

ENGROSSED 2009 SENATE BILL 2

February 11, 2009 – Printed by direction of ASSEMBLY CHIEF CLERK.

1 **AN ACT** *to amend* 109.03 (5), 109.03 (6), 109.09 (1), 109.09 (2) (a), 109.09 (2) (b)
2 1., 109.09 (2) (b) 2., 109.09 (2) (b) 3., 109.09 (2) (c) 1m., 109.09 (2) (c) 2., 109.09
3 (2) (c) 3. and 109.11 (2) (a); and *to create* 109.09 (2) (c) 1. ag., 109.09 (2) (c) 1r.
4 and 109.09 (2) (c) 4. of the statutes; **relating to:** the filing of a wage claim or
5 the bringing of a wage claim action by a collective bargaining representative on
6 behalf of an employee and the priority of a wage claim lien over a prior lien of
7 a commercial lending institution and over the rights of a purchaser of any
8 property of the employer.

Analysis by the Legislative Reference Bureau

Engrossment information:

The text of Engrossed 2009 Senate Bill 2, as passed by the senate on February 10, 2009, consists of the following documents adopted in the senate on February 10, 2009: the bill as affected by Senate Amendment 1 (as affected by Senate Amendment 1 and the February 10, 2009, chief clerk's correction thereto).

Content of Engrossed 2009 Senate Bill 2:

Under current law, the Department of Workforce Development (DWD) must investigate and attempt to adjust any claim by an employee that his or her employer

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has not paid the employee any wages that are owed to the employee (wage claim). Currently, DWD or an employee who brings a wage claim action has a lien upon all property of the employer, real and personal, located in this state for the full amount of any wages owed to the employee (wage claim lien). Currently, a wage claim lien takes precedence over all other debts, judgments, decrees, liens, or mortgages against an employer, except for a lien of a commercial lending institution that originates before the wage claim lien takes effect (prior lien), regardless of whether those other debts, judgments, decrees, liens, or mortgages originated before or after the wage claim lien takes effect. Current law provides, however, that a wage claim lien takes precedence over a prior lien of a commercial lending institution as to the first \$3,000 of unpaid wages covered under the wage claim lien that are earned within the six months preceding the filing of the wage claim with DWD or the commencement of an action by the employee to recover the wages due.

This bill increases that \$3,000 cap to \$10,950 and eliminates that six-month time limit so that under the bill the first \$10,950 of unpaid wages covered under a wage claim lien that are earned at any time takes precedence over a lien of a commercial lending institution, regardless of whether the lien of the commercial lending institution is perfected before or after the wage claim lien is perfected. The bill also requires DWD, beginning on January 1, 2011, to adjust the cap created under the bill by the increase in the consumer price index.

In addition, the bill provides that a wage claim lien takes precedence over the rights of any person that purchases any property of the employer after the lien is created, including any bona fide purchaser. This change reverses *In Re Globe Building Materials, Inc.*, 463 F. 3d 631 (7th Cir. 2006), which held that the trustee in bankruptcy could avoid a wage claim lien because under the current wage claim lien law a wage claim does not expressly take precedence over the rights of a bona fide purchaser under the federal bankruptcy law.

Finally, the bill permits a recognized or certified collective bargaining representative of an employee to file a wage claim with DWD, or to bring a wage claim action in court, on behalf of an employee and grants a wage claim lien to a collective bargaining representative that brings a wage claim action.

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

1 **SECTION 1.** 109.03 (5) of the statutes is amended to read:

2 **109.03 (5) ENFORCEMENT.** Except as provided in sub. (1), no employer may by
3 special contract with employees or by any other means secure exemption from this
4 section. Each employee shall have a right of action against any employer for the full
5 amount of the employee's wages due on each regular pay day as provided in this

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1 section and for increased wages as provided in s. 109.11 (2), in any court of competent
2 jurisdiction. An employee may bring a wage claim under this subsection on his or
3 her own behalf or the recognized or certified collective bargaining representative of
4 the employee may bring an action against an employer under this subsection on
5 behalf of the employee. An employee or collective bargaining representative may
6 bring an action against an employer under this subsection without first filing a wage
7 claim with the department under s. 109.09 (1). An employee who or collective
8 bargaining representative that brings an action against an employer under this
9 subsection shall have a lien upon all property of the employer, real or personal,
10 located in this state as described in s. 109.09 (2).

