

2015 DRAFTING REQUEST

Bill

Received: 12/16/2014 Received By: mduchek
Wanted: As time permits Same as LRB:
For: Administration-Budget 266-8219 By/Representing: Kirschbaum
May Contact: Drafter: mduchek
Subject: Unemployment Insurance Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email:
Carbon copy (CC) to: sbostatlanguage@webapps.wi.gov

Pre Topic:

DOA:.....Kirschbaum, BB0308 -

Topic:

Drug Testing for UI

Instructions:

See attached

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 1/9/2015	csicilia 1/12/2015	rschluet 1/12/2015	_____			
/P1	mduchek 1/15/2015	csicilia 1/15/2015		_____	mbarman 1/12/2015		State
/P2	mduchek 1/24/2015	csicilia 1/25/2015	rschluet 1/25/2015	_____	sbasford 1/15/2015		State
/P3	mduchek	csicilia	rschluet	_____	sbasford		State

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	1/27/2015	1/27/2015	1/27/2015	_____	1/25/2015		
/P4	mduchek 1/29/2015	csicilia 1/29/2015	jfrantze 1/29/2015	_____ _____	lparisi 1/27/2015		State
/P5				_____ _____	sbasford 1/29/2015		State

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/P4 gs 1/27/15

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Vers. Drafted

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Handwritten notes:
/P3 cjs 1/25/15
Handwritten initials and dates: 1/25/15, 5/15

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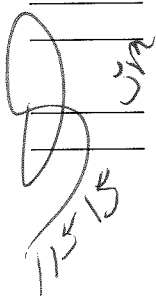
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/? mduchek

Plg's 1/11
15

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FE Sent For:

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Duchek, Michael

From: Hanaman, Cathlene
Sent: Tuesday, December 16, 2014 1:37 PM
To: Duchek, Michael
Subject: FW: Statutory Language Drafting Request - BB0308

From: Bryan.Kirschbaum@wisconsin.gov [mailto:Bryan.Kirschbaum@wisconsin.gov]
Sent: Tuesday, December 16, 2014 1:20 PM
To: Hanaman, Cathlene
Cc: Hynek, Sara - DOA; Kirschbaum, Bryan W - DOA; Connor, Christopher B - DOA
Subject: Statutory Language Drafting Request - BB0308

Biennial Budget: 2015-17

DOA Tracking Code: BB0308

Topic: Drug Testing for UI

SBO Team: EWD

SBO Analyst: Kirschbaum, Bryan
Phone: 608-266-8219
E-mail: Bryan.Kirschbaum@wisconsin.gov

Agency Acronym: DWD

Agency Number: 445

Priority: High

Intent:

Request would add the following statutory language to drug testing for UI under the Department of Workforce Development:

1. Allow employers to voluntarily submit any drug violations/positive tests resulting from pre-employment screening to the Department of Workforce Development.
2. The state may test UI claimants in specific occupations determined by the Department of Workforce Development pending federal regulations.

