



(DNOTE)
State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-3121-PS P4
JTK:cjs: [initials]
stays

wanted Mon 10/6 PM

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

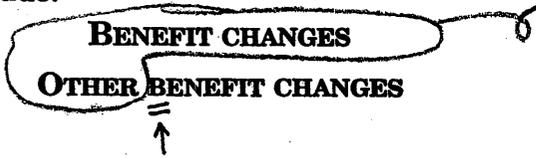
SA ✓

(regenerate)

1 AN ACT ~~to amend 20.445 (1) (n), 108.02 (12) (b) (intro.), 108.02 (12) (bm) (intro.),~~
 2 ~~108.04 (11) (cm), 108.04 (16) (a) (intro.), (b) and (c), 108.04 (17) (a) 1 and 2., (b)~~
 3 ~~1. and 2., (c) 1. and 2., (d), (e), (f), (g), (h), (i) and (k) (intro.), 108.05 (7) (a) 1.,~~
 4 ~~108.05 (7) (c), 108.05 (7) (d) 1. (intro.), 108.05 (7) (f) (intro.), 108.09 (4) (c), 108.14~~
 5 ~~(8s) (a) and (b), 108.191 (4) (c), 108.22 (2) (b), 108.22 (8) (b) and 108.225 (15); and~~
 6 ~~to create 20.445 (1) (ne), 108.02 (6m), 108.05 (7) (cm) and 108.16 (12) of the~~
 7 statutes; relating to: various changes in the unemployment insurance law.

Analysis by the Legislative Reference Bureau

This bill makes various changes in the unemployment insurance law. Significant provisions include:



Employee status

Currently, in order to be eligible to claim benefits, an individual must, in addition to other requirements, be an "employee" as defined in the unemployment insurance law. Generally, an "employee" is an individual who performs services for an employer in employment covered under the unemployment insurance law, whether or not the individual is directly paid by the employer. However, an

individual is not an "employee" if the individual performs services as an independent contractor.

Currently, during the four-year period beginning in the year 2000 (the specific date varies in different situations), an independent contractor, other than a logger or trucker performing services for an employer other than a governmental or nonprofit employer, must meet at least seven of ten conditions concerning the individual's relationship to or control over his or her business or the services that he or she performs. Two of the conditions that an individual may use to qualify as an independent contractor require the individual to have a federal employer identification number or to have filed business or self-employment income tax returns with the federal internal revenue service based on the services performed as an independent contractor. The other eight conditions are the same eight conditions that an individual was able to use to qualify as an independent contractor prior to the year 2000. These conditions relate to the individual's relationship to or direction or control over his or her business or the services that he or she performs.

Beginning in 2004, in order to be considered an independent contractor, an individual must hold or have applied for an employer identification number with the federal internal revenue service or must have filed business or self-employment income tax returns with the federal internal revenue service in the previous year, and must meet at least six of the eight other conditions concerning the individual's relationship to or direction or control over his or her business or the services that he or she performs. This bill makes permanent the test for determination of "employee" status that is in effect prior to 2004.

Approved training

Currently, benefits may not be denied to an otherwise eligible claimant because the claimant is enrolled in a vocational training course under certain conditions. This bill provides that this exception does not apply to a claimant who fails to provide to the Department of Workforce Development (DWD) with his or her social security number or who provides a false social security number. Current law also provides that a claimant is not subject to certain requirements to requalify for benefits by obtaining new work after voluntarily terminating work or failing, without good cause, to accept suitable work or recall to work for a former employer if the failure occurs as a result of participation in a federal training program or the claimant leaves work to enter or continue in such a program. This bill provides that this exemption does not apply to a claimant who fails to provide a social security number or who provides a false social security number. However, the bill extends the current exemption so that a claimant who participates in such a program is not subject to requirements to be able to work and remain available for work, and makes such a claimant exempt from disqualifications or benefit reductions for taking a voluntary leave of absence from work, working in self-employment, failing to maintain a license, being employed by a family-owned business, or failing to provide certain information. However, the bill limits the current exemption so that it applies only to dislocated workers and workers obtaining training under the federal Trade Adjustment Assistance Act, rather than to all workers, who participate in certain federal training programs.

FWS
2A

Recovery of benefit overpayments

Currently, DWD may offset any benefits that are overpaid to a claimant against benefits that the claimant would otherwise be eligible to receive. This bill provides for DWD to recoup any overpayment instead of offsetting it. The change facilitates collection of overpayments during bankruptcy proceedings.

TAX CHANGES**Duration of levies**

Currently, DWD ~~may administratively levy against the property of a third party who holds the property of a person who is indebted to DWD for the purpose of enforcing collection of the debt. No levy applies for more than one year after the date of service. This bill removes that limitation. Under the bill, a levy is effective until the debt is satisfied or until DWD releases the levy, whichever occurs first.~~ ^{an administrative}

Enforcement of assessments against imposters

Currently, if any person makes a false statement or representation in order to obtain benefits in the name of another person, DWD may, by administrative action or by decision in an administrative proceeding, require the person to repay the benefits and may also penalize the person by levying an assessment against him or her in an amount not greater than 50% ^{2 percent} of the benefits wrongfully obtained. The assessment may be enforced by obtaining a judgment against the person in court and then by levying against the nonexempt property of the person to enforce the judgment. This bill provides, in addition, that DWD may recoup the amount due from other benefits that the person would otherwise be eligible to receive or may issue an administrative levy against the property of the person without a court proceeding.

OTHER CHANGES**Treatment of stepchildren**

Currently, stepchildren are not treated as children for purposes of the unemployment insurance law. This bill treats stepchildren as children for that purpose. Among other effects, the change means that: a) unless an employer otherwise elects, with the approval of DWD, the wages of the stepchildren of a nonresident alien who has nonimmigrant status are not subject to contribution requirements (taxes) and these stepchildren may not claim benefits based on their employment; b) ownership of a business by the stepchild of a claimant may result in a limitation of benefit availability based on employment with that business; c) the need to obtain child care for a stepchild or domestic abuse involving a stepchild may serve to permit a claimant to obtain benefits after voluntarily terminating work without requalifying by engaging in new work, under certain conditions; and d) ownership of a business by a stepchild of another owner may result in treatment of the business as the successor of the previous business rather than treatment of the business as a new business, under certain conditions.

Late appeals

Currently, if a party in an unemployment insurance determination files an appeal that is not timely, DWD may schedule a hearing concerning whether the

JWS
3A

party's failure to file the appeal on a timely basis was for a reason that was beyond the party's control. This bill provides that if a party files an appeal that is not timely, an appeal tribunal (attorney employed by DWD) must review the reasons given by the party for not filing a timely appeal and if those reasons, taken as true and construed most favorably to the party, do not constitute a reason that was beyond the party's control, the tribunal may dismiss the appeal without a hearing and issue a decision finding that the appeal was not filed on a timely basis. If the tribunal finds that the appeal may have been filed late for a reason that was beyond the party's control, the department may schedule a hearing on that issue.

Method of payment of certain court filing fees

Currently, DWD has a lien on the property of each employer for payment of contributions (taxes), together with any interest, fees, and forfeitures owed by the employer. DWD may issue a warrant and record the warrant with the clerk of circuit court to secure payment of the amounts due. DWD need not pay the filing fee with each warrant that is recorded, but instead pays semiannually or at another interval that is agreed to by the clerk of circuit court. This bill provides that DWD need not pay the filing fee for any satisfaction of a warrant or release or withdrawal of a warrant at the time it is recorded, but instead may pay the clerk of circuit court periodically in the same manner that fees for recording of warrants are paid currently.

