 31, the last day of the performance year. If a state fails to meet the ALP on the measurement date, it must submit a corrective action plan.