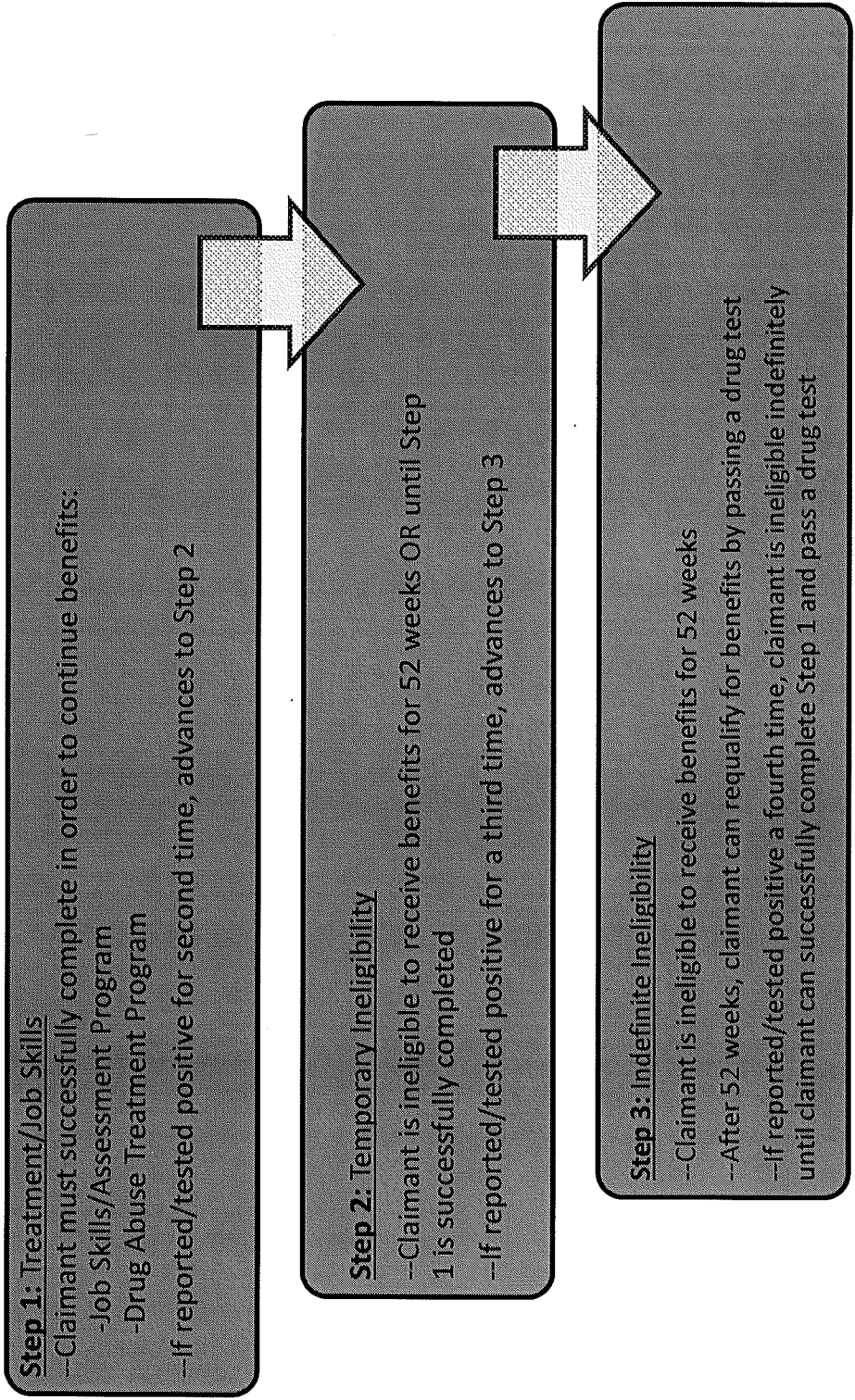
Attachments: False

Please send completed drafts to SBOSatlanguage@webapps.wi.gov

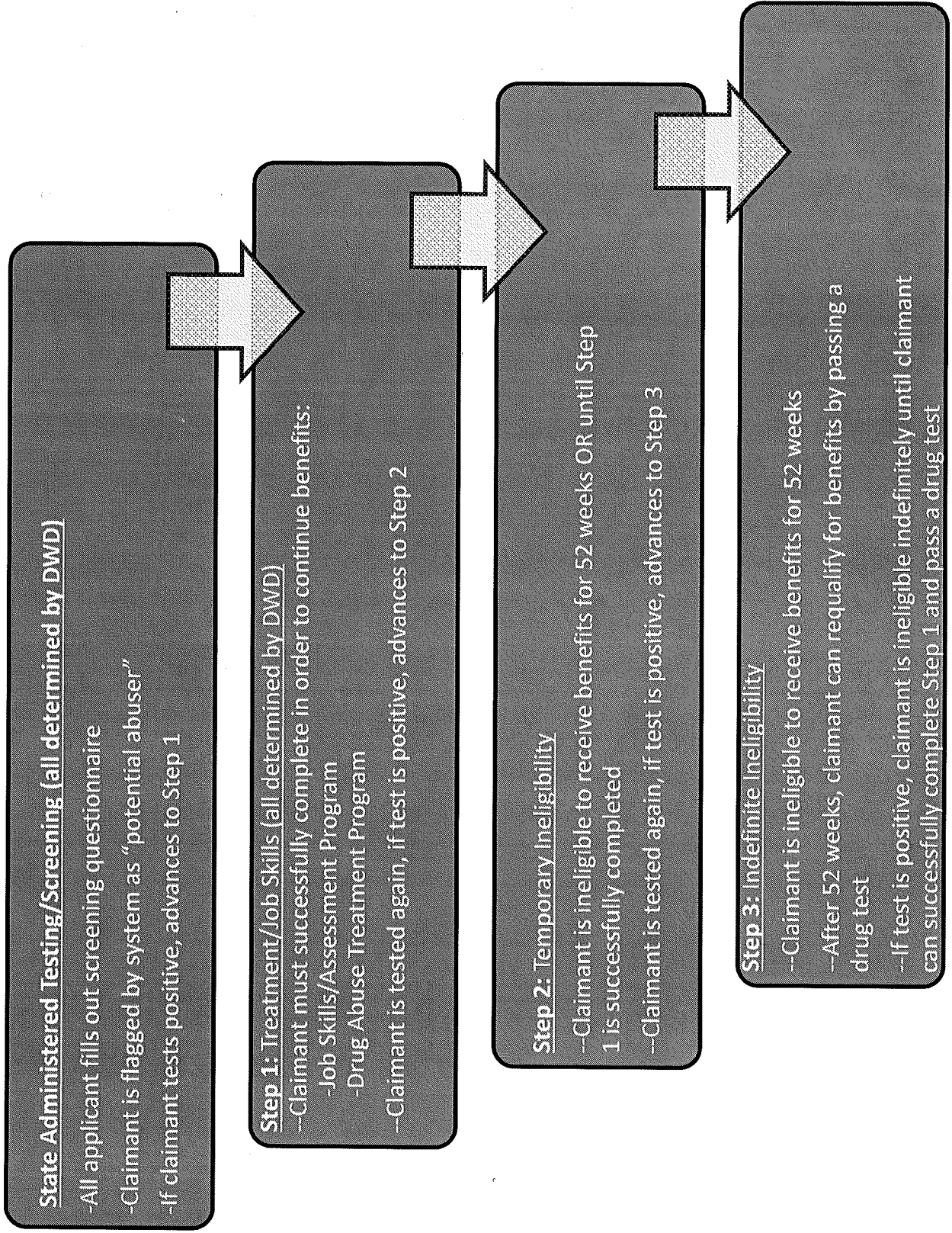
Phase 1—Immediate/Separate Legislation

- A. Allow employers to voluntarily report positive pre-employment drug screenings to DWD
- B. Allow DWD to test all federally-approved occupations that regularly conduct drug testing
- All positive drug from either of above tests will follow the following:

-Screen



Phase 2—(Pending Federal Approval)



EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Compensation
	CORRESPONDENCE SYMBOL OUI/DL
	DATE October 9, 2014

ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 1-15

TO: STATE WORKFORCE AGENCIES

FROM: PORTIA WU *Portia Wu*
Assistant Secretary

SUBJECT: Permissible Drug Testing of Certain Unemployment Compensation Applicants Provided for in Title II, Subtitle A of the Middle Class Tax Relief and Job Creation Act of 2012

1. **Purpose.** To provide guidance about permissible drug testing of certain unemployment compensation (UC) applicants.
2. **References.**
 - Section 2105 of Pub. L. 112-96, the Middle Class Tax Relief and Job Creation Act of 2012 (Act);
 - Section 303 of the Social Security Act (SSA); and
 - Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants; 79 FR 61013 (proposed October 9, 2014) (to be codified at 20 C.F.R. part 620).
3. **Background.** President Obama signed the Act on February 22, 2012. Section 2105 of the Act (Attachment I) adds subsection (l) to section 303, SSA, to permit states to test a UC applicant for the unlawful use of controlled substances (drugs) as an eligibility condition if the applicant:
 - a. Was terminated from employment with his/her most recent employer (as defined under state law) because of the unlawful use of controlled substances; or
 - b. Is an individual for whom suitable work (as defined under state law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor (Secretary)).

These are the only circumstances under which a state is permitted to require applicants to take and pass a drug test as a condition of initial eligibility for UC. An applicant may, if state law provides, be denied UC based on a positive result of this drug test.

RESCISSIONS None	EXPIRATION DATE Continuing
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This Unemployment Insurance Program Letter (UIPL) provides general guidance about these drug testing provisions, and specific guidance about the testing permitted by Section 303(l)(1)(A)(i), SSA, for individuals who were terminated from employment with their most recent employer because of the unlawful use of controlled substances.

As required by the Act, the U.S. Department of Labor (Department) will identify the occupations that regularly conduct drug testing in regulations. The Department has recently issued a Notice of Proposed Rulemaking seeking comment on a proposed list of such occupations. Further guidance on drug testing permitted by Section 303(l)(1)(A)(ii), SSA, for individuals for whom the only available "suitable work," as defined in state law, is in an occupation that regularly conducts drug testing, will be issued after the final regulations identifying such occupations have been promulgated.

4. Discussion.

a. Applicant. Section 303(l)(1)(A), SSA, limits testing to "an applicant for unemployment compensation." As such, drug testing under either clause (i) or (ii) of Section 303(l)(1)(A), SSA, is permitted only when an individual submits an initial application for UC. Once individuals have applied for UC and have been determined eligible for UC, regardless of whether they have already taken and passed a drug test, states may not require them to submit to any further drug tests as a condition of continued eligibility for UC.

b. Most Recent Employer. Section 303(l)(1)(A)(i), SSA, permits states to enact laws that provide for the drug testing of UC applicants who have been separated from their most recent employer because of the unlawful use of a controlled substance. The definition of the term "most recent employer" must be established in state law and be the same as the definition used for other UC purposes, such as when determining which employer is the separating or chargeable employer. Thus, if an employer is not "the most recent employer" under state law for purposes of adjudicating a separation from work, the state may not consider that employer as the most recent employer for purposes of determining whether the separation was for the illegal use of a controlled substance.

While separations from other employers an individual worked for during the base period may (if state law so provides) be adjudicated to determine UC eligibility, state law may provide for drug testing of a UC applicant only if the individual separated from the most recent employer due to the unlawful use of controlled substances.

It is important to note that this basis for drug testing is very limited because, in most cases, separation from employment due to illegal drug use in violation of an employer's drug free workplace policy constitutes misconduct connected with work, which itself results in an individual being disqualified from receiving UC. Some states provide for a total denial of benefit rights for misconduct connected with work; in those states, there would be no reason to drug test as a condition of eligibility. Other states require an individual to work a specified period of time and earn a specified amount of wages before the individual can requalify for UC. If the individual later becomes unemployed and separation from the most recent employer was not due to the illegal use of a controlled substance, the state may not test the

individual for drug use as a condition of UC eligibility. In this case, the most recent employer would be the employer for whom the individual performed services in order to purge the disqualification. However, if state law provides for a fixed-period-of-time disqualification and the individual performed no subsequent work, the state may test the individual for drug use as a condition of eligibility when the individual reapplies for UC because the most recent employer will not have changed.

c. Suitable Work. New section 303(l)(1)(A)(ii), SSA, permits drug testing of UC applicants for whom “suitable work”, as defined under state law, is only available in an occupation that regularly conducts drug testing, as determined under regulations issued by the Secretary. States must use the same definition of “suitable work” under their law for UC applicant drug testing purposes that they use for work search and refusal of work purposes when determining eligibility for UC. Some states establish different definitions of suitable work depending on how long individuals have been unemployed. Since drug testing is permissible only for certain UC applicants, states must use the definition of suitable work that applies to individuals who file initial claims.

d. Only Available. New section 303(l)(1)(A)(ii), SSA, permits drug testing of UC applicants for whom suitable work, as defined under state law, is “only” available in an occupation that regularly conducts drug testing, as determined under regulations issued by the Secretary. This means that all work that is suitable for an individual must be in an occupation that regularly conducts drug testing. If suitable work for an individual is available in any occupation for which drug testing is not regularly conducted, that individual may not be subject to drug testing under section 303(l)(1)(A)(ii), SSA. Additionally, in order for work in a specified occupation to be available, there must be work in the local labor market for that specific occupation.

e. Drug Testing Standard. New section 303(l)(2)(B), SSA, defines “controlled substance” by reference to Section 102 of the Controlled Substances Act (21 U.S.C. 802). Therefore, states may condition UC eligibility on passing tests under either clause (i) or (ii) of Section 303(l)(1)(A), SSA, only for substances that are identified in Section 102 of the Controlled Substances Act. That section provides that “a “controlled substance” means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of that subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.” The current list of controlled substances is found at 21 U.S.C. 812 (Attachment II).