Payment of banking service costs

Currently, the cost of banking services incurred by the unemployment reserve fund is paid by maintaining compensating balances in the bank accounts that are used to make daily transactions. This bill provides for the treasurer of the fund to make estimates, prior to the beginning of each calendar quarter, of the earnings that the fund could anticipate in that quarter if compensating balances are maintained to cover service costs and, alternatively, if the moneys that would otherwise be maintained in bank accounts to cover service costs were instead retained in the federal unemployment trust account and the banking service costs were paid from that account. The treasurer is directed to pay banking service costs using the method that the treasurer determines will permit the fund to realize the greatest net earnings in that quarter.

Reporting of social security benefit information

Currently, claimants and their employers and retirement systems are required to report to DWD any information specified by DWD relating to the portion of social security benefits received by a claimant that is not based upon taxes paid by a claimant. This bill makes the reporting requirement applicable to all social security benefits received.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

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

1 SECTION 1. 20.445 (1) (n) of the statutes, as affected by 2003 Wisconsin Act 33,
2 is amended to read:

3 20.445 (1) (n) *Employment assistance and unemployment insurance*
4 *administration; federal moneys.* All federal moneys received, as authorized by the
5 governor under s. 16.54, for the administration of employment assistance and
6 unemployment insurance programs of the department, for the performance of the
7 department's other functions under subch. I of ch. 106 and ch. 108, except moneys
8 appropriated under par. (nc), and to pay the compensation and expenses of appeal
9 tribunals and of employment councils appointed under s. 108.14, to be used for such
10 purposes, except as provided in s. 108.161 (3e), to transfer to the appropriation
11 account under par. (nb) an amount determined by the treasurer of the unemployment
12 reserve fund not exceeding the lesser of the amount specified in s. 108.161 (4) (d) or
13 the amounts in the schedule under par. (nb), and to transfer to the appropriation
14 account under par. (nd) an amount determined by the treasurer of the
15 unemployment reserve fund not exceeding the lesser of the amount specified in s.
16 108.161 (4) (d) or the amounts in the schedule under par. (nd), and to transfer to the
17 appropriation account under par. (ne) an amount equal to any amount required to
18 pay for the cost of banking services incurred by the unemployment reserve fund.

19 SECTION 2. 20.445 (1) (ne) of the statutes is created to read:

1 20.445 (1) (ne) *Unemployment administration; bank service costs.* All moneys
 2 transferred from the appropriation account under par. (n) to be used for the payment
 3 of the cost of banking services incurred by the unemployment reserve fund.

4 **SECTION 3.** 108.02 (6m) of the statutes is created to read:

5 108.02 (6m) CHILD. "Child" means a natural child, adopted child, or stepchild.

6 **SECTION 4.** 108.02 (12) (b) (intro.) of the statutes is amended to read:

7 108.02 (12) (b) (intro.) During the period beginning on January 1, 1996, and
 8 ending on December 31, 1999, ~~and during the period beginning on January 1, 2004,~~
 9 with respect to contribution requirements, and during the period beginning on
 10 January 1, 1996, and ending on April 1, 2000, ~~and during the period beginning on~~
 11 ~~April 4, 2004,~~ with respect to benefit eligibility, par. (a) does not apply to an individual
 12 performing services for an employing unit other than a government unit or nonprofit
 13 organization in a capacity other than as a logger or trucker, if the employing unit
 14 satisfies the department that:

15 **SECTION 5.** 108.02 (12) (bm) (intro.) of the statutes is amended to read:

16 108.02 (12) (bm) (intro.) During the ~~4-year~~ period beginning on
 17 January 1, 2000, with respect to contribution requirements, and during the period
 18 beginning on April 2, 2000, ~~and ending on April 3, 2004,~~ with respect to benefit
 19 eligibility, par. (a) does not apply to an individual performing services for an
 20 employing unit other than a government unit or nonprofit organization in a capacity
 21 other than as a logger or trucker, if the employing unit satisfies the department that
 22 the individual meets 7 or more of the following conditions by contract and in fact:

22 INS
 23 6-22
 24

23 **SECTION 6.** 108.04 (11) (cm) of the statutes is amended to read:

24 108.04 (11) (cm) ~~Any~~ If any person who makes a false statement or
 25 representation in order to obtain benefits in the name of another person, the benefits

1 received by that person constitute a benefit overpayment. Such person may, by a
2 determination or decision issued under s. 108.095, be required to repay the amount
3 of the benefits obtained and be assessed an administrative assessment in an
4 additional amount equal to not more than 50% of the amount of benefits obtained.

5 SECTION 7. 108.04 (16) (a) (intro.), (b) and (c) of the statutes are amended to
6 read:

7 108.04 (16) (a) (intro.) Benefits shall not be reduced under sub. (1) (a), or denied
8 under sub. (2) (a) or (d) or (8) or s. 108.141 (3g) to any otherwise eligible individual
9 for any week because the individual is enrolled in a full-time course of vocational
10 training or basic education which is a prerequisite to such training, provided it is
11 determined that:

12 (b) The requalifying ~~employment~~ requirement under subs. (7) and (8) and the
13 general qualifying requirements under ~~sub.~~ subs. (1) and (2) (a) and (d) do not apply
14 to an individual as a result of the individual's enrollment in training or leaving
15 unsuitable work to enter or continue training in accordance with the plan of any state
16 under 19 USC 2296 or a plan for training of dislocated workers approved under 29
17 USC 2822.

18 (c) Benefits may not be denied to an otherwise eligible individual under par. (a)
19 who is enrolled in a program under the plan of any state for training under 19 USC
20 2296 or a plan for training of dislocated workers approved under 29 USC 2822,
21 notwithstanding the failure of such training to meet any of the requirements of par.
22 (a) 1. to 4.

23 SECTION 8. 108.04 (17) (a) 1. and 2., (b) 1. and 2., (c) 1. and 2., (d), (e), (f), (g),
24 (h), (i) and (k) (intro.) of the statutes are amended to read:

1 108.04 (17) (a) 1. During the period between 2 successive academic years or
2 terms, if the school year employee performed such services for ~~an~~ any educational
3 institution in the first such year or term and if there is reasonable assurance that he
4 or she will perform such services for ~~an~~ any educational institution in the 2nd such
5 year or term; or

6 2. During the period between 2 regular but not successive academic terms,
7 when an agreement between an employer and a school year employee provides for
8 such a period, if the school year employee performed such services for ~~an~~ any
9 educational institution in the first such term and if there is reasonable assurance
10 that he or she will perform such services for ~~an~~ any educational institution in the 2nd
11 such term.

12 (b) 1. During the period between 2 successive academic years or terms, if the
13 school year employee performed such services for any such ~~-a-~~ government unit,
14 Indian tribe, or nonprofit organization in the first such year or term and if there is
15 reasonable assurance that he or she will perform such services for any such ~~-a-~~
16 government unit, Indian tribe, or nonprofit organization in the 2nd such year or
17 term; or

18 2. During the period between 2 regular but not successive academic terms,
19 when an agreement between an employer and a school year employee provides for
20 such a period, if the school year employee performed such services for any such ~~-a-~~
21 government unit, Indian tribe, or nonprofit organization in the first such term and
22 if there is reasonable assurance that he or she will perform such services for any such
23 ~~-a-~~ government unit, Indian tribe, or nonprofit organization in the 2nd such term.

24 (c) 1. During the period between 2 successive academic years or terms, if the
25 school year employee performed such services for ~~an~~ any educational service agency

1 in the first such year or term and if there is reasonable assurance that he or she will
2 perform such services for an any educational service agency in the 2nd such year or
3 term; or

4 2. During the period between 2 regular but not successive academic terms,
5 when an agreement between an employer and a school year employee provides for
6 such a period, if the school year employee performed such services for an any
7 educational service agency in the first such term and if there is reasonable assurance
8 that he or she will perform such services for an any educational service agency in the
9 2nd such term.