11 **SECTION 2.** 109.03 (6) of the statutes is amended to read:

12 109.03 (6) WAGE CLAIM. In an action by an employee, a collective bargaining
13 representative, or the department against the employer on a wage claim, no security
14 for payment of costs is required. In any such proceeding the court may allow the
15 prevailing party, in addition to all other costs, a reasonable sum for expenses. No
16 person other than an employee, a collective bargaining representative, or the
17 department shall be benefited or otherwise affected by this subsection.

18 **SECTION 3.** 109.09 (1) of the statutes is amended to read:

19 109.09 (1) The department shall investigate and attempt equitably to adjust
20 controversies between employers and employees as to alleged wage claims. An
21 employee may file a wage claim under this subsection on his or her own behalf or the
22 recognized or certified collective bargaining representative of the employee may file
23 a wage claim under this subsection on behalf of the employee. The department may
24 receive and investigate any wage claim which is filed with the department, or
25 received by the department under s. 109.10 (4), no later than 2 years after the date

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1 the wages are due. The department may, after receiving a wage claim, investigate
2 any wages due from the employer against whom the claim is filed to any employee
3 during the period commencing 2 years before the date the claim is filed. The
4 department shall enforce this chapter and ss. 66.0903, 103.02, 103.49, 103.82, 104.12
5 and 229.8275. In pursuance of this duty, the department may sue the employer on
6 behalf of the employee to collect any wage claim or wage deficiency and ss. 109.03 (6)
7 and 109.11 (2) and (3) shall apply to such actions. Except for actions under s. 109.10,
8 the department may refer such an action to the district attorney of the county in
9 which the violation occurs for prosecution and collection and the district attorney
10 shall commence an action in the circuit court having appropriate jurisdiction. Any
11 number of wage claims or wage deficiencies against the same employer may be joined
12 in a single proceeding, but the court may order separate trials or hearings. In actions
13 that are referred to a district attorney under this subsection, any taxable costs
14 recovered by the district attorney shall be paid into the general fund of the county
15 in which the violation occurs and used by that county to meet its financial
16 responsibility under s. 978.13 (2) (b) for the operation of the office of the district
17 attorney who prosecuted the action.

18 **SECTION 4d.** 109.09 (2) (a) of the statutes is amended to read:

19 109.09 (2) (a) The department of workforce development, under its authority
20 under sub. (1) to maintain actions for the benefit of employees, ~~or an employee who~~
21 ~~brings an action under s. 109.03 (5), or the recognized or certified collective~~
22 ~~bargaining representative of an employee, under its authority under s. 109.03 (5) to~~
23 ~~maintain actions for the benefit of employees,~~ shall have a lien upon all property of
24 the employer, real or personal, located in this state for the full amount of any wage

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1 claim or wage deficiency. A lien under this paragraph is created when the services
2 for which the wages are due are performed.

3 **SECTION 5d.** 109.09 (2) (b) 1. of the statutes is amended to read:

4 109.09 (2) (b) 1. A lien under par. (a) upon real property ~~takes effect~~ is perfected
5 when the department of workforce development ~~or~~, employee, or collective
6 bargaining representative files a notice of the lien with the clerk of the circuit court
7 of the county in which the services or some part of the services were performed, pays
8 the fee specified in s. 814.61 (5) to that clerk of circuit court, and serves a copy of ~~that~~
9 ~~petition~~ the notice on the employer by personal service in the same manner as a
10 summons is served under s. 801.11 or by certified mail with a return receipt
11 requested. The clerk of circuit court shall enter the notice of the lien on the judgment
12 and lien docket kept under s. 779.07.

