



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

## **RESEARCH APPENDIX -** **PLEASE DO NOT REMOVE FROM DRAFTING FILE**

Date Transfer Requested: 12/04/2005 (Per: JTK)



Appendix A ... Part 03 of 16

☞ The 2005 drafting file for LRB 05-2978/11

has been copied/added to the 2005 drafting file for

**LRB 05-3956 (SB 426)**

☞ The attached 2005 draft was incorporated into the new 2005 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied, and added, as a appendix, to the new 2005 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2005 drafting file. The drafting file was then returned, intact, to its folder and filed.

LRB  
05-2978  
Drafting  
File

ATTACHMENT I

## DETAILED EXPLANATION OF SECTION 303(k), SSA QUESTIONS AND ANSWERS

### IN GENERAL

**1. Question:** How do the SUTA dumping amendments affect the federal-state UC program?

**Answer:** States must assure their UC laws provide for the following:

- **Mandatory Transfers.** Unemployment experience must be transferred whenever there is substantially common ownership, management or control of two employers, and one of these employers transfers its trade or business (including its workforce), or a portion thereof, to the other employer. This requirement applies to both total and partial transfers of business.
- **Prohibited Transfers.** Unemployment experience may not be transferred, and a new employer rate (or the state's standard rate) will instead be assigned, when a person who is not an employer acquires the trade or business of an existing employer. This prohibition applies only if the UC agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions.
- **Penalties for SUTA Dumping.** "Meaningful" civil and criminal penalties must be imposed on persons "knowingly" violating or *attempting to violate* the two requirements discussed above. These penalties must also be applicable to any person (including the person's employer) who knowingly gives advice leading to such a violation.
- **Procedures.** Procedures for identifying SUTA dumping must be established. The exact procedures do not need to be specified in state law, but state law must specifically provide for the establishment of such procedures.

These are the minimum requirements which all state laws must meet. States may provide for more stringent provisions, provided they are otherwise consistent with Federal UC law. For example, instead of requiring a partial transfer of experience only when there is common ownership, management or control, a state may require transfers of experience whenever a partial transfer of trade or business occurs.

**2. Question:** Do the SUTA dumping amendments require my state to completely overhaul its provisions relating to transfers of experience?

**Answer.** No. The amendments do not change the way states handle transfers except as discussed in the preceding Q&A. As a result, a state may leave its current provisions intact while amending its law to provide that any state law provisions implementing Section 303(k), SSA, override these other provisions. The draft legislative language attached to this UIPL takes this approach.

### MANDATORY TRANSFERS – SECTION 303(k)(1)(A), SSA

**3. Question:** Under what conditions must experience be transferred?

**Answer:** Unemployment experience must be transferred whenever there is substantially common ownership, management or control of two employers, and one of these employers transfers its trade or business, or a portion thereof, to the other employer. Thus, this requirement applies to both total and partial transfers.

**4. Question:** Provide an example of when experience must be transferred under the amendments.

**Answer:** Corporation A is assigned the state's maximum UC contribution rate of 5.4%. It establishes a shell corporation that is treated as a separate employer for UC purposes. The shell eventually qualifies for the state's minimum UC contribution rate of .5%. (How the new entity obtains this rate may vary depending on how it was established and on the state's UC law. It may, for example, simply wait out a new employer period. If state law permits, it may use voluntary contributions to "buy down" to the minimum rate.) Corporation A then transfers all or some of its workforce to that shell. The result, absent the amendments, would be that, even though Corporation A controls the shell and its operations, it escapes a rate of 5.4% on the transferred workforce and instead pays at a rate of .5%.

Under the amendments, if the workforce is transferred to the shell, then the unemployment experience attributable to the transferred workforce must also be transferred to the shell. The shell's experience would be recomputed based on its experience as well as the experience transferred from Corporation A. Assuming a total transfer of workforce and experience to the shell, the shell might even continue to receive the maximum rate of 5.4%.

It does not matter whether the employer transfers all or some of its trade or business to the shell. Experience commensurate with the trade or business transferred must be transferred to the shell.

**5. Question:** Why is the employer's workforce part of the employer's "trade or business," and thus subject to the SUTA dumping amendments?

**Answer:** The employer's workforce is necessarily a part of its business and is the means by which an employer effectuates its trade or business. Without a workforce, there would be neither trade nor business. Thus, when some or all of the workforce is transferred, the employer no longer has the means of performing its trade or business with respect to the transferred workforce.

As noted elsewhere in this UIPL, the best-known means of SUTA dumping is the manipulation of an employer's workforce/payroll. Senate Majority Leader Frist specifically addressed this manipulation on the floor of the Senate when he stated that the amendment "prohibits shifting employees into shell companies..." (150 Cong. Rec. S8804 (daily ed. July 22, 2004).) The mandatory transfer provisions of the SUTA dumping amendments would have little, if any, effect if the workforce/payroll were not considered to be part of the employer's trade or business.

**6. Question:** How does a state determine if there is "substantially" common ownership, management, or control of two employers?

**Answer:** The state must examine the facts of each case using reasonable factors. Among other things, the state would consider the extent of commonality or similarity of: ownership; any familial relationships; principals or corporate officers; organizational structure; day-to-day operations; assets and liabilities; and stated business purposes. The Department is not at this time establishing a bright line test of what constitutes "substantially" common ownership, management, or control.

Nothing prohibits a state from exceeding the minimum Federal requirement by lowering this threshold test to "any" common ownership, management or control. This will meet the Federal law requirement as it will include all cases where "substantially common ownership, management or control" exists.

**7. Question:** When is the transfer of trade or business effective?

**Answer:** When an acquisition of trade or business is concluded is usually determined by examining the legal documents related to any purchase or acquisition of the trade or business. However, in SUTA dumping cases among businesses with common ownership, management, or control, such an acquisition will generally not take place. Instead,

there may simply be a different entity issuing the paychecks. That a different entity is issuing paychecks is both an indication of the transfer of the workforce and the effective date of the transfer of the workforce.

**8. Question:** Following the mandatory transfer of experience, when must states reassign the employers' rates?

**Answer:** Although the amendments require that the experience be combined, it does not specify when revised rates must be reassigned. As a result, states may either (1) assign revised rates for the predecessor and successor employers immediately upon completion of the transfer of trade or business, or (2) assign revised rates for the predecessor and successor the next time the state calculates rates for all employers.

For purposes of implementing this new mandatory transfer, the Department strongly recommends that states reassign rates immediately upon completion of the transfer. If rates are not reassigned until a later date, it is possible that a successful "SUTA dump" will be achieved during the period between the completion of the transfer and the assignment of a new rate. For example, if an employer with a rate of 5.4% transfers 1,000 employees into a shell with a rate of .1% on the first day of the rate year, the employer will have accomplished a "SUTA" dump for that rate year.

**9. Question:** An employee of one legal entity is moved to another legal entity. Although each entity is treated as a separate employer for UC purposes, there is substantially common control over the two entities. Does this mean that unemployment experience must be transferred?

**Answer:** No. When a single person is moved from one entity to another, it is merely a transfer of an individual rather than a transfer of trade or business.

**10. Question:** A state's UC law provides that any corporate shell or spin-offs where there is "a continuity of control of the business enterprise" will not be treated as a new employer for UC purposes, but instead as the same employer. Does this constitute an acceptable alternative to the mandatory transfer requirement?

**Answer:** While this provision prohibits many (if not most) SUTA dumps, it will not necessarily address all situations where there are cases of "substantially common *ownership, management, or control.*" (Emphasis added.) There may, for example, be cases where substantially common ownership exists, but that ownership does not exert a controlling interest. (For example, it is possible that a majority owner of two corporations could have non-voting stock.) This situation would require a transfer of experience under Section 303(k), SSA, even if "substantially common control" did not exist.

States with such "continuity" provisions will meet the requirements of Section 303(k)(1)(A), SSA, concerning mandatory transfers if they amend their provisions to be as specific as the Federal requirement. That is, the "continuity" provision may be amended to provide that there is no new employer where there is "substantially common ownership, management, or control."

Instead of providing for amendments addressing the mandatory transfer of experience, states may wish to amend their laws to provide for a "continuity" provision. A "continuity" provision may be easier to administer because, if all entities with substantially common ownership, management and control are always treated as being a single employer under the state UC law, the issue of transfers of experience would not arise. An example of such a law is California's, which was quoted in UIPL 34-02. (Note that California's law is limited to continuity of control, and thus, does not currently meet the Federal requirement.) The penalties described below would need to apply to violations and attempted violations of any "continuity" provision.

**11. Question:** How are professional employer organizations (PEOs) affected by the new mandatory transfer requirement?

**Answer:** The same rules apply to PEOs as any other employer. If a PEO sets up a shell corporation and transfers some or all of its trade or business to the shell, then the unemployment experience associated with the transferred trade or business must be transferred to the shell. Similarly, if the conditions prohibiting transfers of experience are met, as discussed in Questions and Answers 16-18, they would apply to PEOs.

Except for these mandatory/prohibited transfers, the amendments do not otherwise affect the relationship between the PEO and its clients. States currently vary in their treatment of PEOs and their clients for experience rating purposes. Some states treat the client as the employer for experience rating purposes and others treat the PEO as the employer for these purposes. The amendments do not require states to change this treatment.

**12. Question:** A PEO sets up several different shells. Each year it shifts all its clients to a different shell. For example, in the first year the client contracts with Shell A; in the second, it contracts with Shell B; and in the third it contracts with Shell C. When this occurs, must experience be transferred from Shell A to Shell B and then to Shell C?

**Answer:** Yes. By dictating that the client must sign with a particular shell (or otherwise manipulating which shell the client signs with), the PEO is effectively transferring its trade/business – that is, the trade/business of performing services as a PEO for a client - from Shell A to Shell B and then to Shell C. The control exercised by the PEO over which shell is the contracting entity meets the test of "substantial control." Since a transfer of trade/business has occurred and substantial commonality of control exists, experience must be transferred.