10 (d) A school year employee of an educational institution who performs services
11 other than in an instructional, research or principal administrative capacity is
12 ineligible for benefits based on such services for any week of unemployment which
13 occurs during a period between 2 successive academic years or terms if the school
14 year employee performed such services for an any educational institution in the first
15 such year or term and there is reasonable assurance that he or she will perform such
16 services for an any educational institution in the 2nd such year or term.

17 (e) A school year employee of a government unit, Indian tribe, or nonprofit
18 organization which provides services to or on behalf of an any educational institution
19 who performs services other than in an instructional, research or principal
20 administrative capacity is ineligible for benefits based on such services for any week
21 of unemployment which occurs during a period between 2 successive academic years
22 or terms if the school year employee performed such services for any such -a-
23 government unit or nonprofit organization in the first such year or term and there
24 is reasonable assurance that he or she will perform such services for any such -a-

1 government unit, Indian tribe, or nonprofit organization in the 2nd such year or
2 term.

3 (f) A school year employee of an educational service agency who performs
4 services other than in an instructional, research or principal administrative
5 capacity, and who provides such services in an educational institution or to or on
6 behalf of an educational institution, is ineligible for benefits based on such services
7 for any week of unemployment which occurs during a period between 2 successive
8 academic years or terms if the school year employee performed such services for ~~an~~
9 any educational service agency in the first such year or term and there is reasonable
10 assurance that he or she will perform such services for ~~an~~ any educational service
11 agency in the 2nd such year or term.

12 (g) A school year employee of an educational institution who performs services
13 as described in par. (a) or (d) is ineligible for benefits based on such services for any
14 week of unemployment which occurs during an established and customary vacation
15 period or holiday recess if the school year employee performed such services for ~~an~~
16 any educational institution in the period immediately before the vacation period or
17 holiday recess, and there is reasonable assurance that he or she will perform the
18 services described in par. (a) or (d) for ~~an~~ any educational institution in the period
19 immediately following the vacation period or holiday recess.

20 (h) A school year employee of a government unit, Indian tribe, or nonprofit
21 organization which provides services to or on behalf of an educational institution
22 who performs the services described in par. (b) or (e) is ineligible for benefits based
23 on such services for any week of unemployment which occurs during an established
24 and customary vacation period or holiday recess if the school year employee
25 performed such services for any such ~~a~~ government unit, Indian tribe, or nonprofit

1 organization in the period immediately before the vacation period or holiday recess,
2 and there is reasonable assurance that the school year employee will perform the
3 services described in par. (b) or (e) for any such ~~a~~ government unit, Indian tribe, or
4 nonprofit organization in the period immediately following the vacation period or
5 holiday recess.

6 (i) A school year employee of an educational service agency who performs the
7 services described in par. (c) or (f), and who provides such services in an educational
8 institution or to or on behalf of an educational institution, is ineligible for benefits
9 based on such services for any week of unemployment which occurs during an
10 established and customary vacation period or holiday recess if the school year
11 employee performed such services for ~~an~~ any educational service agency in the period
12 immediately before the vacation period or holiday recess, and there is reasonable
13 assurance that the school year employee will perform the services described in par.
14 (c) or (f) for ~~an~~ any educational service agency in the period immediately following
15 the vacation period or holiday recess.

16 (k) (intro.) If benefits are reduced or denied to a school year employee who
17 performed services other than in an instructional, research or principal
18 administrative capacity under pars. (d) to (f), and the department later determines
19 that the school year employee was not offered an opportunity to perform such
20 services for ~~the~~ an applicable employer under pars. (d) to (f) in the 2nd academic year
21 or term, the department shall recompute the school year employee's base period
22 wages under sub. (4) (a) and ss. 108.05 (1) and 108.06 (1) and shall make retroactive
23 payment of benefits for each week of such reduction or denial if the school year
24 employee:

25 SECTION 9. 108.05 (7) (a) 1. of the statutes is amended to read:

1 108.05 (7) (a) 1. "Pension payment" means a pension, retirement, annuity, or
2 other similar payment made to a claimant, based on the previous work of that
3 claimant, whether or not payable on a periodic basis, from a governmental or other
4 retirement system maintained or contributed to by an employer from which that
5 claimant has base period wages, ~~other than a payment received under the federal~~
6 ~~Social Security Act (42 USC 301 et seq.) that is based in whole or in part upon taxes~~
7 ~~paid by the claimant.~~

8 **SECTION 10.** 108.05 (7) (c) of the statutes is amended to read:

9 108.05 (7) (c) *Required benefit reduction.* If Except as provided in par. (cm), if
10 a claimant actually or constructively receives a pension payment, the department
11 shall reduce benefits otherwise payable to the claimant for a week of partial or total
12 unemployment, but not below zero, if pars. (d) and (e) or if pars. (d) and (f) apply.

13 **SECTION 11.** 108.05 (7) (cm) of the statutes is created to read:

14 108.05 (7) (cm) *Payments received under Social Security Act.* If a claimant
15 receives a pension payment under the federal Social Security Act (42 USC 301 et
16 seq.), the department shall not reduce the benefits otherwise payable to the claimant
17 resulting from the claimant's receipt of the portion of the pension payment that is
18 based upon taxes paid by the claimant.

19 **SECTION 12.** 108.05 (7) (d) 1. (intro.) of the statutes is amended to read:

20 108.05 (7) (d) 1. (intro.) If a pension payment to which par. (c) applies is not paid
21 on a weekly basis, the department shall allocate and attribute the payment to
22 specific weeks if:

23 **SECTION 13.** 108.05 (7) (f) (intro.) of the statutes is amended to read:

24 108.05 (7) (f) *Partial or total employee funding.* (intro.) If any portion of a
25 pension payment to which par. (c) applies that is actually or constructively received

1 by a claimant under this subsection is funded by the claimant's contributions, the
2 department shall compute the benefits payable for a week of partial or total
3 unemployment as follows:

4 SECTION 14. 108.09 (4) (c) of the statutes is amended to read:

5 108.09 (4) (c) *Late appeal.* If a party files an appeal which is not timely, an
6 appeal tribunal shall review the appellant's written reasons for filing the late appeal.
7 If those reasons, when taken as true and construed most favorably to the appellant,
8 do not constitute a reason beyond the appellant's control, the appeal tribunal may
9 dismiss the appeal without a hearing and issue a decision accordingly. Otherwise,
10 the department may schedule a hearing concerning the issue question of whether the
11 party's ~~failure to timely file~~ the appeal was filed late for a reason that was beyond
12 the party's ~~appellant's~~ control. The department may also provisionally schedule a
13 hearing concerning any matter in the determination. ~~If, after hearing testimony, the~~
14 ~~appeal tribunal finds that the party's failure to timely file the appeal was not for a~~
15 ~~reason beyond the party's control, the appeal tribunal shall issue a decision~~
16 ~~containing this finding and dismissing the appeal. If, after hearing testimony, the~~
17 ~~appeal tribunal finds that the party's failure to timely file an appeal was for a reason~~
18 ~~beyond the party's control, the appeal tribunal shall issue a decision containing this~~
19 ~~finding. The being appealed. After hearing testimony on the late appeal question,~~
20 the appeal tribunal shall issue a decision which makes ultimate findings of fact and
21 conclusions of law concerning whether the the appellant's appeal was filed late for
22 a reason that was beyond the appellant's control and which, in accordance with those
23 findings and conclusions, either dismisses the appeal or determines that the appeal
24 was filed late for a reason that was beyond the appellant's control. If the appeal is
25 not dismissed, the same or another appeal tribunal established by the department

1 for this purpose, after conducting a hearing, shall then issue a decision under sub.
2 (3) (b) ~~after conducting a hearing~~ concerning any matter in the determination.