States that enact laws to drug test UC applicants must establish their own drug testing programs. However, states may enter into a contract with an entity to conduct the drug tests on behalf of the state. When conducting tests for illegal use of controlled substances, the state must use a test that meets or exceeds the standards of the *Mandatory Guidelines for Federal Workplace Drug Testing Programs*, published by the Substance Abuse and Mental Health Services Administration (SAMHSA), or the U.S. Department of Transportation (DOT) procedures. Those are the standards that the Federal government uses and are the standards that most laboratories, and government or private-sector employers use when following the provisions of the Drug Free Workplace Act. Tests that do not meet or exceed (i.e., have more rigorous standards for sample collection, chain of custody, and other procedural requirements)

the SAMHSA or DOT procedures may not be used to determine an individual's eligibility for UC. Additionally, any laboratory used by the state to conduct drug testing must meet all of the requirements to be certified by SAMHSA under Subpart K of the Mandatory Guidelines for Federal Workplace Drug Testing Programs. (See 73 FR71858 published on November 25, 2008.)

The *Mandatory Guidelines for Federal Workplace Drug Testing Programs* may be found online at: <http://www.gpo.gov/fdsys/pkg/FR-2008-11-25/pdf/E8-26726.pdf>. Information about DOT standards may be found online at: <http://www.dot.gov/odapc/>. All questions regarding these standards should be directed to those agencies.

f. Cost of Drug Testing. Section 301, SSA, provides that the Federal government will provide grants to the states for the administration of their UC laws. Section 303(a)(1), SSA, requires, as a condition of a state receiving these administrative grants, that state law include provision for "[s]uch methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." These provisions of law have been historically interpreted to prohibit states from transferring the cost of administering the UC program to unemployed workers because these costs may inhibit individuals who may be eligible from filing a claim and receiving UC "when due." If a state chooses to require drug tests under either clause (i) or (ii) of Section 303(l)(1)(A), SSA, the testing would be an expense of administering the state UC law. As such, it may be paid from the state's UC administrative grant. Further, because it is a cost of program administration, states may not require applicants to pay any of the cost of drug tests.

g. Total Reduction of Benefit Rights. Section 3304(a)(10) of the Federal Unemployment Tax Act (FUTA) requires that "compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of benefit rights for any cause other than discharge for misconduct connected with his work, fraud in connection with a claim for compensation, or receipt of disqualifying income." Section 303(l)(1)(B), SSA, as added by the Act, specifies that "[n]othing in this Act or any other provision of Federal law shall be considered to prevent a State from enacting legislation to provide for . . . denying such compensation to such applicant on the basis of the result of the [drug] testing conducted by the State . . ." As such, it provides an exception to the requirements of section 3304(a)(10), FUTA. Thus, states may cancel wage credits or impose a total denial of benefit rights on applicants who fail a drug test permitted under either clause (i) or (ii) of Section 303(l)(1)(A), SSA.

h. Timely Eligibility Determinations. The requirement that UC payments be made when due in section 303(a)(1), SSA, has been interpreted to require that UC be paid as soon as administratively feasible. (See California Department of Human Resources Development v. Java, 402 U.S. 121, 130-31 (1971).) The Department's regulations at 20 CFR part 640 establish the standard for benefit payment promptness. As a result, states that implement drug testing provisions consistent with the requirements of either clause (i) or (ii) of Section 303(l)(1)(A), SSA, must establish procedures to ensure that eligibility determinations are made promptly, that benefits are provided "with the greatest promptness that is administratively feasible," and that they meet all of the promptness requirements in 20 CFR part 640.

i. Confidentiality of information. The results of, or even the fact of, a drug test for an applicant for UC is confidential UC information as defined in 20 CFR 603.2(j). Therefore, the confidentiality requirements of 20 CFR 603.4 apply. States may not release information about an individual's drug test except as provided under state law that conforms to the requirements of 20 CFR part 603.

j. Limits on Permissible Drug Testing. Section 3304(a)(4), FUTA, requires, as a condition for employers in a state to receive credit against the Federal tax, that state law provide that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund . . ." Section 303(a)(5), SSA, provides a similar requirement as a condition for a state to receive administrative grants. Section 3306(h), FUTA, defines compensation as "cash benefits payable to individuals with respect to their unemployment." These provisions taken together are commonly referred to as the "withdrawal standard" of Federal UC law.

UIPL No. 787 transmitted the Secretary's decision in the 1964 conformity case involving South Dakota that interpreted these sections to mean UC eligibility must be based on the "fact or cause" of unemployment. Specifically, the Secretary ruled that the payment of UC premised on a condition of entitlement "unrelated to the fact or cause of unemployment" is inconsistent with Federal law.

Because of this longstanding interpretation, the only permissible reasons for drug testing are those provided for in Section 303(l), SSA. As a general rule, when there is no direct link between a person becoming unemployed and the illegal use of a controlled substance, drug testing does not relate to the "fact or cause" of unemployment because the fact or possibility of drug use has nothing to do with the reason a person became unemployed. Even in Section 303(l), SSA, testing is permitted only if the "cause" of unemployment is termination from employment because of unlawful use of controlled substances or the "fact" of unemployment is due to an inability to pass a required drug test. Thus, the underlying requirement remains that UC eligibility must be based on the "fact or cause" of an individual's unemployment. As exceptions to any of the requirements of Federal UC law are narrowly construed, drug testing of claimants as a condition of eligibility for UC for any reason other than those specifically authorized by section 303(l)(1)(A), SSA, would violate the withdrawal standard.

k. Effective Date. Because Section 2105 does not provide for an effective date, section 303(l), SSA, became effective upon enactment of the Act on February 22, 2012. However, as discussed above, only drug testing under clause (i) of Section 303(l)(1)(A) may be implemented by states at this time; drug testing under clause (ii) is not permitted until a final rule is in effect. Also, as a reminder, since drug testing under the Act is optional, no changes to state UC law are required unless a state wishes to provide for drug testing of UC applicants as authorized by the Act. However, states that wish to conduct drug testing as permitted by Section 303(l)(1)(A), SSA, must amend their state law to explicitly provide for such testing.

5. **Action Required.** States are requested to review this UIPL, and assure their laws and practices conform to and comply with its guidance.

6. **Inquiries.** Inquiries should be directed to the appropriate Regional Office.

7. **Attachments.**

I Text of Section 2105 of Pub. L. 112-96, the Middle Class Tax Relief and Job Creation Act of 2012.

II 21 U.S.C. § 812. Schedules of controlled substances.

ATTACHMENT I

Text of Section 2105 of Pub. L. 112-96, the Middle Class Tax Relief and Job Creation Act of 2012

SEC. 2105. DRUG TESTING OF APPLICANTS.

Section 303 of the Social Security Act is amended by adding at the end the following:

12 VSC 503 “(1)(1) Nothing in this Act or any other provision of Federal law shall be considered to prevent a State from enacting legislation to provide for—

“(A) testing an applicant for unemployment compensation for the unlawful use of controlled substances as a condition for receiving such compensation, if such applicant—

“(i) was terminated from employment with the applicant’s most recent employer (as defined under the State law) because of the unlawful use of controlled substances; or

“(ii) is an individual for whom suitable work (as defined under the State law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of Labor); or

“(B) denying such compensation to such applicant on the basis of the result of the testing conducted by the State under legislation described in subparagraph (A).

“(2) For purposes of this subsection—

“(A) the term ‘unemployment compensation’ has the meaning given such term in subsection (d)(2)(A); and

“(B) the term ‘controlled substance’ has the meaning given such term in section 102 of the Controlled Substances Act (21 U.S.C. 802).”.

ATTACHMENT II

Schedules of Controlled Substances in Section 102 of the Controlled Substances Act (21 U.S.C. 802).

§ 812. Schedules of controlled substances.

- (a) Establishment

There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.