**13. Question:** May my state limit the mandatory transfer provision to large transfers of experience, such as those where 300 or more employees are transferred?

**Answer:** No. The SUTA dumping amendments apply to all transfers, large and small, where there is substantially common ownership, management or control.

**14. Question:** Current state law requires partial transfers of experience only when an "identifiable and segregable" component of an employer has been transferred to another employer. Is this an acceptable limitation on partial transfers?

**Answer:** No. States must transfer experience whenever "a part" of an existing business is transferred.

The bill that eventually became P.L. 108-295 was H.R. 3463. As introduced, H.R. 3463 required transfers of experience only when there was a transfer of an "identifiable and segregable" component of the employer. That language was deleted after the Department alerted Congressional staff of concerns that it would create a loophole allowing SUTA dumping. Thus, states must transfer experience whenever "a part" of an existing business is transferred.

For example, larger businesses are often divided into separate legal entities. Under the "identifiable and segregable" test as commonly applied under many current state UC laws, a transfer of experience would be mandated only if *all* of the trade and business of one legal entity is acquired by another legal entity. Conversely, if only a part of the entity is acquired by another entity, then no "identifiable and segregable" component could be identified and no transfer of experience would be required. As a result, the limitation relating to an "identifiable and segregable" component could easily be circumvented through transferring the majority of employees from one entity into a shell that had earned the state's minimum tax rate.

**15. Question:** How is experience transferred when no identifiable and segregable component of a business can be identified? For example, Business A sets up a shell. Business A then transfers 90% of its workforce to the shell.

**Answer:** States may prorate the payroll of the employees transferred against benefit charges/reserve balance/benefit

wages, whichever is appropriate. In determining the payroll transferred, the state may use either taxable or total payroll, but it must be the payroll immediately prior to the transfer of workforce.

Thus, assuming a state uses total payroll, if 90% of Business A's total payroll was transferred to the shell, 90% of the experience attributable to Business A (that is, benefit charges, reserve balance, or benefit wages, or payroll, whichever is appropriate) must be transferred to the shell. This method is acceptable only when no identifiable and segregable component can be identified.

It should be noted that, in this case, a "continuity" provision, as discussed in Question and Answer # 10, would hold that the shell is not a separate employer. As a result, the issue of a transfer of experience would not arise.

### **PROHIBITED TRANSFERS – SECTION 303(k)(1)(B), SSA**

**16. Question:** Under what conditions are states prohibited from transferring experience under the SUTA dumping amendments?

**Answer:** Unemployment experience may not be transferred, and a new employer rate or the state's standard rate will instead be assigned, when a person who is not an employer acquires the trade or business of an existing employer. However, this prohibition applies only if the UC agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. (The identification of a state's standard rate is explained in UIPL 15-84.)

**17. Question:** Provide an example of when experience may not be transferred under the amendments.

**Answer:** The amendment prohibiting transfers is intended to address situations where a person, who is *not* an employer, purchases a small business solely or primarily for the purpose of obtaining its low rate of contributions when it commences its new business. Generally, the small business is converted to a different type of business.

For example, Person A is not an employer. Person A purchases a flower shop, which has earned the minimum UC rate of .5 percent to begin a manufacturing business. Person A either stops the flower business, or it becomes incidental as non-flower-shop payroll overwhelms it. Had Person A not purchased the flower shop, it would have been assigned a new employer rate of 4.5 percent based on its non-flower shop industry. The facts here should lead the state UC agency to conclude that the purchase was primarily for the purpose of obtaining a lower rate of contributions. Thus, under the amendments, state laws may not permit the experience of the flower shop to be transferred to Person A. Instead, Person A will be assigned the applicable new employer rate (or the state's standard rate) until such time as Person A qualifies for a rate based on experience.

**18. Question:** How will a state determine if the acquisition of an employer was made "solely or primarily for the purpose of obtaining a lower rate of contributions?"

**Answer:** The state should "use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition." (The quoted language is from the Draft Legislative Language in Attachment II.) The cost of acquiring a business may be used as an objective factor because this cost, as compared with any potential savings in contributions costs, will indicate the extent to which UC tax savings may accrue.

State law may not arbitrarily limit the criteria to be used. For example, some state laws currently consider only whether the business enterprise of the acquired business is continued. This limitation would allow an impermissible SUTA dump to occur as it does not address situations where the purchaser continues the acquired business while flooding the

business (and the experience account) with a substantial number of employees performing duties unrelated to the acquired business. For this reason, the draft legislative language is written to refer to "objective factors *which include*" the listed. (Emphasis added.)

### **REQUIRED PENALTIES – SECTION 303(k)(1)(D), SSA**

**19. Question:** What penalties must be imposed under state law?

**Answer:** State law must provide that "meaningful civil and criminal penalties" are imposed with respect to—

- Persons who "knowingly violate or attempt to violate" those provisions of the state's UC law that implement Section 303(k), SSA.
- Persons who "knowingly advise another person to violate those provisions of" state UC laws that implement Section 303(k), SSA.

"Knowingly" is defined as "having actual knowledge of *or* acting with deliberate ignorance of *or* reckless disregard for the prohibition involved." (Emphasis added. Section 303(k)(2)(E), SSA.)

**20. Question:** Must penalties be imposed in every case of SUTA dumping that is identified?

**Answer:** No. The penalties only apply to persons who "knowingly violate or attempt to violate" the SUTA dumping provisions of state law.

However, when a determination issued by the appropriate authority or a consent order establishes that a person "knowingly" violated (or attempted to violate) a state's SUTA dumping provisions, then civil penalties must be imposed. States will take into account the amounts at issue and the likelihood of successful prosecution in determining which cases will result in criminal prosecutions.

In cases where a SUTA dumping investigation results in a settlement between the state and the employer in which the employer admits no wrongdoing, there has been no clear establishment of SUTA dumping. In such cases, Federal law does not require the imposition of a penalty.

**21. Question:** What is a "meaningful" penalty?

**Answer:** To be "meaningful," the penalty must have the effect of curtailing SUTA dumping. Minimal penalties will not accomplish this end.

Concerning cases where only civil penalties are imposed, a monetary penalty must be of sufficient size that an employer will not be tempted to SUTA dump. A flat fine against SUTA dumping may not be a meaningful deterrent. For example, if a corporation that attempted to dump \$2 million in SUTA taxes is fined \$5,000, this will likely not be a meaningful deterrent against future attempts to SUTA dump. For that reason, the draft legislative language attached to this UIPL takes the approach that an employer who violated (or attempted to violate) the SUTA dumping prohibitions be assessed the maximum tax rate, or, if assigning the maximum rate does not result in a rate increase of at least 2% of taxable wages, then a penalty rate of 2% of taxable wages will instead be assessed for the rate year in which the violation occurred (or was attempted) and the following three years. States are free to vary this penalty (including assessing both rate increases and fines) but any penalty must have significant financial impact to have a deterrent effect.

**22. Question:** May state law limit the civil penalties to rate increases?

**Answer:** No. UC rate increases are not applicable to self-employed individuals who knowingly advise employers to SUTA dump. As a result, state law also needs to provide for fines against individuals. The draft legislative language attached to this UIPL takes the approach that rate increases will be applied to employers and fines to non-employers.

**23. Question:** Do the SUTA dumping amendments specify the uses of any financial penalties collected by the UC agency?

**Answer:** No. The draft legislative language attached to this UIPL operates on the assumption that, as is the case with any other UC contributions payable under a state's UC law, any amounts paid due to any rate increase will be deposited in the state's unemployment fund in which case they may be withdrawn *only* for the payment of benefits. Also, under the draft legislative language, any fines will be deposited in the state's penalty and interest account. States may limit the use of these fines to SUTA dumping and other integrity activities.

## PAYROLLING

**24. Question:** Do the SUTA dumping amendments address situations where one employer reports its payroll under another employer's account?

**Answer: No.** Although this practice, commonly called "payrolling," has been known for some time, it is not addressed by the amendments. "Payrolling" may also include cases where two unrelated businesses negotiate for a fee to have all or part of the employer with the higher UC rate report its payroll as belonging to the other employer. A PEO was recently found to be "payrolling" by shifting *its* payroll to the account of a client with a lower rate. In each case, the employers are fraudulently reporting who is the employer of an individual.

Unlike the manipulations the SUTA dumping amendments are designed to prevent, "payrolling" should already be explicitly prohibited under all states' UC laws since it involves an employer submitting fraudulent documents concerning who is an individual's employer for UC purposes.

Recognizing that "payrolling" has the same effect as SUTA dumping, the Draft Legislative Language is written so that its penalties will apply to "payrollers." It provides that the penalties apply not just to the mandatory and prohibited transfers required by new Section 303(k), SSA, but also to violations or attempted violations of "any other provision of this Chapter related to determining the assignment of a contribution rate."

## ESTABLISHING PROCEDURES – SECTION 303(k)(1)(E), SSA

**25. Question:** What must my state law say regarding establishing procedures to detect SUTA dumping?

**Answer:** The state law must say that the state will establish procedures to "identify the transfer or acquisition of a business for purposes of" detecting SUTA dumping. (Section 303(k)(1)(E), SSA.) The state law is not required to specify the procedures. The Department does not believe that it is desirable to legislate what these procedures *must* be as the most effective procedures may vary over time. As a result, the Draft Language does not specify procedures. However, the state must implement procedures to detect SUTA dumping.

## OTHER

**26. Question:** What does "person" mean for purposes of the amendments?

**Answer:** "Person" has "the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986." (Section 303(k)(2)(F), SSA.) Section 7701(a)(1), IRC, defines "person" as meaning "an individual, a trust, estate, partnership, association, company or corporation." Thus, the term "person" is very broad; it includes entities that

may be employers under state law and it includes individuals who are not employers.