3 SECTION 15. 108.14 (8s) (a) and (b) of the statutes are amended to read:

4 108.14 (8s) (a) Overpayments of unemployment insurance benefits as
5 determined under this chapter may be ~~recovered by offset~~ recouped from
6 unemployment insurance benefits otherwise payable under the unemployment
7 insurance law of another state, and overpayments of unemployment insurance
8 benefits as determined under the unemployment insurance law of that other state
9 may be ~~recovered by offset~~ recouped from unemployment insurance benefits
10 otherwise payable under this chapter; and

11 (b) Overpayments of unemployment insurance benefits as determined under
12 applicable federal law, with respect to benefits or allowances for unemployment
13 provided under a federal program administered by this state under an agreement
14 with the U.S. secretary of labor, may be ~~recovered by offset~~ recouped from
15 unemployment insurance benefits otherwise payable under that program, or under
16 the unemployment insurance law of this state or of another state or any such federal
17 unemployment benefit or allowance program administered by the other state under
18 an agreement with the U.S. secretary of labor if the other state has in effect a
19 reciprocal agreement with the U.S. secretary of labor as authorized by 42 USC 503
20 (g) (2), if the United States agrees, as provided in the reciprocal agreement with this
21 state entered into under 42 USC 503 (g) (2), that overpayments of unemployment
22 insurance benefits as determined under this chapter, and overpayments as
23 determined under the unemployment insurance law of another state which has in
24 effect a reciprocal agreement with the U.S. secretary of labor as authorized by 42
25 USC 503 (g) (2), may be ~~recovered by offset~~ recouped from benefits or allowances for

1 unemployment otherwise payable under a federal program administered by this
2 state or the other state under an agreement with the U.S. secretary of labor.

3 SECTION 16. 108.16 (12) of the statutes is created to read:

4 108.16 (12) The fund's treasurer shall estimate at the end of each calendar
5 quarter the earnings rate payable on the fund's bank balances and the earnings rate
6 payable by the federal unemployment account under title XII of the Social Security
7 Act (42 USC 1321 to 1324) for the following quarter. Based on these estimates, the
8 treasurer shall pay for the cost of banking services incurred by the fund in the
9 following quarter either by maintaining compensating bank balances or by payment
10 for the services from the appropriation under s. 20.445 (1) (ne), whichever payment
11 method is estimated to yield the highest net earnings for the fund.

12 SECTION 17. 108.161 (4) (c) of the statutes, as affected by 2003 Wisconsin Act
13 33, is amended to read:

14 108.161 (4) (c) Specifying that the appropriated amounts are available for
15 obligation solely within the 2 years beginning on the appropriation law's date of
16 enactment. This paragraph does not apply to the ~~appropriation~~ appropriations
17 under s. 20.445 (1) (nd) and (ne).

18 SECTION 18. 108.22 (2) (b) of the statutes is amended to read:

19 108.22 (2) (b) The clerk of circuit court shall accept, file and enter the each
20 warrant under par. (a) and each satisfaction, release, or withdrawal under subs. (5),
21 (6), and (8m) in the judgment and lien docket without prepayment of any fee, but the
22 clerk of circuit court shall submit a statement of the proper fee semiannually to the
23 department covering the periods from January 1 to June 30 and July 1 to December
24 31 unless a different billing period is agreed to between the clerk of circuit court and
25 the department. The fees shall then be paid by the department, but the fees provided

1 by s. 814.61 (5) for entering the warrants shall be added to the amount of the warrant
2 and collected from the employing unit when satisfaction or release is presented for
3 entry.

4 SECTION 19. 108.22 (8) (b) of the statutes is amended to read:

5 108.22 (8) (b) To recover any overpayment which is not otherwise repaid or
6 recovery of which has not been waived, the department may ~~offset~~ recoup the amount
7 of the overpayment ~~against~~ from benefits the individual would otherwise be eligible
8 to receive, or file a warrant against the liable individual in the same manner as is
9 provided in this section for collecting delinquent payments from employers, or both,
10 but only to the extent of recovering the actual amount of the overpayment and any
11 costs and disbursements, without interest.

12 SECTION 20. 108.225 (15) of the statutes is amended to read:

13 108.225 (15) DURATION OF LEVY. A levy is effective from the date on which the
14 levy is first served on the 3rd party until the liability out of which the levy arose is
15 satisfied, or until the levy is released ~~or until one year from the date of service,~~
16 whichever occurs first. *ar*

17 SECTION 21. Nonstatutory provisions.

18 (1) Notwithstanding the treatment of sections 20.445 (1) (n) and (ne), 108.16
19 (12) and 108.161 (4) (c) of the statutes by this act, the treasurer of the unemployment
20 reserve fund may transfer moneys from the appropriation account under section
21 20.445 (1) (n) of the statutes, as affected by this act, to the appropriation account
22 under section 20.445 (1) (ne) of the statutes, as created by this act, and may
23 thereafter pay any banking service costs incurred by the fund that are outstanding
24 on the effective date of this subsection from the appropriation under section 20.445

16-11
12

7-15
10-16
16

SECTION #. 2001 Wisconsin Act 35, section 72(2)(a) 2. and 3. (5) repealed.

1 (1) (ne) of the statutes, as created by this act, if the treasurer determines that the
2 fund would realize higher net earnings by taking such action.

3 **SECTION 22. Initial applicability.**

4 (1) The treatment of sections 20.445 (1) (n) and (ne), 108.16 (12) and 108.161
5 (4) (c) of the statutes first applies with respect to the first calendar quarter beginning
6 after the effective date of this subsection.

7 (2) The treatment of section 108.04 (16) (a) (intro.), (b), and (c) of the statutes
8 first applies with respect to weeks of unemployment beginning on the effective date
9 of this subsection.

10 (3) The treatment of section 108.09 (4) (c) of the statutes first applies with
11 respect to determinations issued under sections 108.09, 108.095, and 108.10 of the
12 statutes on December 29, 2003.

13 (4) The treatment of sections 108.14 (8s) (a) and (b) and 108.22 (8) (b) of the
14 statutes first applies with respect to determinations issued under section 108.09 of
15 the statutes on the effective date of this subsection.

16 (5) The treatment of section 108.22 (2) (b) of the statutes first applies with
17 respect to satisfactions, releases, and withdrawals of warrants issued on the effective
18 date of this subsection.

19 (6) The treatment of section 108.225 (15) (11)(d), (16)(a) and (16m)
20 respect to levies issued on the effective date of this subsection.

21 **SECTION 23. Effective dates.** This act takes effect on the first Sunday after
22 publication, except as follows:

23 (END)

~~requalifies is generally charged to the employer or employers that employed the employee during his or her base period. Under this bill, the cost of benefits that would otherwise be chargeable to the recalling employer is charged to the balancing account of the unemployment reserve fund, unless the employee's employer or employers do not pay contributions, in which case the cost of benefits is generally chargeable to the employee's employer or employers.~~

Rule making

~~The bill directs DWD to submit proposed rule changes to the legislative council staff no later than the first day of the 11th month beginning after the day the bill becomes law to:~~ *2001 Wisconsin Act 35 directed ✓*
December 1, 2002

~~1. Decrease the number of hours per week that a claimant must remain available for work in order to receive benefits from 36 to 32.~~

1. ~~21~~ Establish a specified level of repeated absenteeism or repeated tardiness that will permit an employer to terminate an employee without being required to pay the cost of any benefits for which the employee may qualify resulting from the base period applicable to the date of termination, and that will preclude the employee from receiving benefits without requalifying by working for a specified period and receiving a specified amount. (Currently, the degree of absenteeism or tardiness that permits such action varies depending upon the facts of each case.)

2. ~~1A~~ Specify, in accordance with applicable administrative and judicial interpretations, what constitutes an "establishment" for purposes of a current disqualification from receipt of benefits because of a labor dispute in the establishment in which an employee is or was employed.

