

2013 DRAFTING REQUEST

Bill

Received: **8/20/2013** Received By: **jkuesel**
 Wanted: **Soon** Same as LRB:
 For: **Sheila Harsdorf (608) 266-7745** By/Representing: **Brooke Froelich**
 May Contact: Drafter: **mduchek**
 Subject: **Employ Priv - worker's comp** Addl. Drafters: **mduchek**
Unemployment Insurance

Extra Copies:

Submit via email: **YES**
 Requester's email: **Sen.Harsdorf@legis.wisconsin.gov**
 Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Exclusion of individuals working from their homes from worker's compensation and unemployment insurance laws

Instructions:

Per LRB-1192/2 with permission of Rep. Severson (P/C, AJ Scholz, 8/19/13). Instructions: exclude "cottage industry" workers from coverage under the worker's compensation and unemployment insurance laws

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mduchek 8/20/2013	evinz 8/20/2013	rschluet 8/20/2013	_____			
/1				_____	sbasford 8/20/2013	srose 8/20/2013	

FE Sent For:

↳ Not
Needed

<END>

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DNOTE

State of Wisconsin
2013 - 2014 LEGISLATURE

WED, per requester

in 8-20

2013 BILL

2965/1
LRB-1102/2
GMM:eev:rs
MED

D-note

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1 AN ACT *to amend* 102.07 (8) (a), 108.02 (12) (a), 108.02 (12) (bm) (intro.), 108.09
2 (2) (bm) and 108.09 (4s); and *to create* 102.07 (8) (bm) and 108.02 (12) (bg) of
3 the statutes; **relating to:** exclusion of certain independent contractors from
4 coverage under the worker's compensation law and the unemployment
5 insurance law.

Analysis by the Legislative Reference Bureau

Under current law, for purposes of coverage under the worker's compensation law, an independent contractor is not an employee of an employer for whom the independent contractor performs work if the independent contractor: 1) maintains a separate business with his or her own office, equipment, materials, and other facilities; 2) holds a federal employer identification number or has filed business or self-employment income tax returns based on that work; 3) operates under contracts to perform specific work for specific amounts of money and under which he or she controls the means of performing the work; 4) incurs the main expenses related to the work; 5) is responsible for the satisfactory completion of the work and is liable for a failure to complete the work; 6) receives compensation on a commission, per job, or competitive bid basis; 7) may realize a profit or suffer a loss; 8) has continuing or recurring business liabilities or obligations; and 9) succeeds or fails depending on the relationship of business receipts to expenditures.

This bill, in addition, excludes from coverage under the worker's compensation law an independent contractor who: 1) has signed a written agreement with the

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employer for whom he or she performs work stating that he or she is performing the work as an independent contractor; 2) performs the work primarily at his or her own residence and primarily using his or her own tools and equipment; and performs the work free from the control or direction of the employer, other than control or direction provided for purposes of initial training or quality control. The bill provides that, for purposes of the bill, "primarily" means 75 percent or more.

Currently, under the unemployment insurance (UI) law, coverage for services performed by an individual is dependent in part upon whether the individual is an "employee," which the UI law defines as any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, subject to certain exceptions. One such exception is that an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker is not considered an employee if the individual meets the following criteria: 1) the services of the individual are performed free from control or direction by the employing unit over the performance of his or her services, as determined by considering various factors, including five specified in current law; and 2) the individual meets six or more of nine specified conditions related to the nature of his or her work. An employing unit is not required to pay UI contributions (taxes) on wages earned by an individual not considered an employee under the UI law, and the individual's wages may not be counted as base period wages for purposes of determining eligibility for UI benefits.

This bill creates another exception from the definition of employee under the UI law, which applies to an individual performing services for an employing unit other than a government unit, nonprofit organization, or Indian tribe in a capacity other than as a logger or trucker if all of the following apply to the individual: 1) the individual performs the services pursuant to a written agreement with the employing unit under which the individual or an entity owned by the individual has agreed or represented that the services are being performed as an independent contractor; 2) the individual performs the services primarily at the individual's residence and primarily using the individual's own tools and equipment; and 3) the individual performs the services free from control or direction of the employing unit, other than initial training and quality control. The bill provides that, for purposes of the bill, "primarily" means 75 percent or more. If an individual is not covered under the exception created in the bill, the individual may still be covered under the exception under current law if it is satisfied.

