

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2965/1dn

MED:eev:rs

August 20, 2013

Please note that, regarding the changes to the Unemployment Insurance (UI) law in this bill, it is normally the case that, unless a state is subject to additional assessments resulting from federal loans, employment that is covered under the Federal Unemployment Tax Act (FUTA) (26 USC 3301) is subject to a federal tax of 6.0 percent on the first \$7,000 of annual taxable wages paid to an employee. FUTA (26 USC 3302), however, permits a credit of up to 5.4 percent against this tax for unemployment taxes that were paid, or but for an employer's favorable layoff experience, would be payable to this state on these same wages. Creating an additional exception from the definition of "employee" for independent contractors under the UI law could result in higher taxes for those businesses for whom the contractor performs services, because the businesses would then be subject to the full FUTA tax without the benefit of the credit against the tax that is currently available. I have been advised by DWD that this is because federal law generally uses a common law standard for determining who is an independent contractor, and the proposed language could exclude from state UI law coverage services performed for businesses that do not qualify as independent contractors under federal law. In that case, the businesses would lose credits against state taxes they would have otherwise paid, as well as additional credit amounts provided to employers with favorable layoff experiences.

Please also note that the created independent contractor exclusion in the UI law could prove difficult to administer because it will create a test for determining independent contractor status containing language and concepts that overlap with the test in current law contained in s. 108.02 (12) (bm), stats. For that reason and in general, I would recommend sharing the bill with DWD to ensure that the bill and the language used therein will have the desired result.

Finally, I would note that changes to our UI law are reviewed by the federal Department of Labor to ensure that Wisconsin's law is in conformity with requirements under federal law for participation in the state/federal UI program. You may wish to ask DWD to send the proposed legislation for a preliminary review before passage of the bill to try to ensure that no such issues arise after passage of the bill. You may also wish to offer the proposal to the Council on Unemployment Insurance for its consideration.

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