~~The bill also directs DWD to promulgate an emergency rule no later than the 90th day after the bill becomes law to extend the current deadline for filing an initial claim for benefits from the end of the initial week for which benefits are payable to the end of the following week. Currently, emergency rules are generally effective for no more than 150 days. Under the bill, this emergency rule is effective until the first day of the 11th month after the day on which the bill becomes law or the day on which a permanent rule relating to this subject matter becomes effective, whichever is sooner, and no finding of emergency is required to promulgate the emergency rule.~~

TAX CHANGES

Claimant eligibility reviews

This bill directs DWD to conduct reviews of claimants for unemployment insurance benefits in the 2001-03 fiscal biennium to verify adherence to work search requirements and other conditions of eligibility.

Deferral of first quarter contribution liability

Currently, if an employer is liable for the payment of contributions (taxes), the employer must make regular payments for the periods specified by DWD. This bill codifies the existing requirement that these payments be made on a quarterly basis. The bill also permits an employer that has a first quarter contribution liability of at least \$5,000 and that is not delinquent in making its contribution payments or in paying any interest, penalties or fees assessed against the employer for unemployment insurance purposes to defer payment of up to 60% of the contribution

** This bill repeals this requirement.*

2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3121/P4ins
JTK.....

INS 6-22:

✓

SECTION 1. 108.04 (2) (a) 3. of the statutes is amended to read:

108.04 (2) (a) 3. The individual is seeking suitable work during that week or, during the 156-week period beginning on January 2, 2000, the individual conducts a reasonable search for suitable work during that week. The reasonable search required during the period specified in this subdivision must include 2 actions that constitute a reasonable search as prescribed by rule of the department. The department shall, by rule, require claimants to conduct a reasonable search for suitable work during the period beginning after the 156-week period specified in this subdivision and shall, by rule, prescribe standards for the search to be considered reasonable. This ^{Subdivision} paragraph does not apply to an individual if the department determines that the individual was most recently employed by an employer that has previously recalled the individual to a job that is substantially in line with the individual's prior job skill and rate of pay during one or more layoffs and that the same employer is reasonably likely to recall the individual to such a job within a reasonable period during the current layoff.

History: 1971 c. 40, 42, 53, 211; 1973 c. 247; 1975 c. 24, 343; 1977 c. 127, 133, 286, 418; 1979 c. 52, 176; 1981 c. 28, 36, 315, 391; 1983 a. 8, 27, 99, 168; 1983 a. 189 s. 329 (28); 1983 a. 337, 384, 468, 538; 1985 a. 17, 29, 40; 1987 a. 38 ss. 23 to 59, 107, 136; 1987 a. 255, 287, 403; 1989 a. 77; 1991 a. 89; 1993 a. 112, 122, 373, 492; 1995 a. 118, 417, 448; 1997 a. 35, 39; 1999 a. 9, 15, 83; 2001 a. 35.

INS 16-11:

✗

SECTION 2. 108.225 (1) (d) of the statutes is repealed. ✓

INS 16-16:

✓

SECTION 3. 108.225 (16) (a) of the statutes is amended to read:

108.225 (16) (a) A subsistence allowance of ~~75%~~ of the debtor's disposable earnings then due and owing equal to the amount that the debtor could claim as exempt under s. 812.34 (2) if the amount owed were subject to garnishment, but without respect to the ^{exception specified in} ~~exemption provided under~~ s. 812.34 (1) or any adjustment permitted under s. 812.38 (2); *
 *
 **

History: 1989 a. 77; 1997 a. 187, 283; 2001 a. 35, 109.

SECTION 4. 108.225 (16m) of the statutes is created to read:

108.225 (16m) DETERMINATION OF EXEMPTION. For purposes of sub. (16) (a), reference in s. 812.34 (2) to garnishment means a levy upon the property of a debtor under this section and service upon the garnishee means service of the levy under sub. (13).

INS 17-6:

*constat
mit app*

(#) The treatment of section 108.04 (2) (a) 3. of the statutes first applies with respect to determinations issued under section 108.09 of the statutes on the effective date of this subsection.

INS 2A:

Search for work

In order to remain eligible to receive benefits for a week in which a claimant receives no benefits, a claimant is required, among other things, to conduct a reasonable search for suitable work within that week.

This bill provides that this requirement does not apply if DWD determines that the claimant was most recently employed by an employer that has previously recalled the claimant to a job that is substantially in line with the claimant's prior job skill and rate of pay during one or more layoffs and that the employer is reasonably likely to recall the claimant to such a job within a reasonable period during the current layoff.

Exemption of wages from levies

Currently, DWD may administratively levy against property held by a ~~3rd~~ party who holds the property of a person who is indebted to DWD for the purpose of enforcing collection of the debt. If the levy is to collect a benefit overpayment or a forfeiture (civil penalty) imposed upon an employer, an individual debtor is entitled to an exemption of the greater of 1) 75% of the debtor's earnings (excluding amounts withheld by law, insurance premiums, union dues, child support payments, and prior garnishments) then due and owing; or 2) an amount equal to 30 times the federal minimum wage per week or a proportionate amount for any partial week of earnings received.

provides instead that
This bill ~~substitutes an exemption of 80%~~ provides instead that 80% of the debtor's earnings (excluding deductions for social security and federal and state income taxes) unless 1) the debtor's household income (including unearned income and the income of dependents but excluding family support payments) is below the federal poverty line or the levy would cause that result; or 2) the debtor receives or within 6 months prior to service of the levy received need-based public assistance or has been determined to be eligible for such assistance

in which case the debtor's earnings are totally exempt from levy

percent
third
are exempt from levy
Six
percent



DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3121/P4dn

JTK:.....

gjs

Tom Smith:

1. This draft incorporates labor proposals # 6 (work search) and 10 (exemption from levies) and the repeal of the rule-making directives in 2001 Act 35. Other items will be added when we resume drafting following the shutdown.

2. With respect to the ^{exception to those} exemption of a debtor's earnings from levy under s. 108.225 (16) (a), stats., this draft carries forward only the exemptions that apply under s. 812.34 (2), stats., but not the ~~exemptions that apply~~ under s. 812.34 (1), stats. Also, the draft does not permit an appeal for relief under s. 812.38 (1) (b), stats. Please let me know if you also want to incorporate the ^{exception} ~~exemptions~~ under s. 812.34 (1), stats. or the appeal procedure under s. 812.38 (1) (b), stats. Also, please note that because the definitions and limitations under s. 812.34 (2), stats. are quite different than those that apply under s.108.225 (16), stats., there may be cases in which this change may actually tighten rather than loosen the current exemption from levy. Depending upon your specific intent, it may be desirable to build all the operative language required to effect this change directly into ch. 108, stats. instead of incorporating part of the language by crossreference.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3121/P4dn
JTK:cjs:rs

October 3, 2003

Tom Smith:

1. This draft incorporates labor proposals # 6 (work search) and 10 (exemption from levies) and the repeal of the rule-making directives in 2001 Act 35. Other items will be added when we resume drafting following the shutdown.
2. With respect to the exemption of a debtor's earnings from levy under s. 108.225 (16) (a), stats., this draft carries forward only the exemptions that apply under s. 812.34 (2), stats., but not the exception to those exceptions under s. 812.34 (1), stats. Also, the draft does not permit an appeal for relief under s. 812.38 (1) (b), stats. Please let me know if you also want to incorporate the exemption under s. 812.34 (1), stats., or the appeal procedure under s. 812.38 (1) (b), stats. Also, please note that because the definitions and limitations under s. 812.34 (2), stats. are quite different than those that apply under s. 108.225 (16), stats., there may be cases in which this change may actually tighten rather than loosen the current exemption from levy. Depending upon your specific intent, it may be desirable to build all the operative language required to effect this change directly into ch. 108, stats., instead of incorporating part of the language by cross-reference.

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778

Kuesel, Jeffery

From: Smith, Thomas E - DWD UI
Sent: Wednesday, October 08, 2003 11:40 AM
To: Kuesel, Jeffery
Subject: LLC Law Change Analysis, etc.