- (b) Placement on schedules; findings required

Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on October 27, 1970, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance. The findings required for each of the schedules are as follows:

- (1) Schedule I. -
 - (A) The drug or other substance has a high potential for abuse.
 - (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
 - (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.
- (2) Schedule II. -
 - (A) The drug or other substance has a high potential for abuse.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
 - (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.
- (3) Schedule III. -
 - (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
 - (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

- (4) Schedule IV. -
 - (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
 - (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III.
- (5) Schedule V. -
 - (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV.
 - (B) The drug or other substance has a currently accepted medical use in treatment in the United States.
 - (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

- **(c) Initial schedules of controlled substances**

Schedules I, II, III, IV, and V shall, unless and until amended¹ pursuant to section 811 of this title, consist of the following drugs or other substances, by whatever official name, common or usual name, chemical name, or brand name designated:

SCHEDULE I

- **(a) Opiates**

Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

- (1) Acetylmethadol.
- (2) Allylprodine.
- (3) Alphacetylmethadol.²
- (4) Alphameprodine.
- (5) Alphamethadol.
- (6) Benzethidine.
- (7) Betacetylmethadol.

¹ Revised schedules are published in the Code of Federal Regulations, Part 1308 of Title 21, Food and Drugs.

² So in original. Probably should be "Alphacetylmethadol."

- (8) Betameprodine.
- (9) Betamethadol.
- (10) Betaprodine.
- (11) Clonitazene.
- (12) Dextromoramide.
- (13) Dextrorphan.
- (14) Diampromide.
- (15) Diethylthiambutene.
- (16) Dimenoxadol.
- (17) Dimepheptanol.
- (18) Dimethylthiambutene.
- (19) Dioxaphetyl butyrate.
- (20) Dipipanone.
- (21) Ethylmethylthiambutene.
- (22) Etonitazene.
- (23) Etoxidine.
- (24) Furethidine.
- (25) Hydroxypethidine.
- (26) Ketobemidone.
- (27) Levomoramide.
- (28) Levophenacymorphan.
- (29) Morpheridine.
- (30) Noracymethadol.
- (31) Norlevorphanol.
- (32) Normethadone.
- (33) Norpipanone.
- (34) Phenadoxone.
- (35) Phenampromide.
- (36) Phenomorphan.
- (37) Phenoperidine.
- (38) Piritramide.
- (39) Propheptazine.
- (40) Properidine.
- (41) Racemoramide.
- (42) Trimeperidine.

- **(b) Opium Derivatives**

Unless specifically excepted or unless listed in another schedule, any of the following opium derivatives, their salts, isomers, and salt of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) Acetorphine.
 - (2) Acetyldihydrocodeine.
 - (3) Benzylmorphine.
 - (4) Codeine methylbromide.
 - (5) Codeine-N-Oxide.
 - (6) Cyprenorphine.
 - (7) Desomorphine.
 - (8) Dihydromorphine.
 - (9) Etorphine.
 - (10) Heroin.
 - (11) Hydromorphanol.
 - (12) Methyldesorphine.
 - (13) Methylhydromorphine.
 - (14) Morphine methylbromide.
 - (15) Morphine methylsulfonate.
 - (16) Morphine-N-Oxide.
 - (17) Myrophine.
 - (18) Nicocodeine.
 - (19) Nicomorphine.
 - (20) Normorphine.
 - (21) Pholcodine.
 - (22) Thebacon.
- **(c) Hallucinogenic Substances**

Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances, or which contains any of their salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

- (1) 3,4-methylenedioxy amphetamine.
- (2) 5-methoxy-3,4-methylenedioxy amphetamine.
- (3) 3,4,5-trimethoxy amphetamine.
- (4) Bufotenine.
- (5) Diethyltryptamine.
- (6) Dimethyltryptamine.
- (7) 4-methyl-2,5-diamethoxyamphetamine.

- (8) Ibogaine.
- (9) Lysergic acid diethylamide.
- (10) Marihuana.
- (11) Mescaline.
- (12) Peyote.
- (13) N-ethyl-3-piperidyl benzilate.
- (14) N-methyl-3-piperidyl benzilate.
- (15) Psilocybin.
- (16) Psilocyn.
- (17) Tetrahydrocannabinols.

SCHEDULE II

- (a) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
 - (1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.
 - (2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause (1), except that these substances shall not include the isoquinoline alkaloids of opium.
 - (3) Opium poppy and poppy straw.
 - (4) coca³ leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.
- (b) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:
 - (1) Alphaprodine.
 - (2) Anileridine.
 - (3) Bezitramide.
 - (4) Dihydrocodeine.

³ So in original. Probably should be capitalized.

- (5) Diphenoxylate.
 - (6) Fentanyl.
 - (7) Isomethadone.
 - (8) Levomethorphan.
 - (9) Levorphanol.
 - (10) Metazocine.
 - (11) Methadone.
 - (12) Methadone-Intermediate, 4-cyano-2-dimethylamino-4,4-diphenyl butane.
 - (13) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid.
 - (14) Pethidine.
 - (15) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine.
 - (16) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate.
 - (17) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
 - (18) Phenazocine.
 - (19) Piminodine.
 - (20) Racemethorphan.
 - (21) Racemorphan.
- (c) Unless specifically excepted or unless listed in another schedule, any injectable liquid which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.

SCHEDULE III

- (a) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:
 - (1) Amphetamine, its salts, optical isomers, and salts of its optical isomers.
 - (2) Phenmetrazine and its salts.
 - (3) Any substance (except an injectable liquid) which contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers.
 - (4) Methylphenidate.
- (b) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

- (1) Any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid.
- (2) Chorhexadol.
- (3) Glutehimide.
- (4) Lysergic acid.
- (5) Lysergic acid amide.
- (6) Methyprylon.
- (7) Phencyclidine.
- (8) Sulfondiethylmethane.
- (9) Sulfonethylmethane.
- (10) Sulfonmethane.

- **(c) Nalorphine.**

- **(d) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:**
 - (1) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium.
 - (2) Not more than 1.8 grams of codeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts.
 - (3) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium.
 - (4) Not more than 300 milligrams of dihydrocodeinone per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
 - (5) Not more than 1.8 grams of dihydrocodeine per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
 - (6) Not more than 300 milligrams of ethylmorphine per 100 milliliters or not more than 15 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
 - (7) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.
 - (8) Not more than 50 milligrams of morphine per 100 milliliters or per 100 grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts.

- (e) Anabolic steroids.

SCHEDULE IV

- (1) Barbital.
- (2) Chloral betaine.
- (3) Chloral hydrate.
- (4) Ethchlorvynol.
- (5) Ethinamate.
- (6) Methohexital.
- (7) Meprobamate.
- (8) Methylphenobarbital.
- (9) Paraldehyde.
- (10) Petrichloral.
- (11) Phenobarbital.

SCHEDULE V

Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs, which shall include one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

- (1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams.
- (2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams.
- (3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams.
- (4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit.
- (5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams.



10-1-9
State of Wisconsin
2015 - 2016 LEGISLATURE



LRB-09587 PI
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Out 1-12 MON

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DOA:.....Kirschbaum, BB0308 - Drug Testing for UI

FOR 2015-2017 BUDGET -- NOT READY FOR INTRODUCTION

D-note

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1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

Under federal law, a state may require a claimant to submit to a test for the unlawful use of controlled substances (drug test) as a condition of receiving unemployment insurance (UI) benefits if the claimant: 1) was terminated from employment with his or her most recent employer because of the unlawful use of controlled substances; or 2) is an individual for whom suitable work, as defined under a state's UI law, is only available in an occupation that regularly conducts drug testing, as determined in regulations issued by the United States Secretary of Labor (federal regulations). As of January 9, 2015, final regulations have not been issued.

This bill requires DWD to establish a program to drug test claimants who apply for regular UI benefits (program). The bill requires DWD to, when a claimant applies for regular UI benefits, determine whether the claimant is (1) an individual for whom suitable work is only available in an occupation described in the federal regulations or 2) was terminated from employment with his or her most recent employer because of the unlawful use of controlled substances. If DWD determines that the claimant satisfies either criteria, DWD must conduct a screening on the claimant to determine whether the claimant should be required to submit to a drug test. If the screening indicates that the claimant should be required to submit to a drug test, DWD must request that the claimant submit to such a test.