**27. Question:** What does "employer" mean for purposes of the amendments?

**Answer:** "Employer" means "an employer as defined under state law." (Section 303(k)(2)(B), SSA.) Typically, "employer" will mean an entity that pays sufficient wages based on employment to be subject to the state's UC law. If state UC law does not use the term "employer," then, for purposes of determining what entity is an employer, the state should use whatever term it uses to describe this entity. For example, many states use the term "employing unit" to describe this entity.

**28. Question:** What does "business" mean for purposes of the amendments?

**Answer:** "Business" means "a trade or business (or a part thereof)." (Section 303(k)(2)(c), SSA.)

### EFFECTIVE DATE

**29. Question:** By what date must the states amend their UC laws?

**Answer:** The amendments do not specify a date. Instead, they apply to "rate years beginning after the end of the 26-week period beginning on the first day of the first regularly scheduled session of the State legislature beginning on or after the date of the enactment" of P.L. 108-295, which was August 9, 2004. (See Section 2(c) of P.L. 108-295.) Thus, transfers of experience required or prohibited under the amendments must be effective for such rate years. Nothing prohibits states from providing for earlier effective dates. Indeed, states are encouraged to make their amendments effective as soon as possible.

All states currently have rate years beginning either January 1 or July 1. Also, almost all states' first legislative sessions following the date of enactment will begin in the first three months of 2005. As a result, after taking into account the 26-week grace period, the amendments in most states must be effective for rate years beginning on or after January 1, 2006, or on or after July 1, 2006, whichever is applicable in the state.

For purposes of determining when the 26-week period ends, the state should start counting on the first day of the first regularly scheduled session of the state legislature and count up to 182 (26 weeks x 7 days = 182 days). Any rate year beginning after the 182nd day must apply the SUTA dumping amendments.

The following table indicates the required effective dates:

EFFECTIVE DATES		
First Day of State's First Regularly Scheduled Session	State's Rate Year Begins	Effective for Rate Years Beginning
January 1 – July 3, 2005	January 1	January 1, 2006
	July 1	July 1, 2006
July 4 – December 31, 2005	January 1	January 1, 2007
	July 1	July 1, 2006
January 1 – July 3, 2006	January 1	January 1, 2007
	July 1	July 1, 2007

**30. Question:** The state's legislature has adjourned. However, it is scheduled to meet in a one-day session that is

limited to over-riding vetoes. This one-day session is consistently scheduled to occur a specified number of days after the state legislature has adjourned. Although the legislature adjourned prior to the date of enactment of P.L. 108-295, the one-day session occurs after the date of enactment. Does this veto session count as the "first day of the first regularly scheduled session" following enactment?

**Answer:** No. The effective date provisions recognize that states need time to amend their laws. A legislative session where the introduction and enactment of *new* legislation is prohibited will, therefore, not be considered as starting the clock for purposes of determining when rates must be assigned consistent with new Section 303(k), SSA. If, on the other hand, legislation may be introduced and enacted in such a one-day session, the clock will start.

## ATTACHMENT II

## DRAFT LEGISLATIVE LANGUAGE

The following language is provided for state use in developing language that meets the requirements of Section 303(k), SSA, as added by P.L. 108-295, on SUTA dumping.

States will need to modify the language to accord with state usage. For example, "Commissioner" should be changed to the name of the agency administering the state's UC program if that is the state convention. Similarly, legal usages, such as "Chapter" to refer to the state's UC law, should be changed to accord with state convention.

The following language assumes the state wishes to add a separate section addressing SUTA dumping. States may chose instead to integrate the following provisions into existing state law. If this is the case, states should use this language in conjunction with the Checklist in Attachment III to assure all necessary amendments are made. Similarly, states modifying the language should test such modifications against the Checklist.

**Section \_\_\_\_\_ . Special Rules Regarding Transfers of Experience and Assignment of Rates.**

Notwithstanding any other provision of law, the following shall apply regarding assignment of rates and transfers of experience:

- (a) If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is substantially common ownership, management or control of the two employers, then the unemployment experience attributable to the transferred trade or business shall be transferred to the employer to whom such business is so transferred. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer of trade or business.<sup>1</sup>
- (b) Whenever a person<sup>2</sup> who is not an employer<sup>3</sup> under this Chapter at the time it acquires the trade or business of an employer, the unemployment experience of the acquired business shall not be transferred to such person if the Commissioner finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, such person shall be assigned the [applicable]<sup>4</sup> new employer rate under section [*insert section of state law*]. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the Commissioner shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.
- (c)(1) If a person knowingly violates or attempts to violate subsections (a) and (b) or any other provision of this Chapter related to determining the assignment of a contribution rate,<sup>5</sup> or if a person knowingly advises another person in a way that results in a violation of such provision, the person shall be subject to the following penalties:
  - (A) If the person is an employer, then such employer shall be assigned the highest rate assignable under this Chapter for the rate year during which such violation or attempted violation occurred and the three rate years immediately following this rate year. However, if the person's business is already at such highest rate for any year, or if the amount of increase in the person's rate would be less than 2 percent for such year, then a penalty rate of contributions of 2 percent of taxable wages shall be imposed for such year.
  - (B) If the person is not an employer, such person shall be subject to a civil money penalty of not more than \$5,000. Any such fine shall be deposited in the penalty and interest account established under [*insert appropriate section of state law*].<sup>6</sup>

(2) For purposes of this section, the term "knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

(3) For purposes of this section, the term "violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation or willful nondisclosure.<sup>7</sup>

(4) In addition to the penalty imposed by paragraph (1), any violation of this section may be prosecuted as a [insert appropriate language; for example "a class A felony" or "a Class B misdemeanor"] under Section [insert appropriate section] of the Criminal Code.<sup>8</sup>

(d) The Commissioner shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(e) For purposes of this section—

(1) "Person" has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of 1986, and  
 (2) "Trade of business" shall include the employer's workforce.<sup>9</sup>

(f) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.<sup>10</sup>

<sup>1</sup>See Question and Answer 8, which contains the Department's recommendation that rates be recomputed immediately.

<sup>2</sup>The term "person" is used consistent with the usage in Section (k)(1)(B), SSA. It encompasses a broad range of entities who are not "employers." It includes both entities who are not "employers" because they have no payroll or insufficient payroll. Note the definition of "p" given in subsection (e)(1) of the draft language.

<sup>3</sup>States should determine if "employer" is the appropriate term here and in other appearances in this draft language. For example, a state may use the term "employing unit," "subject employer," or "employer liable for contributions" to describe an entity that is subject to taxation under the state's UC law.

<sup>4</sup>The word "applicable" is intended to address situations where not all "new" employers receive the same rate. For example, many states assign new employer rates by industry code.

<sup>5</sup>See Question and Answer 24 regarding payrolling.

<sup>6</sup>This provision permits a penalty to be applied to self-employed financial advisors and individual employees of businesses. See Question and Answer 23 regarding the deposit of the fines in the penalty and interest account.

<sup>7</sup>This provision – paragraph (3) - is optional. An actual listing of violations may help to deter these violations.

<sup>8</sup>States should assure that the criminal penalties cited are applicable to both individuals and corporations.

<sup>9</sup>See Question and Answer 5 regarding whether workforce is part of the employer's "trade or business." This definition assures that questions will not arise about whether an employer's workforce is included in "trade or business."

<sup>10</sup>Subsection (f) is optional. States are encouraged to include such language to avoid potential conflicts with any Federal regulations finalized after enactment of state law. The language is written in terms of minimum Federal requirements to assure states are free to adopt more stringent protections to avoid SUTA dumping.

ATTACHMENT III

CONFORMITY CHECKLIST FOR STATE SUTA DUMPING LAWS	
QUESTIONS	YES OR NO
1. <b>Mandatory Transfers.</b> If Employer A transfers its trade or business (including its workforce) to Employer B, does the state law mandate the transfer of experience from Employer A to Employer B when there is "substantially common" ownership, management or control?	
Does this mandate apply to <i>both total and partial</i> transfers?	
2. <b>Prohibited Transfer.</b> Does state law prohibit the transfer of experience (that is, does it require a new employer rate be assigned) when a person becomes an employer by acquiring an existing employer <i>if</i> the purpose of the acquisition was to obtain a lower rate?	
Does this prohibition apply to a "person" who, prior to the acquisition of the employer, had (a) no individuals in its employ and (b) some employment, but not enough to be an "employer" for purposes of state law?	
3. <b>Penalties.</b> Does state law impose "meaningful civil penalties" for "knowingly" violating and <i>attempting to violate</i> the above?	
Why is the penalty "meaningful"?	
Does state law impose meaningful criminal penalties for the same?	
Are these penalties applicable to both the person who commits the violation and any person (including the employer of the advice-giver) who knowingly gives advice leading to such a violation?	
Does state law address the situation where the person giving the advice may not be an employer? (E.g., self-employed financial advisors?)	
Does the definition of "knowingly" at a minimum mean "having actual knowledge of or acting with deliberate ignorance of or reckless disregard of the law"?	
4. <b>Procedures.</b> Does the law require the establishment of procedures to identify SUTA dumping?	
5. <b>Additional Procedures/Mandates.</b> Optional. Does state law require/prohibit the transfer of experience in accordance with any regulations the Secretary of Labor may prescribe? (If not, future amendments to state laws may be necessary.)	

## ATTACHMENT IV

## TEXT OF P.L. 108-295

## An Act

To amend titles III and IV of the Social Security Act to improve the administration of unemployment taxes and benefits.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'SUTA Dumping Prevention Act of 2004'.