Jeff - Here is the analysis for the LLC law change proposal. You can put this in the red binder as department no. 8. It includes our suggested language and numbering for your assistance in drafting.

With respect to the last bill draft I note the following:

1. Regarding department change no. 32, (regarding imposter overpayments and penalties) the requested language changes in pars. B-D in the language section of the analysis were not included.
2. Regarding Labor no. 10, (limitations on levy of wages) the change agreed to by the UIAC is not simply an adoption of the exemptions in sec. 812.34(2). Please refer to Dick Tillema's single sheet explanation that I gave you at our last meeting. It is identified by my handwritten "108.225(16)" in the upper right corner. The agreed change provides for a wage exemption of 80% unless the debtor's wages are below the applicable federal poverty guidelines or the levy would cause that result, in which cases, all the debtor's wages would be exempt. The agreement also allows the department the option of avoiding the limitations in cases of benefit fraud. None of the other limitations in 812.34(2) would apply.

How's the move going?



LLClawchange2.doc

**PROPOSED LAW CHANGE FOR THE TREATMENT OF LIMITED LIABILITY COMPANIES
(LLCs)
JANUARY/FEBRUARY 2003**

I. DESCRIPTION OF PROPOSED CHANGE

The department recently convened a workgroup to address concerns about the contradictory treatment of limited liability companies (LLCs) for unemployment insurance purposes. The department's policy has been to treat members of LLCs as sole proprietors if the LLC consists of one member, and as partners in partnership if the LLC consists of more than one member. Under this approach, members of LLCs are generally treated as employers for the purposes of unemployment taxes and benefit eligibility. Recent decisions of the Labor and Industry Review Commission, however, have found that members of LLCs were employees and therefore not automatically disqualified from receiving unemployment benefits.

This proposed change would adopt the recommendations of the department's workgroup. The new statute would treat LLCs for unemployment tax and benefit purposes as they have elected to be treated for federal tax purposes. LLCs that wish to be treated as corporations for the purposes of unemployment taxes and benefits must provide proof to the department that they have elected to be treated as corporations with the Internal Revenue Service. LLCs that wish to be treated as sole proprietorships or partnerships should provide the department proof that they have elected to be treated as such. Consistent with federal law, if LLCs make no election the department will assume they wish to be treated as sole proprietorships if they have one member and partnerships if they have more than one member. Under the new statute, the department also reserves the right to treat any member of an LLC as an employee in the interests of justice or to avoid fraud on the program.

Default

II. PROPOSED STATUTORY LANGUAGE

General Provision:

- (a) The department will treat a limited liability company for unemployment insurance tax and benefit purposes consistent with the manner in which the limited liability company is treated for federal tax purposes. A limited liability company that wishes to be treated like a corporation for unemployment insurance tax and benefit purposes must provide proof to the department that the limited liability company has elected to be treated like a corporation for federal tax purposes. Proof of election to be treated like a corporation for federal tax purposes shall be in the form of a copy of the Form 8832 filed by the limited liability company with the federal Internal Revenue Service. The effective date of the treatment of a limited liability company as a corporation for unemployment insurance tax and benefit purposes shall be the same date on which the election became effective for federal tax purposes.
- (b) A limited liability company with at least two members that has elected to be treated like a corporation for federal tax purposes shall be treated like a

Need to provide for treatment in absence of election in an instance

- corporation for unemployment tax and benefit purposes, and the members of the limited liability company will be treated like corporate officers for unemployment tax and benefit purposes.
- (c) A limited liability company with a single member that has elected to be treated like a corporation for federal tax purposes shall be treated like a corporation for unemployment tax and benefit purposes, and the single member shall be treated like a corporate officer for unemployment tax and benefit purposes.
 - (d) A limited liability company with at least two members that has elected to be treated like a partnership for federal tax purposes, or which has made no election as to its treatment for federal tax purposes, will be treated like a partnership for unemployment tax and benefit purposes and, subject to par. (f), the members of the limited liability company will be treated for unemployment tax and benefit purposes as partners in a partnership.
 - (e) A limited liability company with a single member that has elected to be treated as a sole proprietorship for federal tax purposes, or which has made no election as to its treatment for federal tax purposes, will be treated like a sole proprietorship for unemployment tax and benefit purposes, and the sole member shall be treated like a sole proprietor for unemployment tax and benefit purposes.
 - (f) Notwithstanding par. (d), the department may, in the interests of justice or to avoid fraud on the program, determine a member to be an employee of a limited liability company.

Related Provisions:

PARTNERSHIP. "Partnership" shall have the meaning set forth in s. 178.03.

SOLE PROPRIETOR NOT EMPLOYEE. An individual is not an employee of the individual's sole proprietorship.

PARTNER NOT EMPLOYEE. An individual is not an employee of a partnership in which the individual is a partner.

III. PROPOSED REASON FOR CHANGE

Since Wisconsin's LLC law became effective in 1994, LLCs have become the most widely used new business organization. As a result, the department has seen a growing number of issues relating to the tax status and benefit eligibility of LLC members. The department has been forced to confront these issues in the absence of clear statutory guidance.

Not surprisingly, contradictory treatments of LLC members have arisen both within the department and between the department and the Labor and Industry Review Commission. In a few particularly troublesome situations, LLC members were found to be employees and eligible for benefits, while at the same time tax audits determined the same members were non-employees.

This proposed change would address those problems by clarifying the department's treatment of LLCs and by unifying the approach toward LLC members for tax and benefit eligibility purposes. The statute would also simplify the tax treatment of LLCs in that they will be treated in the same manner for unemployment taxes and benefits as they elect to be treated for federal tax purposes. The department's workgroup determined that it would be in the best interests of employers, claimants and adjudicators to develop a statute providing for a consistent and unified approach.

IV. BRIEF HISTORY AND BACKGROUND OF CURRENT PROVISION

There is currently no provision that applies specifically to the unemployment insurance status of LLCs or LLC members.

V. EFFECTS OF PROPOSED CHANGE

Under the proposed statute, if LLCs elect to be treated as corporations with the Internal Revenue Service then the department will treat them as corporations for the purposes of unemployment taxes and benefit eligibility. LLC members would then be treated for tax and benefit purposes as corporate officers, and could be employees if they perform paid services for the LLC. In addition, LLC members could satisfy the exclusion of certain corporate officers from benefit eligibility.

If LLCs wish to be treated as either sole proprietorships or partnerships, or do not make an election, the proposed statute provides that the department will treat LLC members as either sole proprietors or partners in a partnership. Pursuant to the related provisions, an individual is neither an employee of his or her own sole proprietorship, nor an employee of a partnership in which he or she is a partner. Consequently, if LLCs are treated as sole proprietorships or partnerships, LLC members will generally be ineligible for benefits and LLCs will not be responsible for contributions for their services. The department reserves the right, however, to treat any LLC member as an employee to avoid the use of these provisions to perpetrate fraud on the program.

VI. FISCAL EFFECTS

No fiscal effects have yet been estimated.

VII. STATE & FEDERAL ISSUES

The proposed statute is consistent with federal regulations that provide for LLCs and other unincorporated entities to elect their classification for federal tax purposes. See 26 CFR § 301.7701-1. Under federal law, an unincorporated entity that consists of two or more members may elect to be treated as either a corporation or a partnership. 26 CFR § 301.7701-3(a). A business entity with only one member may either elect to be treated as a corporation or have its status "disregarded" as an entity separate from its owner. If an entity's status is "disregarded" the entity will be treated as a sole proprietorship. 26 CFR §§ 301.7701-2(a)-(c). If LLCs and other incorporated entities make no election, federal default rules provide that they will be treated as partnerships if they have two or

more members and sole proprietorships if they have one member. 26 CFR § 301.7701-3(b).