The bill provides that, if the claimant declines to submit to such a test, the claimant is ineligible for UI benefits until the claimant submits to the test or until

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submits to

a subsequent claim for benefits; if the claimant undergoes the drug test, but does not test positive for any controlled substance without a valid prescription, the claimant may receive UI benefits if otherwise eligible and may not be required to submit to any further drug test until a subsequent claim for benefits. If the claimant undergoes the drug test and tests positive for one or more controlled substances without a valid prescription, the bill provides that the claimant is ineligible for UI benefits until a subsequent claim for benefits or except as follows:

Following the positive test, the claimant may maintain his or her eligibility for UI benefits by enrolling in a substance abuse treatment program and undertaking a state-sponsored job skills assessment. The claimant remains temporarily eligible for benefits while the claimant is in full compliance with any requirements of the substance abuse treatment program and job skills assessment. After a period of time determined by DWD, DWD must request the claimant to submit to a second drug test. If the claimant does not test positive on the second test without a valid prescription, the claimant may receive UI benefits with no further testing. If the claimant declines to submit to a second test or if the claimant again tests positive without a valid prescription, the claimant is ineligible to receive benefits until 52 weeks have elapsed or the claimant successfully completes the treatment program and job skills assessment and takes a third drug test. The bill provides that if the claimant submits to a third test and again tests positive without a valid prescription, the claimant is simply ineligible to receive UI benefits for 52 weeks.

The bill also requires DWD to promulgate rules to identify additional occupations for which drug testing is regularly conducted in this state and to, subject to a waiver by the Secretary of Workforce Development (secretary), apply the above provisions for claimants for whom suitable work is only available in one of the occupations identified by DWD. The bill allows the secretary to waive screening and drug testing of those claimants if the secretary determines that such a waiver is necessary to permit continued certification of the state's UI program or for maximum credit allowances to employers under the federal Employment Tax Act.

In addition, the bill allows an employing unit to voluntarily submit to DWD the results of a drug test that was conducted on an individual as pre-employment screening. If the results of the test indicate that the individual has tested positive for one or more controlled substances without a valid prescription, the bill provides that the claimant is ineligible for benefits under this chapter as if the claimant had tested positive in a drug test conducted by DWD, beginning with the week in which DWD receives the report.

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

that are in addition to those identified in the federal regulations

tax

UI

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

1 SECTION 1. 20.445 (1) (aL) of the statutes is created to read:

1 20.445 (1) (aL) *Unemployment insurance administration; controlled*
2 *substances testing.* As a continuing appropriation, the amounts in the schedule to
3 conduct testing for controlled substances and for related expenses under s. 108.133.

****NOTE: This SECTION involves a change in an appropriation that must be reflected in the revised schedule in s. 20.005, stats.

4 **SECTION 2.** 108.133 of the statutes is created to read:

CS
Definitions.

5 **108.133 Testing for controlled substances. (1)** In this section:

6 (a) Notwithstanding s. 108.02 (9), "controlled substance" has the meaning
7 given in 21 USC 802.

8 (b) "Job skills assessment" means an assessment conducted under s. 108.04
9 (15) (a) 1.

10 (c) "Occupation that regularly conducts drug testing" means an occupation
11 identified in the regulations issued by the federal secretary of labor under 42 USC
12 503 (1) (1) ^A(a) (ii).

13 (d) "Screening" means the screening process created by the department under
14 sub. (2) (a) 4.

that conforms to the parameters

15 (e) "Substance abuse treatment program" means a program identified by the
16 department under sub. (2) (a) 3.

17 (f) "Valid prescription" means a valid prescription, as defined in s. 450.01 (19),
18 for a controlled substance for which the supply of the controlled substance indicated
19 by the prescription has not run out.

20 **(2) DRUG TESTING PROGRAM.** The department shall establish a program to test
21 claimants who apply for regular benefits under this chapter for the presence of
22 controlled substances in accordance with this section and shall, under the program,
23 do all of the following:

1 (a) Promulgate rules to establish the program. The department shall do all of
2 the following in the rules promulgated under this paragraph:

***NOTE: If you think it would be appropriate, I could provide that DWD can consult with the state Controlled Substances Board in promulgating the rules for drug testing.

3 1. Identify occupations for which drug testing is regularly conducted in this
4 state.

***NOTE: Is this what you want? *correct*

5 2. Establish a process to test claimants for the presence of controlled
6 substances. In establishing the process, the department shall adhere to any
7 applicable federal requirements regarding drug testing.

***NOTE: I added the second sentence, as the UIPL said this was required. OK?

8 3. Identify the parameters for a substance abuse treatment program for
9 claimants who misuse controlled substances.

10 4. Create a screening process for determining whether a claimant should be
11 required to submit to a test for the presence of controlled substances.

12 (b) When a claimant applies for regular benefits under this chapter, do all of
13 the following:

14 1. Determine whether the claimant is an individual for whom suitable work is
15 only available in an occupation that regularly conducts drug testing.

16 2. Determine whether the claimant is an individual for whom suitable work is
17 only available in an occupation identified in the rules promulgated under par. (a) 1.

18 3. Determine if the individual was terminated from employment with his or her
19 most recent employer because of the unlawful use of controlled substances.

20 4. If the claimant is determined by the department under subd. 1. to be an
21 individual for whom suitable work is only available in an occupation that regularly
22 conducts drug testing or is determined under subd. 3. to have been terminated from

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1 ~~employment with his or her most recent employer because of the unlawful use of~~
2 ~~controlled substances~~, conduct a screening on the claimant ~~(using the process created~~
3 ~~under par. (a) 4.~~

4 5. If the claimant is determined by the department under subd. 2. to be an
5 individual for whom suitable work is only available in an occupation identified in the
6 rules promulgated under par. (a) 1., conduct a screening on the claimant ~~(using the~~
7 ~~process created under par. (a) 4.)~~ if ~~(such)~~ a screening is not already required under
8 subd. 4. ^{e 3,}

9 6. If a screening conducted as required under subd. 4. ^{e 5,} or 5. ^{3. or} indicates that the
10 claimant should be required to submit to a test for the presence of controlled
11 substances, request that the claimant submit to such a test.

12 (3) DRUG TESTING. (a) If a claimant is requested under sub. (2) (b) 6. ^{e 5,} to submit
13 to a test for the presence of controlled substances and the claimant declines to submit
14 to such a test, the claimant is ineligible for benefits under this chapter until the
15 claimant qualifies for benefits in a subsequent benefit year ~~(or until the claimant~~
16 ~~submits to the test.~~

****NOTE: Does this read as you intend?

17 (b) If a claimant who is requested under sub. (2) (b) 6. ^{e 5,} to submit to a test for the
18 presence of controlled substances ^{submits to the test and} does not test positive for any controlled substance
19 or the claimant presents evidence satisfactory to the department that the claimant
20 possess a valid prescription for ^{e each} any controlled substance for which the claimant
21 tests positive, the claimant may receive benefits under this chapter if otherwise
22 eligible and may not be required to submit to any further test for the presence of
23 controlled substances until a subsequent benefit year.

****NOTE: The UIPL did not go into this, but since the test is for the *illegal* use of controlled substances, it stood to reason that a claimant should not be ineligible if he or

she has a valid prescription, so I provided as such. Perhaps more should be said here, however. What if, for instance, a claimant has a prescription, but has way more of the drug in his system than what should be the case under the prescription. Let me know if more should be said here regarding such a situation. Alternatively, this could be addressed in the rules somehow.

1 (c) If a claimant who is requested under sub. (2) (b) ^{es,} 6, to submit to a test for the
2 presence of controlled substances tests positive for one or more controlled substances
3 without presenting evidence satisfactory to the department that the claimant
4 possess a valid prescription for ^{each} any controlled substance for which the claimant
5 tested positive, the claimant is ineligible for benefits under this chapter until the
6 claimant qualifies for benefits in a subsequent benefit year ^{es} or except as provided in
7 sub. (4).