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

- 1 **SECTION 1.** 102.07 (8) (a) of the statutes is amended to read:
2 102.07 (8) (a) Except as provided in ~~par.~~ pars. (b) and (bm), every independent
3 contractor is, for the purpose of this chapter, an employee of any employer under this

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1 chapter for whom he or she is performing service in the course of the trade, business,
2 profession, or occupation of such employer at the time of the injury.

3 **SECTION 2.** 102.07 (8) (bm) of the statutes is created to read:

4 102.07 (8) (bm) An independent contractor is not an employee of an employer
5 for whom the independent contractor performs work or services if the independent
6 contractor meets all of the following conditions:

7 1. Has signed, or an entity owned by the independent contractor has signed,
8 a written agreement with the employer stating that the independent contractor is
9 performing the work or services as an independent contractor.

10 2. Performs the work or services primarily at his or her own residence and
11 primarily using his or her own tools and equipment. In this subdivision, "primarily"
12 means 75 percent or more.

13 3. Performs the work or services free from the control or direction of the
14 employer, other than control or direction provided for purposes of initial training or
15 quality control.

16 **SECTION 3.** 108.02 (12) (a) of the statutes is amended to read:

17 108.02 (12) (a) "Employee" means any individual who is or has been performing
18 services for pay for an employing unit, whether or not the individual is paid directly
19 by the employing unit, except as provided in par. (bg), (bm), (c), (d), (dm) or (dn).

20 **SECTION 4.** 108.02 (12) (bg) of the statutes is created to read:

21 108.02 (12) (bg) Paragraph (a) does not apply to an individual performing
22 services for an employing unit other than a government unit, nonprofit organization,
23 or Indian tribe in a capacity other than as a logger or trucker if all of the following
24 apply to the individual:

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1 1. The individual performs the services pursuant to a written agreement with
2 the employing unit under which the individual or an entity owned by the individual
3 has agreed or represented that the services are being performed as an independent
4 contractor.

5 2. The individual performs the services primarily at the individual's residence
6 and primarily using the individual's own tools and equipment. In this subdivision,
7 "primarily" means 75 percent or more.

8 3. The individual performs the services free from control or direction of the
9 employing unit, other than initial training and quality control.

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

11 108.02 (12) (bm) (intro.) Paragraph (a) does not apply to an individual
12 performing services for an employing unit other than a government unit or nonprofit
13 organization in a capacity other than as a logger or trucker, if the individual is not
14 excluded under par. (bg) and the employing unit satisfies the department that the
15 individual meets the conditions specified in subds. 1. and 2., by contract and in fact:

16 **SECTION 6.** 108.09 (2) (bm) of the statutes is amended to read:

17 108.09 (2) (bm) In determining whether an individual meets the conditions
18 specified in s. 108.02 (12) (bg) or (bm) 2. b. or c. or (c) 1., the department shall not
19 consider documents granting operating authority or licenses, or any state or federal
20 laws or federal regulations granting such authority or licenses.

21 **SECTION 7.** 108.09 (4s) of the statutes is amended to read:

22 108.09 (4s) **EMPLOYEE STATUS.** In determining whether an individual meets the
23 conditions specified in s. 108.02 (12) (bg) or (bm) 2. b. or c. or (c) 1., the appeal tribunal
24 shall not take administrative notice of or admit into evidence documents granting

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1 operating authority or licenses, or any state or federal laws or federal regulations
2 granting such authority or licenses.

3 **SECTION 8. Initial applicability.**

4 (1) The treatment of sections 108.02 (12) (a), (bg), and (bm) (intro.) and 108.09
5 (2) (bm) and (4s) of the statutes first applies to services performed after the December
6 31 that follows the effective date of this subsection.

7 (END)

D-note
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2965/1dn

MED:l:....

Leev

Date

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 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. the

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.

Michael Duchek
Legislative Attorney
Phone: (608) 266-0130
E-mail: michael.duchek@legis.wisconsin.gov

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August 20, 2013

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Rose, Stefanie

From: Froelich, Brooke
Sent: Tuesday, August 20, 2013 4:45 PM
To: LRB.Legal
Subject: Draft Review: LRB -2965/1 Topic: Exclusion of individuals working from their homes from worker's compensation and unemployment insurance laws

Please Jacket LRB -2965/1 for the SENATE.