VIII. PROPOSED EFFECTIVE/APPLICABILITY DATE

**PROPOSED LAW CHANGE FOR THE TREATMENT OF LIMITED LIABILITY COMPANIES
(LLCs)**

I. DESCRIPTION OF PROPOSED CHANGE

The department recently convened a workgroup to address concerns about the contradictory treatment of limited liability companies (LLCs) for unemployment insurance purposes. The department's policy has been to treat members of LLCs as sole proprietors if the LLC consists of one member, and as partners in partnership if the LLC consists of more than one member. Under this approach, members of LLCs are generally not treated as employees for the purposes of unemployment taxes and benefit eligibility. Recent decisions of the Labor and Industry Review Commission, however, have found that members of LLCs were employees and therefore not automatically disqualified from receiving unemployment benefits.

This proposed change would adopt the recommendations of the department's workgroup. The new statute would treat LLCs for unemployment tax and benefit purposes as they have elected to be treated for federal tax purposes. LLCs that wish to be treated as corporations for the purposes of unemployment taxes and benefits must provide proof to the department that they have elected to be treated as corporations with the Internal Revenue Service. LLCs that wish to be treated as sole proprietorships or partnerships should provide the department proof that they have elected to be treated as such. Consistent with federal law, if LLCs make no election the department will assume they wish to be treated as sole proprietorships if they have one member and partnerships if they have more than one member. Under the new statute, the department also reserves the right to treat any member of an LLC as an employee in the interests of justice or to avoid fraud on the program.

II. PROPOSED STATUTORY LANGUAGE

General Provision:

108.068 Treatment of Limited Liability Companies and Members.

- (a) The department will treat a limited liability company for unemployment insurance contribution and benefit purposes consistent with the manner in which the limited liability company is treated for federal tax purposes. A limited liability company that wishes to be treated like a corporation for unemployment insurance contribution and benefit purposes must provide proof to the department that the limited liability company has elected to be treated like a corporation for federal tax purposes. Proof of election to be treated like a corporation for federal tax purposes shall be in the form of a copy of the Form 8832 filed by the limited liability company with the federal Internal Revenue Service. The effective date of the treatment of a limited liability company as a corporation for unemployment insurance contribution

and benefit purposes shall be the same date on which the election became effective for federal tax purposes.

- (b) A limited liability company with at least two members that has elected to be treated like a corporation for federal tax purposes shall be treated like a corporation for unemployment contribution and benefit purposes, and the members of the limited liability company will be treated like corporate officers for unemployment contribution and benefit purposes.
- (c) A limited liability company with a single member that has elected to be treated like a corporation for federal tax purposes shall be treated like a corporation for unemployment contribution and benefit purposes, and the single member shall be treated like a corporate officer for unemployment contribution and benefit purposes.
- (d) A limited liability company with at least two members that has elected to be treated like a partnership for federal tax purposes, or which has made no election as to its treatment for federal tax purposes, will be treated like a partnership for unemployment contribution and benefit purposes and, subject to par. (f), the members of the limited liability company will be treated for unemployment contribution and benefit purposes as partners in a partnership.
- (e) A limited liability company with a single member that has elected to be treated as a sole proprietorship for federal tax purposes, or which has made no election as to its treatment for federal tax purposes, will be treated like a sole proprietorship for unemployment contribution and benefit purposes, and the sole member shall be treated like a sole proprietor for unemployment contribution and benefit purposes.
- (f) Notwithstanding par. (d), the department may, in the interests of justice or to prevent fraud on the unemployment insurance program, determine a member to be an employee of a limited liability company.

Related Provisions:

108.02(20?) PARTNERSHIP. "Partnership" shall have the meaning set forth in s. 178.03.

108.02(12)(a?) SOLE PROPRIETOR NOT EMPLOYEE. An individual is not an employee of the individual's sole proprietorship.

108.02(12)(a?) PARTNER NOT EMPLOYEE. An individual is not an employee of a partnership in which the individual is a partner.

T-16

108.02(15m) FAMILY CORPORATION. Except as provided in s. 108.04 (7) (r), "family corporation" means:

(a) A corporation or a limited liability company which has elected to be treated as a corporation under this chapter, in which 50% or more of the ownership interest, however designated or evidenced, is or during a claimant's employment was owned or controlled, directly or indirectly, by the claimant or by the claimant's spouse or child, or by the claimant's parent if the claimant is under the age of 18, or by a combination of 2 or more of them; or

(b) Except where par. (a) applies, a corporation or a limited liability company which has elected to be treated as a corporation under this chapter in which 25% or more of ownership interest, however designated or evidenced, is or during a claimant's employment was owned or controlled, directly or indirectly, by the claimant.

108.025 Coverage of certain corporate officers and limited liability company members. (1) In this section, "principal officer" means an individual named as a principal officer in ~~the~~ a corporation's most recent annual report or, if that information is not current, an individual holding an office described in the corporation's most recent annual report as a principal officer or, an individual named as a member as of the date of an election under this section, in the records required to be kept under sec. 183.0405, of a limited liability company which has elected to be treated as a corporation under this chapter.

+ (2) (6)

108.04(1)(g)2. Employment by a corporation, or a limited liability company which has elected to be treated as a corporation under this chapter, if one-half or more of the ownership interest, however designated or evidenced, in the corporation is or during such employment was owned or controlled, directly or indirectly, by the individual or by the individual's spouse or child, or by the individual's parent if the individual is under age 18, or by a combination of 2 or more of them.

3. Except where subd. 2. applies, employment by a corporation, or a limited liability company which has elected to be treated as a corporation under this chapter, if one-fourth or more of the ownership interest, however designated or evidenced, in the corporation is or during such employment was owned or controlled, directly or indirectly, by the individual.

108.04(1)(gm) Paragraph (g) does not apply if the department determines that the individual whose base period wages are being computed was employed by an employer which is a family corporation and the individual's employment was terminated by the employer because of involuntary cessation of business of the family corporation under one or more of the following circumstances:

1. Dissolution of the family corporation, due to economic inviability, under ch. 180 or ch. 183 or the analogous applicable laws of the jurisdiction in which the family corporation is incorporated or organized.
2. Filing ~~for corporate~~ a petition in bankruptcy by the family corporation;
3. Filing for personal bankruptcy by all owners who are personally liable for any of the debts of the family corporation; or
4. Disposition of a total of 75% or more of the assets of the family corporation using one or more of the following methods:
 - a. Assignment for the benefit of creditors.
 - b. Surrender to one or more secured creditors or lienholders.
 - c. Sale, due to economic inviability, if the sale does not result in ownership or control by substantially the same interests that owned or controlled the family corporation. It is presumed unless shown to the contrary that a sale, in whole or in part, to a spouse, parent or child of an individual who owned or controlled the family corporation, or to any combination of 2 or more of them, is a sale to substantially the same interests that owned or controlled the family corporation.

8-6

108.04(7)(r) Paragraph (a) does not apply if the department determines that the employee owns or controls, directly or indirectly, an ownership interest, however designated or evidenced, in a family corporation and the employee's employment was terminated by the employer because of an involuntary cessation of the business of the family corporation under one or more of the conditions specified in sub. (1) (gm). In this paragraph, "family corporation" has the meaning given in s. 108.02 (15m) and also includes a corporation or a limited liability company which has elected to be treated as a corporation under this chapter in which 50% or more of the ownership interest is or was owned or controlled, directly or indirectly, by one or more brothers or sisters of a claimant, or by a combination of one or more brothers or sisters and one or more of the persons specified in s. 108.02 (15m) (a).

III. REASON FOR PROPOSED CHANGE

Since Wisconsin's LLC law became effective in 1994, LLCs have become the most widely used new business organization. As a result, the department has seen a growing number of issues relating to the tax status and benefit eligibility of LLC members. The department has been forced to confront these issues in the absence of clear statutory guidance.