**SEC. 2. TRANSFER OF UNEMPLOYMENT EXPERIENCE UPON TRANSFER OR ACQUISITION OF A BUSINESS.**

(a) IN GENERAL- Section 303 of the Social Security Act (42 U.S.C. 503) is amended by adding at the end the following:

- `(k)(1) For purposes of subsection (a), the unemployment compensation law of a State must provide--
  - `(A) that if an employer transfers its business to another employer, and both employers are (at the time of transfer) under substantially common ownership, management, or control, then the unemployment experience attributable to the transferred business shall also be transferred to (and combined with the unemployment experience attributable to) the employer to whom such business is so transferred,
  - `(B) that unemployment experience shall not, by virtue of the transfer of a business, be transferred to the person acquiring such business if--
    - `(i) such person is not otherwise an employer at the time of such acquisition, and
    - `(ii) the State agency finds that such person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions,
  - `(C) that unemployment experience shall (or shall not) be transferred in accordance with such regulations as the Secretary of Labor may prescribe to ensure that higher rates of contributions are not avoided through the transfer or acquisition of a business,
  - `(D) that meaningful civil and criminal penalties are imposed with respect to--
    - `(i) persons that knowingly violate or attempt to violate those provisions of the State law which implement subparagraph (A) or (B) or regulations under subparagraph (C), and
    - `(ii) persons that knowingly advise another person to violate those provisions of the State law which implement subparagraph (A) or (B) or regulations under subparagraph (C), and
  - `(E) for the establishment of procedures to identify the transfer or acquisition of a business for purposes of this subsection.
- `(2) For purposes of this subsection--
  - `(A) the term 'unemployment experience', with respect to any person, refers to such person's experience with respect to unemployment or other factors bearing a direct relation to such person's unemployment risk;
  - `(B) the term 'employer' means an employer as defined under the State law;
  - `(C) the term 'business' means a trade or business (or a part thereof);
  - `(D) the term 'contributions' has the meaning given such term by section 3306(g) of the Internal Revenue Code of 1986;
  - `(E) the term 'knowingly' means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved; and
  - `(F) the term 'person' has the meaning given such term by section 7701(a)(1) of the Internal Revenue Code of

1986'.

(b) **STUDY AND REPORTING REQUIREMENTS-**

(1) **STUDY-** The Secretary of Labor shall conduct a study of the implementation of the provisions of section 303(k) of the Social Security Act (as added by subsection (a)) to assess the status and appropriateness of State actions to meet the requirements of such provisions. (2) **REPORT-** Not later than July 15, 2007, the Secretary of Labor shall submit to the Congress a report that contains the findings of the study required by paragraph (1) and recommendations for any Congressional action that the Secretary considers necessary to improve the effectiveness of section 303(k) of the Social Security Act.

(c) **EFFECTIVE DATE-** The amendment made by subsection (a) shall, with respect to a State, apply to certifications for payments (under section 302(a) of the Social Security Act) in rate years beginning after the end of the 26-week period beginning on the first day of the first regularly scheduled session of the State legislature beginning on or after the date of the enactment of this Act.

(d) **DEFINITIONS-** For purposes of this section--

- (1) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands;
- (2) the term 'rate year' means the rate year as defined in the applicable State law; and
- (3) the term 'State law' means the unemployment compensation law of the State, approved by the Secretary of Labor under section 3304 of the Internal Revenue Code of 1986.

**SEC. 3. USE OF NEW HIRE INFORMATION TO ASSIST IN ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAMS.**

Section 453(j) of the Social Security Act (42 U.S.C. 653(j)) is amended by adding at the end the following:

**'(8) INFORMATION COMPARISONS AND DISCLOSURE TO ASSIST IN ADMINISTRATION OF UNEMPLOYMENT COMPENSATION PROGRAMS-**

**'(A) IN GENERAL-** If, for purposes of administering an unemployment compensation program under Federal or State law, a State agency responsible for the administration of such program transmits to the Secretary the names and social security account numbers of individuals, the Secretary shall disclose to such State agency information on such individuals and their employers maintained in the National Directory of New Hires, subject to this paragraph.

**'(B) CONDITION ON DISCLOSURE BY THE SECRETARY-** The Secretary shall make a disclosure under subparagraph (A) only to the extent that the Secretary determines that the disclosure would not interfere with the effective operation of the program under this part.

**'(C) USE AND DISCLOSURE OF INFORMATION BY STATE AGENCIES-**

**'(i) IN GENERAL-** A State agency may not use or disclose information provided under this paragraph except for purposes of administering a program referred to in subparagraph (A).

**'(ii) INFORMATION SECURITY-** The State agency shall have in effect data security and control policies that the Secretary finds adequate to ensure the security of information obtained under this paragraph and to ensure that access to such information is restricted to authorized persons for purposes of authorized uses and disclosures.

**'(iii) PENALTY FOR MISUSE OF INFORMATION-** An officer or employee of the State agency who fails to comply with this subparagraph shall be subject to the sanctions under subsection (1)(2) to the same extent as if such officer or employee was an officer or employee of the United States.

**'(D) PROCEDURAL REQUIREMENTS-** State agencies requesting information under this paragraph shall adhere to uniform procedures established by the Secretary governing information requests and data matching under this paragraph.

**'(E) REIMBURSEMENT OF COSTS-** The State agency shall reimburse the Secretary, in accordance with subsection (k)(3), for the costs incurred by the Secretary in furnishing the information requested under this paragraph.'

 <b>EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D. C. 20210</b>	<b>CLASSIFICATION</b> SUTA Dumping
	<b>CORRESPONDENCE SYMBOL</b> DL
	<b>ISSUE DATE</b> October 13, 2004
	<b>RESCISSIONS</b> None
	<b>EXPIRATION DATE</b> Continuing

**ADVISORY : UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 30-04 CHANGE 1**

**TO : STATE WORKFORCE AGENCIES**

**FROM : CHERYL ATKINSON s/s  
Administrator  
Office of Workforce Security**

**SUBJECT : SUTA Dumping – Amendments to Federal Law affecting the Federal-State  
Unemployment Compensation Program - Additional Guidance**

1. **Purpose.** To provide additional guidance to states concerning the amendments to Federal law designed to prohibit "SUTA Dumping."

2. **Reference.** Public Law (P.L.) No. 108-295, the "SUTA Dumping Prevention Act of 2004," signed by the President on August 9, 2004; the Social Security Act (SSA); the Internal Revenue Code (IRC), including the Federal Unemployment Tax Act (FUTA); and Unemployment Insurance Program Letters (UIPLs) 30-04, 14-84, and 29-83 Change 3.

3. **Background.** UIPL 30-04 informed states of the amendments to Federal unemployment compensation (UC) law made by P.L. No. 108-295, the "SUTA Dumping Prevention Act of 2004." P.L. 108-295 amended the SSA by adding Section 303(k) to establish a nationwide minimum standard for curbing SUTA dumping. States will need to amend their UC laws to conform with the new legislation.

Since the issuance of UIPL 30-04, the Department of Labor has received requests for clarification and other questions on the Federal SUTA dumping requirements. This UIPL is issued to respond to these requests and questions. As was UIPL 30-04, it is a question and answer (Q&A) format. States are especially directed to Q&As 1, 2, 14, and 15, which include additions and modifications to the draft legislative language provided with UIPL 30-04.

4. **Action.** State administrators should distribute this advisory to appropriate staff. States must adhere to the requirements of Federal law contained in this advisory.

5. **Inquiries.** Questions should be addressed to your Regional Office.

6. **Attachment.**

QUESTIONS AND ANSWERS (Q&As)

## ATTACHMENT TO UIPL 30-04

## QUESTIONS AND ANSWERS (Q&amp;As)

## MANDATORY TRANSFERS – SECTION 303(k)(1)(A), SSA

**1-1. Question:** In anticipation of a major layoff, Employer A transfers the portion of its business and workforce which it will be laying off to a small company, Employer B. Since there is substantially common ownership, experience is also transferred. Employer B then lays off all of the transferred workforce and is charged for the resulting UC payments. Employer B then either ceases operating or operates with a greatly reduced workforce, thereby minimizing its UC costs. May the transfer of experience from Employer A to Employer B be voided in this case? If not, what can be done to avoid this type of SUTA dumping?

**Answer:** Since there is substantially common ownership, experience must be transferred from Employer A to Employer B under the mandatory transfer provisions.

Although Federal law does not require states to prevent this type of SUTA dumping, states may take action. (States which charge benefits to the separating employer may be particularly vulnerable to this type of SUTA dumping.) If the state determines that a substantial purpose of the transfer of trade or business was to obtain a lower rate, then both Employer A and Employer B's accounts could be treated as a single account for experience rating purposes. This will prevent Employer A from escaping its poor experience. It is consistent with Federal law both because Section 303(k)(2)(B), SSA, permits states to define "employer" and because Section 3303(a)(1), FUTA, has long permitted the establishment of joint accounts. To this end, the draft legislative language contained in Attachment II to UIPL 30-04 is revised as follows:

- By inserting "(1)" after "(a)" in the provision addressing mandatory transfers, and
- By inserting the following new language:

(2) If, following a transfer of experience under paragraph (1), the Commissioner determines that a substantial purpose of the transfer of trade or business was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to such account.

The Department recommends that states consider addressing this matter.

Alternatively, nothing prohibits a state from revisiting its determination that Employer B was a separate legal entity for UC purposes. If, for example, the state determines that Employer B has no business existence separate and apart from Employer A, and, therefore, under its law should not have been established as a separate employer for UC purposes, then its establishment as a separate employer may be voided and its experience will revert to Employer A. (Note this approach would not cover transfers to a long-established business that has a separate business identity.)

**1-2. Question:** Although the answer to Q&A 5 of UIPL 30-04 provides that an "employer's workforce is necessarily a part of its business," the draft legislative language attached to that UIPL does not specifically address transferring workforce. Instead, it simply refers to transfers of trade or business. May the draft legislative language be modified to specifically cite transfers of workforce or employees?

**Answer:** Yes. The draft legislative language is just that – draft language. It may, therefore, be modified to

explicitly provide that transfers of trade or business include situations where employees are transferred. The following language is added at the end of subsection (a) of the draft legislative language as optional language that state may consider using:

The transfer of some or all of an employer's workforce to another employer shall be considered a transfer of trade or business when, as the result of such transfer, the transferring employer no longer performs trade or business with respect to the transferred workforce, and such trade or business is performed by the employer to whom the workforce is transferred.