13 **SECTION 6d.** 109.09 (2) (b) 2. of the statutes is amended to read:

14 109.09 (2) (b) 2. A lien under par. (a) upon personal property ~~takes effect~~ is
15 perfected when the department of workforce development ~~or~~, employee, or collective
16 bargaining representative files a notice of the lien with the department of financial
17 institutions in the same manner, and ~~form, and place~~ as financing statements are
18 ~~filed under subch. V of ch. 409 regarding debtors who are located in this state,~~ pays
19 the ~~same~~ fee provided in s. 409.525 for filing financing statements, and serves a copy
20 of the notice on the employer by personal service in the same manner as a summons
21 is served under s. 801.11 or by certified mail with a return receipt requested. The
22 department of financial institutions shall place the notice of the lien in the same file
23 as financing statements are filed under subch. V of ch. 409.

24 **SECTION 7.** 109.09 (2) (b) 3. of the statutes is amended to read:

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1 109.09 (2) (b) 3. The department of workforce development ~~or~~, employee, or
2 collective bargaining representative must file the notice under subd. 1. or 2. within
3 2 years after the date on which the wages were due. The notice shall specify the
4 nature of the claim and the amount claimed, describe the property upon which the
5 claim is made, and state that the person filing the notice claims a lien on that
6 property.

7 **SECTION 8d.** 109.09 (2) (c) 1. ag. of the statutes is created to read:

8 109.09 (2) (c) 1. ag. “Consumer price index” means the average of the consumer
9 price index over each 12-month period for all urban consumers, U.S. city average,
10 as determined by the bureau of labor statistics of the U.S. department of labor.

11 **SECTION 9d.** 109.09 (2) (c) 1m. of the statutes is amended to read:

12 109.09 (2) (c) 1m. A lien under par. (a) takes precedence over all other debts,
13 judgments, decrees, liens, interests, or mortgages against the employer, except a lien
14 of a commercial lending institution as provided in ~~subd. subds. 1r. and 2. and 3., a~~
15 lien of a financial institution as provided in subd. 3., or a lien under s. 292.31 (8) (i)
16 or 292.81, regardless of whether those other debts, judgments, decrees, liens,
17 interests, or mortgages originate before or after the lien under par. (a) ~~takes effect~~
18 is perfected. A lien under par. (a) also takes precedence over the rights of any person
19 that purchases any property of the employer after the lien is created, including any
20 bona fide purchaser. A lien under par. (a) may be enforced in the manner provided
21 in ss. 779.09 to 779.12, 779.20, and 779.21, insofar as those provisions are applicable.
22 The lien ceases to exist if the department of workforce development ~~or the~~, employee,
23 or collective bargaining representative does not bring an action to enforce the lien
24 within the period prescribed in s. 893.44 for the underlying wage claim.

25 **SECTION 9m.** 109.09 (2) (c) 1r. of the statutes is created to read:

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1 109.09 (2) (c) 1r. Except as provided in this subdivision, a lien under par. (a)
2 does not take precedence over a lien of a commercial lending institution against the
3 employer that is perfected before the lien under par. (a) is perfected. Subject to subds.
4 2. and 3., a lien under par. (a) takes precedence over a lien of a commercial lending
5 institution against the employer that is perfected before the lien under par. (a) is
6 perfected only as to the first \$10,950 or an amount determined by the department
7 under subd. 4. of unpaid wages covered under the lien.