8 (4) CLAIMANTS WITH POSITIVE DRUG TESTS. If a claimant tests positive for one or
9 more controlled substances ^o and is unable to ^{without my} present evidence of a valid prescription
10 as provided under sub. (3) (c), all of the following apply:

11 (a) Following the positive test, the claimant may maintain his or her eligibility
12 for benefits under this chapter if the claimant enrolls in a substance abuse treatment
13 program and ^{undergoes} undertakes a job skills assessment. Subject to pars. (b) and (c), the
14 claimant remains eligible for benefits under this chapter, if otherwise eligible, while
15 the claimant is in full compliance with any requirements of the substance abuse
16 treatment program and job skills assessment.

****NOTE: I believe it was the case that DWD could only require a job skills assessment for weeks subsequent to the initial week of benefits. See s. s. 108.04 (15) (a) 1. So the requirement that claimants do that assessment before receiving any benefits may be problematic, but I am not sure if that is true in the case of requiring it to requalify after a positive drug test. This seems like a fairly minor issue, but it might be an issue.

17 (b) After a period of time determined by the department in the rules
18 promulgated under sub. (2) (a), the department shall request a claimant who has
19 remained eligible for benefits under par. (a) to submit to a 2nd test for the presence
20 of controlled substances. If the claimant does not test positive for any controlled

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1 substance for which the claimant does not present^{g without} evidence satisfactory to the
 2 department of a valid prescription, the claimant may receive benefits under this
 3 chapter if otherwise eligible and may not be required to submit to any further test
 4 for the presence of controlled substances until a subsequent benefit year. If the
 5 claimant declines to submit to a test under this paragraph or if the claimant again
 6 tests positive for one or more controlled substances without presenting evidence of
 7 a valid prescription, the claimant is ineligible to receive benefits until whichever

8 occurs first: ^{of the following}

9 1. 52 weeks have elapsed since the claimant declined to submit to the 2nd test
 10 or tested positive at that 2nd test.

***NOTE: The instructions didn't say what the starting point would be for the 52^{test} weeks. Is this what was meant? Or did you mean 52 weeks since the initial claim? Regardless, I believe 52 weeks would potentially take the claimant into a subsequent benefit year, which would require a new test anyway.

11 2. The claimant provides the department with evidence of successfully
 12 completing the substance abuse treatment program and job skills assessment and
 13 submits to a 3rd test for the presence of controlled substances and does not test
 14 positive for any controlled substance without presenting evidence of a valid
 15 prescription.

16 (c) If a claimant, upon submitting to a 3rd test for the presence of controlled
 17 substances under par. (b) 2., again tests positive for one or more controlled
 18 substances without presenting evidence satisfactory to the department of a valid
 19 prescription, the claimant is is ineligible to receive UI benefits until 52 weeks have
 20 elapsed since the claimant tested positive at that 3rd test.

***NOTE: The instructions didn't say what the starting point would be for the 52^{test} weeks. Is this what was meant? Or did you mean 52 weeks since the initial claim? Regardless, I believe 52 weeks would potentially take the claimant into a subsequent benefit year, which would require a new test anyway.

1 (5) ^ePREEMPLOYMENT DRUG TESTING. (a) An employing unit may voluntarily
 2 submit to the department the results of a test for the presence of controlled
 3 substances that was conducted on an individual as ^epre-employment screening. The
 4 department shall retain the information received from employing units under this
 5 paragraph for the purpose of determining eligibility for benefits. If the results of the
 6 test indicate that the individual has tested positive for one or more controlled
 7 substances without evidence of a valid prescription, subject to par. (b), the claimant^{e individual}
 8 is ineligible for benefits under this chapter ^{3x}as if the individual had tested positive
 9 under sub. (3) (c), beginning with the week the week^e in which the department
 10 receives a report of the individual's positive test under this paragraph.

11 (b) A claimant^{e An individual} is not ineligible under par. (a) unless the individual ^{e was} is afforded
 12 the opportunity to request that the specimen be sent to a different testing facility for
 13 an additional test. This paragraph does not require an employing unit or the
 14 department to pay the costs of any additional test.

15 (6) SECRETARY MAY WAIVE COMPLIANCE. The secretary may waive compliance
 16 with sub. (2) (b) 2. and ^{e 4.} (5) if the secretary determines that such a waiver is necessary
 17 to permit continued certification of this chapter for grants to this state under Title
 18 III of the federal Social Security Act or for maximum credit allowances to employers
 19 under the federal Employment Tax Act.

20 **SECTION 9351. Initial applicability; Workforce Development.**

21 (1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The treatment of sections 108.133
 22 (2) (b), ⁽³⁾(4), and (5) of the statutes first applies to determinations issued under section
 23 108.09 of the statutes on the effective date of this subsection

24 **SECTION 9451. Effective dates; Workforce Development.**

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(1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The treatment of sections 108.133

(2) (b), (4), (5), and (6) of the statutes takes effect the first Sunday of the 7th month

beginning after publication, whichever is later.

(END)

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D-note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Bryan:

Please review the draft and the embedded notes. There were a few gaps I had to fill in. Let me know if anything does not reflect the intent. In addition, note the following:

1. Regarding drug testing by DWD I tried to draft the provision, where possible, in conformity with the UIPL issued by the U.S. Department of Labor (USDOL). However, there are provisions in the language requested that I am unsure whether USDOL would take issue with. For example, while it is clear from the UIPL that a state may not require a claimant who *passes* a drug test to take further drug tests, the UIPL does not directly address whether a state may allow a claimant who *failed* a drug test to continue to receive benefits under certain circumstances and ~~to~~ then require the claimant take additional drug tests in order to remain qualified. Likewise, the UIPL does not address screening claimants and only drug test those that are flagged by the screening. Finally, the UIPL makes clear that states may not require claimants to pay the costs of drug testing, but does not address requiring claimants to enter a drug treatment program that the claimants may have to pay for themselves. So I just note that I'm not sure whether there might be issues with some of the details, as many of the concepts in this draft are novel and not addressed in the UIPL.

2. As I indicated, there are two groups of individuals who may be drug tested by the state under federal law: 1) those terminated from their most recent employer for drug use; and 2) those for whom suitable work is only available in an occupation that regularly conducts drug testing, as determined by federal regulation. In this draft, I allowed for testing of *both* groups, but note that, with regards to group #1, as I indicated, many of these individuals are likely to have been fired for misconduct and may therefore already be ineligible for UI. Testing these individuals could therefore result in testing of individuals who will not qualify for benefits anyway.

3. I also provided that DWD may identify occupations that regularly conduct drug testing in this state, in addition to those identified in the federal regulations. If any such occupations are not in the final regulations, it is unlikely that claimants in those occupations could be drug tested. However, it is possible that the federal regulations could somehow include or account for the ones DWD identified. This is something I would suggest discussing with DWD.

4. I included the provision about disqualifying claimants based upon pre-employment drug screening. However, as I indicated, this has previously been viewed by USDOL

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as not permissible. I did draft the provision so that they would not be automatically ineligible for UI benefits but would be treated like those who had a positive drug test administered by DWD, but I am not sure if this resolves the problems. There may be other problems with this provision as well. As you requested, I provided that the testing of DWD-identified occupations would be pending federal approval, and I could add that the provision about pre-employment drug testing would also be only implemented pending federal approval.

5. The bill creates a continuing GPR appropriation for DWD to conduct drug testing. However, as I indicated, according to the UIPL, states may use their federal administrative grants to conduct the drug testing under federal law, though it is my understanding that this would not mean that a state would receive additional money for this purpose. Again, I would suggest discussing this with DWD.

6. I provided that the appropriation and the provisions allowing DWD to set up the drug testing program would go into effect immediately, but that the actual testing provisions would take effect the first Sunday of the 7th month beginning after the bill's publication date. These dates can be adjusted as needed. I do not know, however, if this is enough time for DWD to promulgate its rules (which would realistically initially have to be emergency rules unless we provide otherwise) and establish a drug testing program.

Michael Duchek
 Legislative Attorney
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Also, it was my sense that the job skills assessment is not an ongoing thing like a substance abuse program would be, but something you simply complete at one time. So it might not really make sense to say that the person is complying with the requirements of the job skills assessment, as the person may have already done everything that the job skills assessment requires.

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Note that s. 108.14 (13) allows the Secretary of Workforce Development to modify or suspend any UI provision in order to maintain federal compliance. This authority may be needed to be exercised if any of the provisions in the draft is determined not to be compliant with federal requirements.