Care should be taken to assure the state law does not require transfers of experience where an employee is "moved" from one employer to another, without any transfer of trade or business. See Q&A 1-7.

**1-3. Question.** The answer to Q&A 6 in UIPL 30-04 indicates that the Department is not defining a "bright line" test of what constitutes "substantially common ownership, management, or control." Does this mean state law may contain a test of "substantially common" that requires more than 90 percent commonality? Or more than 50 percent commonality?

**Answer:** No, a 90 percent test would be a "substantial majority" test, while a 50 percent test would be a simple "majority" test. Congress could have specified either of these tests, but it instead chose a test of "substantial" commonality. Therefore, "substantially" could include less than 50% common ownership, management, or control. "Substantial" common management, for example, might even occur where Company A and Company B share only one manager, but that one manager exercises pervasive control as the chief executive officer of both companies.

**1-4. Question:** The answer to Q&A 8 in UIPL 30-04 "strongly recommends that states reassign rates immediately on completion of the transfer" of experience to avoid a SUTA dump between the completion of a transfer and assignment of a new rate. If a state currently lacks the capability to assign two different rates to the same employer for the same year, may it retroactively change the employers' rates to the beginning of the rate year to reflect the transferred experience?

**Answer:** No. Section 3303(a)(1), FUTA, requires that "reduced rates" be assigned to an employer based on "his" experience during "not less than the 3 consecutive years immediately preceding the computation date." If a rate based on transferred experience is assigned to an employer for a period before it becomes "his" experience, the employer cannot be said to be receiving a rate based on "his" experience for that period.

States have other options to address this concern. States may establish a different employer account number for the employer(s) and assign the recalculated rate to that new account number.

States may also retroactively impose the state's standard rate of contributions or the state's highest rate of contributions since these rates are not "reduced rates" subject to FUTA. (See UIPL 14-84 for guidance in determining the state's standard rate. Caution should be taken in using standard rates since in some states the standard rate may be lower than the employer's experience rate, either prior to or after any transfer.) Although this approach is consistent with FUTA, states should consider whether retroactively imposing higher rates on employers is equitable since employers will not have budgeted for retroactive costs and because the rates are not based on experience.

**1-5. Question:** Recalculating an employer's reduced rate in the middle of the rate year may be administratively burdensome. May a state simply assign the employer the higher of the two rates for the remainder of the rate year? For example, assume Employer A has a rate of 5.0 percent and is purchased by Employer B which has a rate of 4.0 percent. May the state assign a rate of 5.0 percent to Employer B for the remainder of the rate year? (This

method is authorized by UIPL 29-83, Change 3, which discusses transfers of experience, but only when Employer B is *not* an existing employer.)

**Answer:** Yes, the state may assign the higher of the two rates. FUTA's experience rating requirements apply to "reduced rates." This approach always serves to *increase* the employer's rate. As noted in UIPL 29-83, Change 3, "Since assigning the highest rate results in an increased rate (even though it may be less than the standard rate), there is no conflict with FUTA." Although UIPL 29-83, Change 3, addressed only cases where the successor was not an existing employer, this principle also applies to cases where the successor is an employer.

States should note that this approach may raise fairness issues. For example, assuming substantial commonality of ownership, management, or control at the time of the transfer or trade or business, an employer with a workforce of 10 individuals and an experience rate of 5.4 percent could have its trade/business and experience transferred to an employer with a workforce of 1,000 individuals and an experience rate of 2.0 percent. The result of assigning a higher rate would be a significantly higher rate on a significantly larger workforce.

**1-6. Question:** The answer to Q&A 8 in UIPL 30-04 provides for the option of "immediately" recalculating an employer's rate "after the completion of the transfer of trade or business." This could be problematic since this rate change could occur in the middle of a quarter. May the recalculated rate take effect with the start of the quarter following the transfer?

**Answer:** Yes. Since nothing in the SUTA dumping amendments requires rates be recalculated prior to the next time the state calculates rates for all employers, states have latitude in this matter.

**1-7. Question:** The answer to Q&A 9 in UIPL 30-04, says that where "[a]n employee of one legal entity is *moved* to another legal entity," no transfer of experience is required. (Emphasis added.) However, the answer to Q&A 13 in UIPL 30-04 says the SUTA Dumping amendment applies to "all transfers, large and small." What is the distinction between the two?

**Answer:** Q&A 13 applies to cases where there is a transfer of trade or business. (Q&As 5 and 14 in UIPL 30-04 and 1-2 in this UIPL also apply to situations where trade or business is transferred.)

The answer to Q&A 9 applies to cases where an employee is "moved" from one legal entity to another, but where there is *no* transfer of trade or business. For example, an owner of two separate legal entities "moves" an individual from head of widget making for Entity A to head of graphic design for Entity B, but does not transfer any of the widget-making trade/business to Entity B. In this case, no trade or business is transferred and the "move" of the individual is in the nature of a reassignment.

In cases where no trade or business has been transferred, experience may not be transferred. Therefore, when an employee's "move" is merely in the nature of a reassignment, the state may not transfer experience.

**1-8. Question.** State law allows employers to voluntarily combine their experience rating histories into joint accounts under certain conditions. Does the SUTA dumping legislation affect this?

**Answer:** No. Joint accounts may continue to be established in accordance with state law.

The SSA's mandatory transfer provisions affect joint accounts in the same way they affect individual employer accounts. That is, if an employer participating in a joint account transfers trade or business to another employer and a transfer of experience is required under provisions of state law implementing the SSA's mandatory transfer provisions, then any subsequent calculation of the experience rate of the joint account must take into account this transfer.

**1-9. Question:** Do the amendments mandating a transfer of experience affect what constitute taxable wages?

**Answer:** The amendments address the transfer of experience and of rates based on that experience. They do not affect determinations of what constitute taxable wages under the state's law. As a result, after trade and business is transferred, the state may either give effect to taxable wages paid by the predecessor in determining whether the taxable wage base is met, or "restart" the taxable wage base for the individual at zero.

**1-10. Question:** Do the mandatory transfer provisions for SUTA Dumping apply when an employer is "reorganized?"

**Answer:** The keys under Section 303(k)(1)(A), SSA, are whether there is a transfer of trade or business and whether there is substantially common ownership, management, or control. Thus, the answer depends on whether the reorganization involves a transfer of trade or business between entities under substantially common ownership, management or control.

As used in bankruptcy law, a reorganization is a "financial restructuring of a corporation, esp. in the repayment of debts, under a plan created by a trustee and approved by a court." (Black's Law Dictionary (8th edition, 2004).) Thus, if a single employer simply "financially restructures" itself, without transferring trade or business, then the mandatory transfer provisions do not apply.

In other cases, reorganizations are mergers of corporations which involve a transfer of trade or business. For example, a reorganization may be a "restructuring of a corporation, as by a merger or recapitalization, in order to improve its tax treatment under the Internal Revenue Code." (Black's Law Dictionary (8th edition, 2004).) When there is a merger, the mandatory transfer provisions will apply if there is substantially common ownership, management, or control at the time of the transfer of trade or business.

Note the mandatory transfer provision of Section 303(k)(1)(A), SSA, does not speak in terms of "acquisitions." In many reorganizations, there may be mergers involving stock swaps or stock-for-asset exchanges, and it may be argued that no "acquisition" has occurred, even though workforce has been moved to another legal entity within a corporate umbrella. For purposes of the mandatory SUTA dumping amendments, whether there has been an "acquisition" is immaterial. What is significant is whether trade or business was transferred when, at the time of the transfer, there is substantially common ownership, management, or control. If this occurs, then the experience must also be transferred.

#### **REQUIRED PENALTIES – SECTION 303(k)(1)(D), SSA**

**1-11. Question:** The draft legislative language attached to UIPL 30-04 provides that, in addition to any civil penalty, "any violation of this section *may be* prosecuted as a" criminal offense. (Emphasis added.) Does this mean that inclusion of criminal penalties is optional on the part of the state?

**Answer:** No, Section 303(k)(1)(D), SSA, clearly requires that state law must provide that "meaningful civil and criminal penalties" are imposed under certain circumstances. (See Q&A 19 in UIPL 30-04.) The draft legislative language quoted in the question merely indicates that the state has discretion to apply criminal penalties as appropriate. As noted in Q&A 20 in UIPL 30-04, "States will take into account the amounts at issue and the likelihood of successful prosecution in determining which cases will result in criminal prosecutions."

**1-12. Question:** State law must provide for the imposition of penalties for persons who "knowingly" violate or attempt to violate those provisions of state law that implement Section 303(k), SSA, and for those who "knowingly" advise another person to violate such provisions. Since it is often difficult to prove that an action is done "knowingly," may state law provide that penalties may be imposed using a lower level of proof?

**Answer:** Yes. The "knowingly" test is the minimum standard that state law must contain to meet the requirements of Section 303(k)(1)(D), SSA. States must assure that any such test is at least as encompassing as the "knowingly" standard.

## STATUTE OF LIMITATIONS

**1-13. Question:** Assume a "SUTA dump" occurred five years before the state identified it. The state's statute of limitations prevents the state from assessing contributions more than three years prior to the date of detection. Does this statute of limitations conflict with the SUTA dumping amendments?

**Answer:** No. Nothing in the SUTA dumping legislation overrides a state's statute of limitations. As a result, in the above example, the state may limit its assessment of contributions to the three-year period provided in its statute of limitations.

## DRAFT LEGISLATIVE LANGUAGE

**1-14. Question.** Subsection (c)(1) of the draft legislative language attached to UIPL 30-4 provides for civil penalties for persons knowingly violating or attempting to violate "subsections (a) *and* (b) or any other provision of this Chapter related to determining the assignment of a contribution rate?" (Emphasis added.) Should the "and" be an "or"?