Not surprisingly, contradictory treatments of LLC members have arisen both within the department and between the department and the Labor and Industry Review

Commission. In a few particularly troublesome situations, LLC members were found to be employees and eligible for benefits, while at the same time tax audits determined the same members were non-employees.

This proposed change would address those problems by clarifying the department's treatment of LLCs and by unifying the approach toward LLC members for tax and benefit eligibility purposes. The statute would also simplify the tax treatment of LLCs in that they will be treated in the same manner for unemployment taxes and benefits as they elect to be treated for federal tax purposes. The department's workgroup determined that it would be in the best interests of employers, claimants and adjudicators to develop a statute providing for a consistent and unified approach.

IV. BRIEF HISTORY AND BACKGROUND OF CURRENT PROVISION

There is currently no provision that applies specifically to the unemployment insurance status of LLCs or LLC members.

V. EFFECTS OF PROPOSED CHANGE

Under the proposed statute, if LLCs elect to be treated as corporations with the Internal Revenue Service then the department will treat them as corporations for the purposes of unemployment taxes and benefit eligibility. LLC members would then be treated for tax and benefit purposes as corporate officers, and could be employees if they perform paid services for the LLC. In addition, LLC members could satisfy the exclusion of certain corporate officers from benefit eligibility.

If LLCs wish to be treated as either sole proprietorships or partnerships, or do not make an election, the proposed statute provides that the department will treat LLC members as either sole proprietors or partners in a partnership. Pursuant to the related provisions, an individual is neither an employee of his or her own sole proprietorship, nor an employee of a partnership in which he or she is a partner. Consequently, if LLCs are treated as sole proprietorships or partnerships, LLC members will generally be ineligible for benefits and LLCs will not be responsible for contributions for their services. The department reserves the right, however, to treat any LLC member as an employee to avoid the use of these provisions to perpetrate fraud on the program.

VI. FISCAL EFFECTS

The proposal facilitates utilization of the LLC as a form of business organization by clarifying how LLCs will be treated for Unemployment Insurance purposes. It does not require adopting a particular form of business organization (sole proprietorship, partnership, or corporation). As a business entity can achieve the same result both under current law and under the proposal with respect to unemployment insurance coverage, benefits, and taxation, clearly stating the options as they apply to an LLC is unlikely to have a significant fiscal effect.

VII. STATE & FEDERAL ISSUES

The proposed statute is consistent with federal regulations that provide for LLCs and other unincorporated entities to elect their classification for federal tax purposes. See 26 CFR § 301.7701-1. Under federal law, an unincorporated entity that consists of two or more members may elect to be treated as either a corporation or a partnership. 26 CFR § 301.7701-3(a). A business entity with only one member may either elect to be treated as a corporation or have its status "disregarded" as an entity separate from its owner. If an entity's status is "disregarded" the entity will be treated as a sole proprietorship. 26 CFR §§ 301.7701-2(a)-(c). If LLCs and other incorporated entities make no election, federal default rules provide that they will be treated as partnerships if they have two or more members and sole proprietorships if they have one member. 26 CFR § 301.7701-3(b).

VIII. PROPOSED EFFECTIVE/APPLICABILITY DATE

MGM 4. Restore partial successorship provisions in effect prior to 2001 Wisconsin Act 35.

When unrelated parties transfer a business under current law, the transferee (successor) may choose to use the unemployment insurance employer account balance and taxable payroll (rating factors) for determining the tax rate of the successor business only when 100% of the business is transferred. The proposal would allow the successor the option of using the predecessor's rate factors when at least 25% of the business is transferred and other conditions are met to assure the integrity of the reserve fund. If the option of assuming the rate factors of the predecessor is not taken, the transferee would start with the new employer rate if a new business or treat the workers as newly hired in an existing business if the transferee is already in business.

When related parties transfer a business under current law, the transferee assumes the rating factors of the predecessor only if 100% of the business is transferred or the unemployment insurance employer account balance of the transferor is overdrawn. In all other cases under current law the transferee receives the new employer tax rate or, if already in business, treats the new workers as if newly hired into that business. The proposal would require the transferee to assume the rating factors of the predecessor in all business transfers between related parties.

The proposal is not a matter of cost to the reserve fund. It is primarily an issue between buyers and sellers of businesses. The proposal would allow some sellers to receive a higher price for parts of their business when the buyer has an opportunity to assume a lower tax rate than is possible under current law.

MGM 3. Work Search

- A. Institute a permanent requirement for two work search activities per week and increase departmental monitoring of the requirement; or,
- B. Change Administrative Rule Chapter DWD 127 as follows:
 - 1. Waive work search in any week in which a claimant performs work in an employment other than self-employment;
 - 2. Amend DWD 127.02 to allow work search waivers whenever a claimant has reasonable expectation of recall;
 - 3. Require the same work search of self-employed claimants as is required of other claimants who are not job attached;
 - 4. Require two work search activities each week;
 - 5. Allow the department to deny benefits retroactively for any week in which required work search was not performed and no fraud was found;
 - 6. Require claimants to keep work search records during the entire benefit year and its extensions;
 - 7. Simplify the structure of the rule by combining the sections on mandatory and personal circumstances leading to a work search waiver;
 - 8. Delete obsolete references to reporting in person and the reference, if redundant, to ineligibility resulting from failure to certify that work search has been made; and,
 - 9. Delete redundant references to allowing a claimant to refuse to apply for work with an employer that the claimant quit for good cause attributable to the employer or for sexual harassment.
- A. A requirement to make two work searches instead of one is not expected to have a major fiscal impact on the Reserve Fund even though it may increase administrative expenditure. Most people who are looking for work already make more than one application per week. The proposal is directed at exceptional situations where there may be questions about how actively an individual is looking. It is assumed that present and any newly adopted waivers of work search would continue as, for example, when someone has a definite date for recall; is registered at a union hiring hall, etc.
- B. The nine proposed changes to DWD Rule 127 are not expected to have any major fiscal impact except for the change that would allow the department to disqualify benefits retroactively for any week in which work search was not performed and fraud was not found. (When fraud is found, benefits may already be denied retroactively.) Based on a selective survey of adjudicators, it is the opinion of field office staff that it would not be unreasonable to expect about 300 people disqualified if adjudicators were allowed to do so when following up on complaints in cases in

which it seemed unlikely that work search was being performed. As there is already a limit of eight weeks to which the disqualification may be applied, it was assumed that disqualification would on average occur for 4.5 weeks per person. The total reduction in reserve fund expenditure as a result of this provision would be approximately \$300,000.

Kuesel, Jeffery

From: Smith, Thomas E - DWD UI
Sent: Monday, October 13, 2003 11:16 AM
To: Kuesel, Jeffery
Cc: Frigo, Greg; Kho, Michelle; Tillema, Richard; Wojick, Terese
Subject: Work Search Law Change

Jeff - Here is the latest version of the language for the work search law change.



Work Search
Waiver and ER Veri..

108.04(2)(a)

3. ~~The individual is seeking suitable work during that week or, during the 156 week period beginning on January 2, 2000, the individual conducts a reasonable search for suitable work during that week. The reasonable search for suitable work required during the period specified in this subdivision must include 2 actions that constitute a reasonable search as prescribed by rule of the department. The department shall, by rule, require claimants to conduct a reasonable search for suitable work during the period beginning after the 156 week period specified in this subdivision and shall, by rule, prescribe standards for the search to be considered reasonable.~~ This subdivision does not apply to an individual if the department determines that the individual was laid off from work but there is a reasonable expectation of reemployment by the employer. In determining whether the individual has a reasonable expectation of reemployment the department shall request the employer to verify the individual's employment status and shall also consider other factors, including but not limited to.:

- a. The past history of layoff and reemployments by the employer;
- b. Any information which the employer furnished to the individual or the department about the expected reemployment date; and
- c. Whether the individual has recall rights with the employer under the provisions of any applicable collective bargaining agreement.