INS DNB

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#. This is drafted as a budget draft. If it is determined that this will not be included in the budget but will be in separate legislation, additional changes may be needed.

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Should be
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0958/P1dn

MED:cjs:rs

January 12, 2015

Bryan:

Please review the draft and the embedded notes. There were a few gaps I had to fill in. Let me know if anything does not reflect the intent. Note that s. 108.14 (13) allows the Secretary of Workforce Development to modify or suspend any UI provision in order to maintain federal compliance. This authority may need to be exercised if any of the provisions in the draft is determined not to be compliant with federal requirements. In addition, note the following:

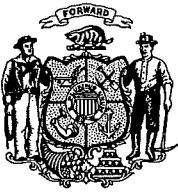
1. This is drafted as a budget draft. If it is determined that this will not be included in the budget but will be in separate legislation, additional changes may be needed.
2. Regarding drug testing by DWD, I tried to draft the provision, where possible, in conformity with the UIPL issued by the U.S. Department of Labor (USDOL). However, there are provisions in the language requested that I am unsure whether USDOL would take issue with. For example, while it is clear from the UIPL that a state may not require a claimant who *passes* a drug test to take further drug tests, the UIPL does not directly address whether a state may allow a claimant who *failed* a drug test to continue to receive benefits under certain circumstances and then require the claimant to take additional drug tests in order to remain qualified. Likewise, the UIPL does not address screening claimants and only drug testing those that are flagged by the screening. Finally, the UIPL makes clear that states may not require claimants to pay the costs of drug testing, but does not address requiring claimants to enter a drug treatment program that the claimants may have to pay for themselves. So I just note that I'm not sure whether there might be issues with some of the details, as many of the concepts in this draft are novel and not addressed in the UIPL.
3. I also provided that DWD may identify occupations that regularly conduct drug testing in this state, in addition to those identified in the federal regulations. If any such occupations are not in the final regulations, it is unlikely that claimants in those occupations could be drug tested. However, it is possible that the federal regulations could somehow include or account for the ones DWD identified. This is something I would suggest discussing with DWD.
4. I included the provision about disqualifying claimants based upon preemployment drug screening. However, as I indicated, this has previously been viewed by USDOL as not permissible. I did draft the provision so that they would not be automatically

ineligible for UI benefits but would be treated like those who had a positive drug test administered by DWD, but I am not sure if this resolves the problems. There may be other problems with this provision as well.

5. The bill creates a continuing GPR appropriation for DWD to conduct drug testing. However, as I indicated, according to the UIPL, states may use their federal administrative grants to conduct the drug testing under federal law, though it is my understanding that this would not mean that a state would receive additional money for this purpose. Again, I would suggest discussing this with DWD.

6. I provided that the appropriation and the provisions allowing DWD to set up the drug testing program would go into effect immediately, but that the actual testing provisions would take effect the first Sunday of the 7th month beginning after the bill's publication date. These dates can be adjusted as needed. I do not know, however, if this is enough time for DWD to promulgate its rules (which would realistically initially have to be emergency rules unless we provide otherwise) and establish a drug testing program.

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State of Wisconsin
2015 - 2016 LEGISLATURE



LRB-0958/P1 P2
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stays

TODAY

DOA:.....Kirschbaum, BB0308 - Drug Testing for UI

FOR 2015-2017 BUDGET - NOT READY FOR INTRODUCTION

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1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

Under federal law, a state may require a claimant to submit to a test for the unlawful use of controlled substances (drug test) as a condition of receiving unemployment insurance (UI) benefits if the claimant: 1) was terminated from employment with his or her most recent employer because of the unlawful use of controlled substances; or 2) is an individual for whom suitable work, as defined under a state's UI law, is only available in an occupation that regularly conducts drug testing, as determined in regulations issued by the United States Secretary of Labor (federal regulations). As of January 12, 2015, final federal regulations have not been issued.

This bill requires DWD to establish a program to submit to a drug test claimants who apply for regular UI benefits. The bill requires DWD to determine, when a claimant applies for regular UI benefits, whether the claimant is an individual for whom suitable work is only available in an occupation described in the federal regulations. If DWD determines that the claimant is such an individual, DWD must conduct a screening on the claimant to determine whether the claimant should be required to submit to a drug test. If the screening indicates that the claimant should be required to submit to a drug test, DWD must request that the claimant submit to such a test.

The bill provides that, if the claimant declines to submit to such a test, the claimant is ineligible for UI benefits until the claimant submits to the test or until

state-sponsored

a subsequent claim for benefits; if the claimant submits to the drug test, but does not test positive for any controlled substance without a valid prescription, the claimant may receive UI benefits if otherwise eligible and may not be required to submit to any further drug test until a subsequent claim for benefits. If the claimant submits to the drug test and tests positive for one or more controlled substances without a valid prescription, the bill provides that the claimant is ineligible for UI benefits until a subsequent claim for benefits, except as follows:

* Following the positive test, the claimant may maintain his or her eligibility for UI benefits by enrolling in a substance abuse treatment program, and undergoing a state-sponsored job skills assessment. The claimant remains temporarily eligible for benefits while the claimant is in full compliance with any requirements of the substance abuse treatment program and job skills assessment. After a period of time determined by DWD, DWD must request the claimant to submit to a second drug test. If the claimant does not test positive on the second test without a valid prescription, the claimant may receive UI benefits with no further testing. If the claimant declines to submit to a second test or if the claimant again tests positive without a valid prescription, the claimant is ineligible to receive benefits until 52 weeks have elapsed or the claimant successfully completes the treatment program and job skills assessment and takes a third drug test. The bill provides that if the claimant submits to a third test and again tests positive without a valid prescription, the claimant is simply ineligible to receive UI benefits for 52 weeks.

The bill also requires DWD to promulgate rules to identify occupations for which drug testing is regularly conducted in this state and to apply, subject to a waiver by the Secretary of Workforce Development (secretary), the above provisions for claimants for whom suitable work is only available in one of the occupations identified by DWD. The bill allows the secretary to waive screening and drug testing of those claimants if the secretary determines that such a waiver is necessary to permit continued certification of the state's UI program or for maximum tax credit allowances to employers under the federal Employment Tax Act.

In addition, the bill allows an employing unit to voluntarily submit to DWD the results of a drug test that was conducted on an individual as preemployment screening. If the results of the test indicate that the individual has tested positive for one or more controlled substances without a valid prescription, the bill provides that the claimant is ineligible for UI benefits as if the claimant had tested positive in a drug test conducted by DWD, beginning with the week in which DWD receives the report.

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

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

1 SECTION 1. 20.445 (1) (aL) of the statutes is created to read:

1 20.445 (1) (aL) *Unemployment insurance administration; controlled*
2 *substances testing.* As a continuing appropriation, the amounts in the schedule to
3 conduct testing for controlled substances and for related expenses under s. 108.133.

****NOTE: This SECTION involves a change in an appropriation that must be reflected in the revised schedule in s. 20.005, stats.

4 SECTION 2. 108.133 of the statutes is created to read:

§ other than providing substance abuse treatment under s. 108.133(2)(c)

5 **108.133 Testing for controlled substances. (1) DEFINITIONS.** In this
6 section:

7 (a) Notwithstanding s. 108.02 (9), “controlled substance” has the meaning
8 given in 21 USC 802.

9 (b) “Job skills assessment” means an assessment conducted under s. 108.04
10 (15) (a) 1.

11 (c) “Occupation that regularly conducts drug testing” means an occupation
12 identified in the regulations issued by the federal secretary of labor under 42 USC

13 503 (1) (1)(a)(ii).
el (A)

14 (d) “Screening” means the screening process created by the department under
15 sub. (2)(A) 4.
e (a)

16 (e) “Substance abuse treatment program” means a program that conforms to
17 the parameters identified by the department under sub. (2) (a) 3.

of the provided by the department under sub. (2)(c).

18 (f) “Valid prescription” means a prescription, as defined in s. 450.01 (19), for a
19 controlled substance for which the supply of the controlled substance indicated by
20 the prescription has not run out.

21 (2) DRUG TESTING PROGRAM. The department shall establish a program to test
22 claimants who apply for regular benefits under this chapter for the presence of

1 controlled substances in accordance with this section and shall, under the program,
2 do all of the following:

3 (a) Promulgate rules to establish the program. The department shall do all of
4 the following in the rules promulgated under this paragraph:

****NOTE: If you think it would be appropriate, I could provide that DWD can consult with the state Controlled Substances Board in promulgating the rules for drug testing.