**Answer:** Yes. The word "and" could be read to mean that the person must have violated, or attempted to violate, both the mandatory transfer provision and the prohibited transfer provision. Therefore the draft legislative language should be corrected by changing "and" to "or".

**1-14. Answer.** Note there is a typo in subsection (e)(2) of the draft legislative language. "Trade *of* business" should be corrected to "Trade *or* business." (Emphasis added.)

**1-15. Question.** Subsection (c)(4) of the draft legislative language attached to UIPL 30-4 provides that "In addition to the penalty imposed by paragraph (1), any violation of this section may be prosecuted . . . ." May "section" be changed to "Chapter"?

**Answer:** Yes. Using the word "chapter" will have the effect of making the criminal penalties applicable to any other provision of the state's UC law related to determining the assignment of a contribution rate. Note that states are not required to apply the penalties they develop for SUTA dumping to other violations of state law. (See Q&A 24 in UIPL 30-04.)

Date: November 22, 2004  
Proposed by: Department  
Prepared by: Melissa Montey

## **ANALYSIS OF PROPOSED LAW CHANGE**

### **1. Description of Proposed Change**

Remove the reference to "(2)(a) or (d)" from §108.04(16)(b) and (c)2, to prevent an unintended relief of charges ("non-charge") to employers when claimants are not able and available for work but are eligible for benefits because they are enrolled in approved training.

### **2. Proposed Statutory Language**

108.04(16)(b):

The department shall not apply any benefit disqualification under sub. (1)(b)1., (7)(c), or (8)(e) or s. 108.141(3g) that is not the result of training or basic education under par. (a) while an individual is enrolled in a course of training or education that meets the standards specified in par. (a).

108.04(16)(c)2:

The department shall not apply benefit disqualifications under sub. (1)(b)1., (7)(c), or (8)(e) or s. 108.141(3g) that are not the result of the training while the individual is enrolled in the training.

### **3. Proposer's Reason for the Change**

During the last bill cycle the Council approved a relief of charges for benefits paid while an individual is enrolled in approved training and has been separated from his/her employment or refused a job due to an inability to work or unavailability to work for reasons other than school attendance. Prior to the law change, the affected employer was charged for benefits.

The Council did not intend to provide a relief of charges to **all** liable employers for benefits paid while an individual is enrolled in approved training simply because the individual has restrictions other than the schooling. The relief of charges was only intended for situations involving a separation of employment or job refusal with a specific employer.

### **4. Brief History and Background of Current Provisions**

Wisconsin Act 197 created the statutory language for delaying and temporarily lifting suspensions while a claimant is enrolled in approved training, which was initially the effect of a 1994 Circuit Court of Appeals ruling. At the same time, language was incorporated that would relieve an employer of charges when benefits were allowed under specific law sections. Sections 108.04(2)(a) or (d) were included in error.

5. **Effect of the Proposed Change**

Policy

No effect. The department is currently applying the law as intended.

Administrative Feasibility

No effect. The department is currently applying the law as intended.

Equitable

No issue.

6. **Fiscal**

If this law proposal is not approved there is the potential for misapplications of these provisions, which would have a negative impact on the balancing account.

7. **State and Federal Issues**

None.

8. **Proposed Effect/Applicability Date**

Effective with weeks of unemployment occurring after the week of publication.

## **ANALYSIS OF PROPOSED UI LAW CHANGE**

### **Amend § 108.068(2) to change the effective date applicable for benefit purposes**

#### **1. Description of Proposed Law Change**

During the 2003 bill cycle, § 108.068 was created to deal with limited liability companies (LLCs) and their members. Subsection (2) set forth the date that treatment as a LLC would apply for tax and benefit purposes. In order to avoid retroactive benefit eligibility, the statutory language allowed different effective dates to be used for tax and benefit purposes. This language has raised issues that were neither desired nor intended by the department. This change is designed to eliminate some of the problems created by the original language regarding the effective date for benefit purposes.

#### **2. Proposed Statutory Language**

Amend Wis. Stat. § 108.068(2) to read:

For unemployment insurance tax purposes, the department shall treat a limited liability company that files proof under sub. (1) as a corporation under this chapter beginning on the same date that the federal internal revenue service treats the company as a corporation for federal tax purposes. Except that for benefit purposes, the treatment shall apply to benefit years in existence on or commencing after the date the internal revenue service treats the company as a corporation for federal tax purposes, provided that that benefit year has not ended at the time the request for treatment as a corporation under this section is made and further provided that proof of internal revenue service treatment as a corporation is submitted to the department. on the same date that the internal revenue service applies the treatment or the date that proof is filed with the department, whichever is later.

#### **3. Proposer's Reason for the Change**

The department's intent when creating this provision was to avoid payment of retroactive benefits and to avoid retroactive adjustment of benefit eligibility. However, the language that was used in subsection (2) establishing the effective date for benefit purposes has led to problems in application that the department did not anticipate. For example, consider a Claimant who is a member of an LLC and has a VNC of 28/04 with a base period of Q2/03 through Q1/04. The LLC was treated as a corporation for IRS purposes as of 10/01/03. The department received proof of this treatment on 08/18/04. Under the current language, the employer will be treated as a corporation for tax purposes as of 10/01/03 but for benefit purposes not until 08/18/04. So even though wages paid to the claimant during his base period from 10/01/03 through 12/31/04 are taxed, they cannot be included as base period wages for determining entitlement for his benefit year that ends in week 27/05. Yet the wages earned as of 08/18/04 would be reportable on weekly claims for computing partial unemployment benefits payable. Therefore, this change has been proposed to eliminate situations such as that described in the example case while still minimizing the retroactive adjustment of benefit claims.

February 08, 2005

**D05-51**

Proposed by: Department

Prepared by Jessica Nelson

#### **4. Brief History and Background of Current Provision**

Section 108.068 was one of several provisions created or amended by 2003 Wisconsin Act 197 to deal with the issue of treatment of LLCs and their members for unemployment insurance purposes. However, the language drafted in an attempt to avoid retroactive adjustments to benefit eligibility has created problems in application that need to be corrected.

#### **5. Effects of the Proposed Change**

##### Administrative Impact

There will be minimal training time required to ensure the new language is applied properly. In addition, the proposed language will allow some retroactive adjustments to benefit eligibility that may either result in additional payments to claimants based on prior weeks of eligibility or result in an overpayment of benefits.

#### **6. State and Federal Issues**

This change will not have any effect on other sections of Chapter 108 or require the promulgation of administrative rules. It will not create any conformity issues.

#### **7. Proposed Effective/Applicability Date**

The proposal, if enacted, would be effective

## **ANALYSIS OF PROPOSED UI LAW CHANGE**

**Amend § 108.02(12) to clarify that a sole proprietor and a partner are not considered employees of their respective businesses.**

### **1. Description of Proposed Law Change**

2003 Wisconsin Act 197 created § 108.02(12)(dm) and (dn) to clarify that a sole proprietor was not an employee of his or her sole proprietorship and that a partner was not an employee of his or her partnership. However, the language as enacted suggests that sole proprietors and partners are never employees, even when working for an employer entirely owned by a third party. This change clarifies that the exclusion from the definition of an employee applies only to a sole proprietor in his or her service to the sole proprietorship that he or she owns and to a partner only as to the services he or she provides to the partnership in which he or she is a partner.

### **2. Proposed Statutory Language**

Recreate Wis. Stat. § 108.02(12)(dm) to read:

A sole proprietor is not an employee of that individual's sole proprietorship.

Recreate Wis. Stat. § 108.02(12)(dn) to read:

An individual is not an employee of a partnership in which that individual is a partner.

### **3. Proposer's Reason for the Change**

The department's intent when creating these provisions was simply to clarify that a sole proprietor who provides services to his or her own sole proprietorship and a partner providing services to his or her own partnership were not considered employees based on the services they were providing to their sole proprietorship or partnership. The department did not intend to exclude sole proprietors and partners from the definition of an employee when these individuals provided services for pay to a business which they did not own or were not a partner in. However, the language as it currently exists could be interpreted to exclude sole proprietors and partners from the definition of an employee in this latter situation.

### **4. Brief History and Background of Current Provision**

Both provisions were created by 2003 Wisconsin Act 197 to clarify that a sole proprietor was not an employee of his or her sole proprietorship and that a partner was not an employee of his or her partnership.

January 24, 2005

**D05-52**

Proposed by: Department  
Prepared by Jessica Nelson

**5. Effects of the Proposed Change**

Administrative Impact

This change will amend the statutory language to more accurately reflect department intent and policy, so it change will not cause any administrative problems in implementation. Because the original intent was to exclude sole proprietors and partners only in regard to services provided to their own respective sole proprietorship or partnership, the department has been applying this provision in this manner.

**6. State and Federal Issues**

This change will not have any effect on other sections of Chapter 108 or require the promulgation of administrative rules. It will not create any conformity issues.

**7. Proposed Effective/Applicability Date**

The proposal, if enacted, would be effective the first Sunday after publication.

Date: 12/10/04  
Proposed by: Department  
Prepared by: Jeanne Marcks

D05-56

## **ANALYSIS OF PROPOSED LAW CHANGE**

### **1. Description of Proposed Change**

This proposal would make the following technical changes to statutes 108.09(2)(bm) and 108.09(4s):

- Correct the reference to 108.02(12)(bm) to show that the reference is to subsections (bm) **3 or 4** instead of (bm) **1 or 2**.
- Add reference to 108.02(12)(c)1.

### **2. Proposed Statutory Language**

109.09(2)(bm) In determining whether an individual meets the conditions specified in S. 108.02(12)(b)2.a. or b. or (bm)~~1. Or 2.~~ 3. or 4., or 108.02(12)(c)1, the department shall not consider documents granting operating authority or licenses, or any state or federal laws or federal regulations granting such authority or licenses.

108.09(4s) Employee Status. In determining whether an individual meets the conditions specified in s. 108.02(12)(b) 2.a. or b. or (bm)~~1. Or 2.~~ 3. or 4., or 108.02(12)(c)1, the appeal tribunal shall not take administrative notice of or admit into evidence documents granting operating authority or licenses, or any state or federal laws or federal regulations granting such authority or licenses.