8 **SECTION 10d.** 109.09 (2) (c) 2. of the statutes is amended to read:

9 109.09 (2) (c) 2. Except as provided in this subdivision, a lien under par. (a) does
10 not take precedence over a lien of a commercial lending institution against the
11 employer that is perfected as of the day before the effective date of this subdivision
12 [LRB inserts date], and that originates is perfected before the lien under par. (a)
13 takes effect is perfected or over a lien of a commercial lending institution against the
14 employer for any amount advanced by the commercial lending institution after a lien
15 under par. (a) is perfected under a contract entered into before the effective date of
16 this subdivision [LRB inserts date], including any renewal or time extension of
17 such a contract. Subject to subd. 3., a lien under par. (a) takes precedence over a lien
18 of a commercial lending institution against the employer that is perfected as of the
19 day before the effective date of this subdivision [LRB inserts date], and that
20 originates is perfected before the lien under par. (a) takes effect is perfected, or over
21 a lien of a commercial lending institution against the employer for any amount
22 advanced by the commercial lending institution after a lien under par. (a) is perfected
23 under a contract entered into before the effective date of this subdivision [LRB
24 inserts date], including any renewal or time extension of such a contract, only as to
25 the first \$3,000 of unpaid wages covered under the lien that are earned by an

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1 employee within the 6 months preceding the date on which the employee or collective
2 bargaining representative files the wage claim under sub. (1) or brings the action
3 under s. 109.03 (5) or the date on which the department receives the wage claim
4 under s. 109.10 (4) (a), whichever is applicable.

5 **SECTION 11d.** 109.09 (2) (c) 3. of the statutes is amended to read:

6 109.09 (2) (c) 3. Notwithstanding ~~subd. 1r. and 2.~~ subds. 1r. and 2., a lien of a financial
7 institution that ~~exists on~~ is perfected as of November 30, 2003, and that ~~originates~~
8 is perfected before a lien under par. (a) ~~takes effect~~ is perfected takes precedence over
9 the lien under par. (a), and a lien of a financial institution for any amount advanced
10 by the financial institution after a lien under par. (a) ~~takes effect~~ is perfected under
11 a contract entered into before December 1, 2003, including any ~~extension or renewal~~
12 or time extension of such a contract, takes precedence over the lien under par. (a).
13 Notwithstanding ~~subd. 1r. and 2.~~ subds. 1r. and 2., a lien under par. (a) that ~~exists on~~ is
14 perfected as of November 30, 2003, takes precedence over a lien of a commercial
15 lending institution that is not a financial institution, regardless of whether the lien
16 of the commercial lending institution ~~originates~~ is perfected before or after the lien
17 under par. (a) ~~takes effect~~ is perfected.

18 **SECTION 11m.** 109.09 (2) (c) 4. of the statutes is created to read:

19 109.09 (2) (c) 4. Beginning on January 1, 2011, the department shall annually
20 adjust the amount specified in subd. 1r. by calculating the percentage difference
21 between the consumer price index for the 12-month period ending on June 30 of the
22 preceding year and the consumer price index for the 12-month period ending on June
23 30, 2009, and adjusting that amount by that percentage difference. Notwithstanding
24 s. 227.10 (1), the department need not promulgate those annual adjustments as rules
25 under ch. 227. An adjusted amount under this subdivision shall first apply to a lien

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1 under par. (a) that is perfected on January 1 of the year in which the adjustment is
2 made. This subdivision does not apply if the consumer price index for the 12-month
3 period ending on June 30 of the current year has not increased over the consumer
4 price index for the 12-month period ending on June 30 of the preceding year.

5 **SECTION 12.** 109.11 (2) (a) of the statutes is amended to read:

6 109.11 (2) (a) In a wage claim action that is commenced by an employee before
7 the department has completed its investigation under s. 109.09 (1) and its attempts
8 to compromise and settle the wage claim under sub. (1), a circuit court may order the
9 employer to pay to the employee, in addition to the amount of wages due and unpaid
10 and in addition to or in lieu of the criminal penalties specified in sub. (3), increased
11 wages of not more than 50% of the amount of wages due and unpaid.

12 **SECTION 13m. Initial applicability.**

13 (1) WAGE CLAIM LIEN PRIORITY. The treatment of section 109.09 (2) (c) 1m. of the
14 statutes first applies to a lien under section 109.09 (2) (a) of the statutes that is
15 created on the effective date of this subsection.

16 (END)