### **3. Proposer's Reason for the Change**

Sections 108.09(2)(bm) and 108.09(4s) were created to limit what evidence may be considered when determining whether an individual is an "employee". In some situations, government requirements mandate certain elements of control. It was felt that these governmental laws/regulations were not a fair determinant of whether the employer actually has direction and control over the individual's work.

Due to the various law changes since the enactment of 108.09(2)(bm) and 108.09(4s), they no longer included all of the necessary and correct references to the "direction and control" factors of all "employee" tests.

### **4. Brief History and Background of Current Provisions**

In 1995, 108.09(2)(bm) and 108.09(4s) were created to limit what evidence may be considered when examining the "direction and control" factors of 108.02(12)(b), which was the new test for determining whether an individual is an

“employee”. The direction and control factors were found in subsections 2a and b.

Effective January 1, 2000, 108.02(12)(bm) was created to establish a different test to be used in determining when a worker is an employee. Statutes 108.09(2)(bm) and 108.09(4s) were amended in 2000 to include a reference to 108.02(12)(bm), but the wrong subsections from (12)(bm) were referenced. Subsections 3 and 4 in 108.02(12)(bm) contain the direction and control factors that correspond to subsections 2a and b in 108.02(12)(b).

Also, in 1997 we were instructed by DOL that the former “employee” test must be used for government units and nonprofit organizations. The direction and control factor for that test is found in section 108.02(12)(c)1. We inadvertently failed to add a reference to “(c)1” in 108.09(2)(bm) and 108.09(4s).

## **5. Effect of the Proposed Change**

### Policy

There is no real policy change. The department is already applying the limitations stated in 108.09(2)(bm) and 108.09(4s) when determining if the individual is an employee under 108.02(12)(bm) 3 or 4 and 108.02(12)(c)1.

### Administrative Feasibility

The correction and the addition this law proposal requires will not impact workload. No additional training or notification to the field would be required.

### Equitable

No equity issue. The proposed changes reflect what the department is already doing.

## **6. Fiscal**

No fiscal ramifications from the proposed changes.

## **7. State and Federal Issues**

There are no State or Federal conformity issues.

## **8. Proposed Effect/Applicability Date**

Applies to weeks beginning with the first Sunday after publication.

## **ANALYSIS OF PROPOSED LAW CHANGE**

### **1. Description of Proposed Change**

Repeal §108.04(1)(e), the provision that requires that a self-employed individual make a bona fide search for employment each week to be eligible for benefits and that required department rules to define "self-employment".

### **2. Proposed Statutory Language**

#### §108.04(1)(e)

~~An individual who is self-employed shall not be eligible for benefits for any week in which the individual has worked at the self-employment, unless the individual established to the satisfaction of the department that in view of labor market conditions the individual has made an active and bona fide search for employment. The department shall, by rule, define self-employment for purposes of this paragraph.~~

### **3. Proposer's Reason for the Change**

This subsection has an unintended effect due to the sequence of law changes that requires any self-employed individual, regardless of the nature or purpose of the business, to search for work each week even if one of the waivers under DWD 127 would otherwise apply. Since 1984, we have considered anyone who attempts to produce **any** income from his own business to be self-employed. We need to recognize that there are many such cases where the outside business does not impact the claimant's attachment to other work in the labor market. These claimants should be entitled to the same work search waivers as other unemployed workers when they demonstrate the same attachment to the labor market. For example, we have many claimants who work full-time jobs, as well as operating small family farms. When they are temporarily laid off by their primary employers, they should be entitled to a work search waiver, in spite of their self-employment. In other words, they should be treated the same as their laid off co-workers who are not self-employed.

When a self-employed individual is not available for suitable work as a result of the self-employment, a disqualification under the able and available provisions of §108.04(2)(a) and DWD 128 would be imposed. If the claimant is also required to look for work, the absence of a reasonable search for work

would support this disqualification. In addition, the claimant could be required to make additional work search efforts.

#### **4. Brief History and Background of Current Provisions**

It appears that at its inception Wisconsin UI law defined self-employment under §108.02(22) as a business or enterprise undertaken "for the purpose of producing a **substantial** part" of an individual's income.

Until 1963, §108.04(4)(d) denied benefits from a given employer's account when the claimant was self-employed, had been self-employed for at least 30 of the preceding 52 weeks and had not worked at least 15 hours in more than 20 weeks for the employer.

In 1963, the disqualification under §108.04(4)(d) was replaced by §108.04(1)(e), without the reference to a definition by rule. The explanation given for the change in the 1963-65 law text was "to strengthen the availability requirement in...self-employment cases...."

In 1983 we began treating gross self-employment as wages under §108.05(8) and in 1984 Wisconsin Act 168 dropped the word "gross" from §108.05(8) and promulgated rules under ILHR 131 to define both "self-employment" and "income" for purposes of applying §108.05(8). In addition, Wisconsin Act 168 repealed Section §108.02(22) and amended Section §108.04(1)(e) to incorporate the definition of "self-employment" as set forth in the Rules. The new definition under ILHR 131 required only that the business or enterprise be undertaken "for the purpose of producing income, dropping the word "substantial".

In 1991, Wisconsin Act 89 repealed the treatment of self-employment income as wages under §108.05(8), and in 1993 the portion of ILHR 131 relating to self-employment income was also repealed, and the portion of ILHR 131 relating to the definition of self-employment and the work search requirement was moved to ILHR 127, (now DWD 127.09).

#### **5. Effect of the Proposed Change**

##### Policy

Self-employed claimants are currently subject to the same work search requirements and waivers as claimants who are not self-employed.

##### Administrative Feasibility

No change.

Equitable

No equitability issues.

6. Fiscal

No effect.

7. State and Federal Issues

None.

8. Proposed Effect/Applicability Date

Weeks of unemployment beginning the first Sunday after publication.

March 29, 2005

Proposed by: Thomas H. Devine/Wisconsin National and Community Service Board

Prepared by: Gretchen Mrozinski

## ANALYSIS OF PROPOSED LAW CHANGE

### 1. Description of the Proposed Change.

Amend the Wisconsin UI law to add an exclusion to the definition of employment for participants in the Americorps\*State and National program. This exclusion would not include Americorps\*State and National program participants who are performing services via a "professional corps program"

### 2. Proposed Statutory Language.

The proposed language would amend Wis. Stat. § 108.02(15)(j). This section provides that certain, specified employment will constitute excluded employment. A subsection would be added to provide that services performed by certain Americorps participants would qualify as excluded employment. The proposed language would be found in Wis. Stat. § 108.02(15)(j)(7) and would read:

7. By an individual who is a participant in the Americorps\*State and National program, as long as such service is not performed pursuant to a "professional corps program" as defined in 42 USC 12572(a)(8).

### 3. Proposer's Reason for the Change.

Americorps is made up of three entities: Americorps\*State and National, Americorps\*National Civilian Conservation Corps and Americorps\*VISTA. The proposed law change would only affect the participants in the Americorps\*State and National program.

Americorps\*State and National program is a service program that engages thousands of Americans each year in intensive service to meet critical needs in education, public safety, health and the environment. Americorps\*State and National program participants serve hundreds of nonprofits, public agencies and faith-based organizations. The participants tutor and mentor youth, build affordable housing, teach, clean parks and streams, run after-school programs, and help communities in a variety of other ways. The participants receive a monthly living allowance and when they complete their service (generally a year-long commitment), they receive an educational award. Full-time participants also receive health insurance and child care expenses. Americorps gives federal grants to the local entities who are working with the Americorps participants. Without the federal grants, the local entities would, in most cases, be unable to compensate the participants.

Americorps considers its participants akin to volunteers as their living allowances and educational grants are limited and Americorps programs are not meant to provide employment, but are instead, service opportunities for caring people. The Department of Labor, via a UIPL No. 25-95 had determined that Americorps participants are not employees under federal law and that each state may decide whether or not to cover Americorps participants under each state's unemployment insurance laws. Many states have already decided to exclude Americorps participation from their definition of employment. Thomas Devine of the Wisconsin National and Community Service Board has asked the Council to exclude Americorps\*State and National program participation from the definition of employment in Wisconsin. The reasons for this exclusion are as follows. First, the local entities who are assigned the Americorps participants are generally financially unable to insure such participants for unemployment insurance purposes and if forced to do so, may choose to pass on Americorps participants. Second, Americorps provides grants to the local entities to pay for the living allowance of the participants, but does not provide additional money to cover the cost of unemployment insurance for the local entities. And third, the participants are more akin to volunteers than employees. As a result of these reasons, the Council has agreed to provide an employment exclusion for Americorps\*State and National program participants, with a few exceptions for those participants that are being paid more than the standard living allowance and educational grant.

**4. Brief History and Background of the Current Provision.**

Americorps representatives have asked the UIAC to provide an employment exclusion on several occasions since the mid-1990's. The UIAC's position has been to deny the request and provide benefits to Americorps participants if they are otherwise qualified. In the late 1990's, the UI Division Administrator issued a memo to this effect.

**5. Effects of the Proposed Change.**

**A. Policy**

The proposed change would change the Department's policy concerning treatment of Americorps participants. No other law or policy would be affected.

**B. Administrative Impact**

Adjudicators and ALJs will have to evaluate whether the claimant is in the Americorps\*State and National program, the duties performed, and the terms of their compensation before finding this to be excluded employment. Any increased workload would be minimal. However, the factfinder may need to contact a Wisconsin Americorps representative to determine if the claimant was a traditional Americorps participant or an Americorps participant serving via an Americorps "professional corps program." The latter would not be excluded employment.

**C. Equitable**

The proposed change would serve to deny benefits to various Americorps participants who are otherwise qualified.

**D. Fiscal**

Based upon information about the rate of unemployment provided by Americorps in public testimony, it is estimated that a reduction of approximately \$100,000 in benefits paid by private nonprofit agencies would occur. Based on the stipends received by interns, it is assumed that weekly benefit rates would average less than \$125 and that individuals without other income at the end of their participation in the program would be unemployed at the system wide average of approximately 13 weeks. Participants with professional level jobs that pay more than the average living allowance and educational award would not be excluded.

**6. State and Federal Issues.**

This proposal would place Wisconsin on similar footing with other states who have adopted an Americorps employment exclusion. No other state/federal issues.

**7. Proposed Effect/Applicability Date.**

VNC's (new claims) beginning on or after the effective date of the bill.

**ANALYSIS OF PROPOSED LAW CHANGE  
ELECTRONIC FILING OF QUARTERLY CONTRIBUTION AND WAGE  
INFORMATION**

**1. Description of Proposed Change**

Currently, employer agents who file quarterly tax reports for 25 or more employers are required to report electronically. This change would require agents who prepare reports for less than 25 employers to use the department's Internet reporting application. Agents not using the required media may be assessed a penalty of \$25 per report submitted on paper.

This proposal would also change requirements for submitting quarterly tax and wage reports. Employers reporting 50 or more employees could use any electronic media to file their wage report and the Internet to file their tax report. This would apply to employers individually and not to employers whose reports are prepared by an agent. Wages submitted by agents could be reported using any department electronic media. Employers not using the required reporting media would be assessed a penalty of \$10 per employee reported on paper and/or \$25 penalty for filing the tax report on paper.

In order to give employers time to meet the requirements, these changes would not take effect until at least 2 report quarters after the end of the quarter in which the law was enacted. In addition, the new wage report reporting requirements would be phased in over a 1 ½ year period. The requirement for employers with 75 to 99 employees would take effect 2 report quarters after the end of the quarter in which the law was enacted. For employers with 50 to 74 employees, the change would take effect 6 quarters after the end of the quarter in which the law was enacted.

**2. Proposed Statutory Language**

**Tax Reports**

Amend Section 108.17(2) to include the following:

Any employer of 50 or more employees who does not have their quarterly contribution report filed by an employer agent, shall file their quarterly contribution report using the department's Internet reporting application.

Amend Section 108.22 to include the following:

An employer failing to file their quarterly contribution report under 108.17(2) using the department's Internet reporting application, may be assessed a penalty in the amount of \$25.

Amend Section 108.17(2g) to read as follows

April 13, 2005

**D05-60**

Proposed by: Department

Prepared by: Brian Bradley

Modified 6-28-05 by: Rick Holzbauer

An employer agent that prepares reports under sub. (2) and 108.205(1) on behalf of 24 or less employers shall submit those reports using the department's Internet reporting application. An employer agent that prepares reports under sub.(2) and 108.205(1) on behalf of 25 or more employers shall submit those reports using an electronic medium and format approved by the department....

#### Wage Reports

Amend Section 108.205(2) as follows

Employers of 50 or more employees, as determined under s. 108.22(1)(ae), shall submit the quarterly report under sub. (1) using an electronic medium approved by the department for such employers. Employer agents required to submit contribution reports electronically on behalf of employers under 108.17(2g) shall also submit the quarterly wage reports using an electronic medium approved by the department for such employers....

### **3. Reason for Proposed Change**

We currently receive and process approximately 114,000 UI tax reports from employers each quarter. In addition we receive and process approximately 3.1 million individual employee wage records submitted by employers each quarter. All this information has to be entered into systems used to administer the UI program. This information is submitted in a variety of ways. About 64,000 tax reports and 2.7 million wage items are submitted via various forms of electronic media. About 50,000 tax reports and 383,000 wage records are submitted on paper. Information received on paper reports has to be manually keyed or scanned into the systems. Significant savings would be realized if more information was submitted electronically. This law change proposal should significantly increase the number of employers and employer agents filing electronically.

### **4. Brief History and Background of Current Provision**

#### Tax Reports

Beginning in 2002, employer agents who file reports for 25 or more employers are required to submit the quarterly tax reports electronically. Failure to report electronically results in a \$25 penalty per paper report submitted. If the agent prepares the report but has the employer submit it, the requirement to submit electronically does not apply. Prior to 2002 there was no electronic filing requirement for employer agents. We have 37 agents currently submitting quarterly tax reports electronically for 26,000 employers. There are other agents filing for their clients using our Internet reporting application. We are not able to identify how many may be doing so.

#### Wage Reports

April 13, 2005

**D05-60**

Proposed by: Department

Prepared by: Brian Bradley

Modified 6-28-05 by: Rick Holzbauer

Beginning with reports due for first quarter 2001, employers reporting wages for 100 or more employees are required to report wage data using electronic media. Failure to do so results in a penalty of \$10 per employee reported on paper. Over 4,500 employers who have more than 100 employees are submitting 1.9 million wage records electronically each quarter. This includes employers and agents using our

Internet reporting application. The electronic reporting requirement prior to 2001 applied only to employers with 250 or more employees. There was no associated penalty for reporting on paper.

## **5. Effects of the Proposed Change**

- a. Policy: The law change limits the filing method for employer agents who prepare tax reports for less than 25 employers to using the Department's Internet reporting application. This is due to the time required to process other forms of electronic media such as a disk or cassette. Internet filing of the tax report does not involve any processing time on DWD's part. The change requires tax reports, prepared by agents, whether filed by the agent or the client, be filed using our Internet reporting application. Agents will also be required to submit wage record data electronically. Although difficult to estimate, these changes should increase the number of reports filed electronically by agents. We still receive over 50,000 tax reports on paper each quarter from both agents and individual employers.

This proposal also requires employers with 50 or more employees to report employee wage records using an electronic media approved by the department. This will require an additional 800 employers in this category to report over 48,000 employees currently reported on paper. All employer agents required to report employee wage reports electronically would also be required to report employee wage reports electronically.

- b. Administrative Impact: There will be staff savings resulting from not having to handle and process both quarterly tax and wage reports. Some staff time will be required to modify our systems to identify employers and agents not meeting the requirements and to assess penalties.
- c. Equitable: More employers and agents would be subject to the same requirements.
- d. Fiscal: We estimate the number of tax reports employers file on paper will decrease from 50,000 to about 42,000 per quarter. This should reduce our bank and data input costs by about \$12,800 annually. We also estimate this will free up the equivalent of ¼ cashier position for other activities.

April 13, 2005

**D05-60**

Proposed by: Department

Prepared by: Brian Bradley

Modified 6-28-05 by: Rick Holzbauer

We estimate the number of employee wage record items reported on paper will decrease from 383,000 to 250,000 per quarter. This will free up the equivalent of  $\frac{3}{4}$  wage processing position for other activities.

**6. State and Federal Issues**

- a. Chapter 108: The penalty provisions contained in 108.22 would also apply to the new requirements. Employers not conforming to the wage record reporting requirements would be subject to the \$10 per employee penalty. Employer agents not conforming to the tax reporting requirements would be subject to the \$25 penalty per paper report filed. Employers not using the required media to file their tax report would also be subject to a \$25 penalty.
- b. Administrative Rules: No administrative rule changes are required.

**7. Proposed Effective Date:**

This proposed change should be phased in over a 1 ½ year period. The tax reporting requirements for employer agents should go into effect 2 quarters after the quarter in which the act is published. The wage reporting requirements for employers with 75 to 99 employees should take effect 2 quarters after the quarter in which the act is published. For individual employers with 50 to 74 employees, the tax and wage reporting changes should take effect 6 quarters after the act is published. Once an employer or agent becomes subject to the reporting requirements they should continue to report electronically unless the requirement is waived by the department.

108.06(2)(d)

(d) A claimant may request that the department set aside a benefit year by filing a written, verbal or **electronic** request in the manner that the department prescribes by rule. The department shall grant the request and cancel the benefit year if the request is voluntary, benefits have not been paid to the claimant and at the time the department acts upon the request for that benefit year the claimant's benefit eligibility is not suspended. If the claimant does not meet these requirements, the department shall not set aside the benefit year unless the department defines by rule exceptional circumstances in which a claimant may be permitted to set aside a request to establish a benefit year and the claimant qualifies to make such a request under the circumstances described in the rule.

108.14(2e)

(2e) The department may provide a secure means of **electronic** interchange between itself and employing units, claimants, and other persons that, upon request to and with prior approval by the department, may be used for departmental transmission or receipt of any document specified by the department that is related to the administration of this chapter in lieu of any other means of submission or receipt specified in this chapter. If a due date is established by statute for the receipt of any document that is submitted electronically to the department under this subsection, then that submission is timely only if the document is submitted by midnight of the statutory due date.

108.17(2g)

(2g) An employer agent that files reports under sub. (2) on behalf of 25 or more employers shall file those reports using an **electronic** medium and format approved by the department. An employer agent that becomes subject to the reporting requirement under this subsection shall file its initial reports under this subsection for the 4th quarter beginning after the quarter in which the employer agent becomes subject to the reporting requirement. Once an employer agent becomes subject to the reporting requirement under this subsection, the employer agent shall continue to file its reports under this subsection unless that requirement is waived by the department.

108.205(2)

(2) All employers of 100 or more employees, as determined under s. 108.22 (1) (ae), shall file the quarterly report under sub. (1) using an **electronic** medium approved by the department for such employers. An employer that becomes subject to the reporting requirement under this subsection shall file its initial report under this subsection for the 4th quarter beginning after the quarter in which the employer becomes subject to the reporting requirement. Once an employer becomes subject to the reporting requirement under this subsection, the employer shall continue to file its quarterly reports under this subsection unless that requirement is waived by the department.

108.22(1)(ad)

(ad) An employer agent that is subject to the reporting requirements under s. 108.17 (2g) and that fails to file a contribution report in accordance with s. 108.17 (2g) may be assessed a penalty by the department in the amount of \$25 for each employer whose report is not filed using an **electronic** format and medium approved by the department.