5 1. Identify occupations for which drug testing is regularly conducted in this
6 state.

****NOTE: Is this correct?

7 2. Establish a process to test claimants for the presence of controlled
8 substances. In establishing the process, the department shall adhere to any
9 applicable federal requirements regarding drug testing.

****NOTE: I added the second sentence, as the UIPL said this was required. OK?

10 3. Establish a process to test claimants for the presence of controlled
11 substances. In establishing the process, the department shall adhere to any
12 applicable federal requirements regarding drug testing.

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13 4. Create a screening process for determining whether a claimant should be
14 required to submit to a test for the presence of controlled substances.

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15 (b) When a claimant applies for regular benefits under this chapter, do all of
16 the following:

17 1. Determine whether the claimant is an individual for whom suitable work is
18 only available in an occupation that regularly conducts drug testing.

19 2. Determine whether the claimant is an individual for whom suitable work is
20 only available in an occupation identified in the rules promulgated under par. (a) 1.

1 3. If the claimant is determined by the department under subd. 1. to be an
2 individual for whom suitable work is only available in an occupation that regularly
3 conducts drug testing, conduct a screening on the claimant.

4 4. If the claimant is determined by the department under subd. 2. to be an
5 individual for whom suitable work is only available in an occupation identified in the
6 rules promulgated under par. (a) 1., conduct a screening on the claimant if a
7 screening is not already required under subd. 3.

8 5. If a screening conducted as required under subd. 3. or 4. indicates that the
9 claimant should be required to submit to a test for the presence of controlled
10 substances, request that the claimant submit to such a test.

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11 **(3) DRUG TESTING.** (a) If a claimant is requested under sub. (2) (b) 5. to submit
12 to a test for the presence of controlled substances and the claimant declines to submit
13 to such a test, the claimant is ineligible for benefits under this chapter until the
14 claimant qualifies for benefits in a subsequent benefit year.

****NOTE: Does this read as you intend?

15 (b) If a claimant who is requested under sub. (2) (b) 5. to submit to a test for the
16 presence of controlled substances submits to the test and does not test positive for
17 any controlled substance or the claimant presents evidence satisfactory to the
18 department that the claimant possesses a valid prescription for each controlled
19 substance for which the claimant tests positive, the claimant may receive benefits
20 under this chapter if otherwise eligible and may not be required to submit to any
21 further test for the presence of controlled substances until a subsequent benefit year.

****NOTE: The UIPL did not go into this, but since the test is for the *illegal* use of controlled substances, it stood to reason that a claimant should not be ineligible if he or she has a valid prescription, so I provided as such. Perhaps more should be said here, however. Alternatively, this could be addressed in the rules somehow.

1 (c) If a claimant who is requested under sub. (2) (b) 5. to submit to a test for the
2 presence of controlled substances tests positive for one or more controlled substances
3 without presenting evidence satisfactory to the department that the claimant
4 possesses a valid prescription for each controlled substance for which the claimant
5 tested positive, the claimant is ineligible for benefits under this chapter until the
6 claimant qualifies for benefits in a subsequent benefit year, except as provided in
7 sub. (4).

8 (4) CLAIMANTS WITH POSITIVE DRUG TESTS. If a claimant tests positive for one or
9 more controlled substances without presenting evidence of a valid prescription as
10 provided under sub. (3) (c), all of the following apply:

11 (a) Following the positive test, the claimant may maintain his or her eligibility
12 for benefits under this chapter if the claimant enrolls in ^{the} a substance abuse treatment
13 program and undergoes a job skills assessment. Subject to pars. (b) and (c), the
14 claimant remains eligible for benefits under this chapter, if otherwise eligible, while
15 the claimant is in full compliance with any requirements of the substance abuse
16 treatment program and job skills assessment.

****NOTE: I believe it was the case that DWD could only require a job skills assessment for weeks subsequent to the initial week of benefits. See s. s. 108.04 (15) (a) 1. So the requirement that claimants do that assessment before receiving any benefits may be problematic, but I am not sure if that is true in the case of requiring it to requalify after a positive drug test. This seems like a fairly minor issue, but it might be an issue nonetheless.

Also, it was my sense that the job skills assessment is not an ongoing thing like a substance abuse program would be, but something you simply complete at one time. So it might not really make sense to say that the person is complying with the requirements of the job skills assessment, as the person may have already done everything that the job skills assessment requires.

17 (b) After a period of time determined by the department in the rules
18 promulgated under sub. (2) (a), the department shall request a claimant who has
19 remained eligible for benefits under par. (a) to submit to a 2nd test for the presence

1 of controlled substances. If the claimant does not test positive for any controlled
2 substance without presenting evidence satisfactory to the department of a valid
3 prescription, the claimant may receive benefits under this chapter if otherwise
4 eligible and may not be required to submit to any further test for the presence of
5 controlled substances until a subsequent benefit year. If the claimant declines to
6 submit to a test under this paragraph or if the claimant again tests positive for one
7 or more controlled substances without presenting evidence of a valid prescription,
8 the claimant is ineligible to receive benefits until whichever of the following occurs

9 first:

Fifty-two

10 1. 52 weeks have elapsed since the claimant declined to submit to the 2nd test
11 or tested positive at that 2nd test.

****NOTE: The instructions didn't say what the starting point would be for the 52 weeks. Is this what was meant? Or did you mean 52 weeks since the initial test? Regardless, I believe 52 weeks would potentially take the claimant into a subsequent benefit year, which would require a new test anyway.

12 2. The claimant provides the department with evidence of successfully
13 completing the substance abuse treatment program and job skills assessment and
14 submits to a 3rd test for the presence of controlled substances and does not test
15 positive for any controlled substance without presenting evidence of a valid
16 prescription.

17 (c) If a claimant, upon submitting to a 3rd test for the presence of controlled
18 substances under par. (b) 2., again tests positive for one or more controlled
19 substances without presenting evidence satisfactory to the department of a valid
20 prescription, the claimant is is ineligible to receive UI benefits until 52 weeks have
21 elapsed since the claimant tested positive at that 3rd test.

****NOTE: The instructions didn't say what the starting point would be for the 52 weeks. Is this what was meant? Or did you mean 52 weeks since the initial test?

Regardless, I believe 52 weeks would potentially take the claimant into a subsequent benefit year, which would require a new test anyway.

1 (5) PREEMPLOYMENT DRUG TESTING. (a) An employing unit may voluntarily
2 submit to the department the results of a test for the presence of controlled
3 substances that was conducted on an individual as preemployment screening. The
4 department shall retain the information received from employing units under this
5 paragraph for the purpose of determining eligibility for benefits. If the results of the
6 test indicate that the individual has tested positive for one or more controlled
7 substances without evidence of a valid prescription, the individual is ineligible for
8 benefits under this chapter, subject to par. (b), as if the individual had tested positive
9 under sub. (3) (c), beginning with the week in which the department receives a report
10 of the individual's positive test under this paragraph.

11 (b) An individual is not ineligible ^{for benefits} under par. (a) unless the individual was
12 afforded the opportunity to request that the specimen be sent to a different testing
13 facility for an additional test. This paragraph does not require an employing unit or
14 the department to pay the costs of any additional test.

15 **SECTION 9351. Initial applicability; Workforce Development.**

16 (1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The treatment of sections 108.133
17 (2) (b), ^{and (c)} (3), (4), and (5) of the statutes first applies to determinations issued under
18 section 108.09 of the statutes on the effective date of this subsection ☉

19 **SECTION 9451. Effective dates; Workforce Development.**

20 (1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The treatment of sections 108.133
21 (2) (b), ^{and (c)} (3), (4), and (5) of the statutes takes effect the first Sunday of the 7th month
22 beginning after publication.

23 (END)

2015-2016 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0958/P2ins
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1 SECTION 1. 20.445 (1) (ak) of the statutes is created to read:

2 20.445 (1) (ak) *Unemployment insurance administration; substance abuse*
3 *treatment.* As a continuing appropriation, the amounts in the schedule to provide
4 substance abuse treatment to claimants for unemployment insurance under s.
5 108.133 (2) (c).

***NOTE: This SECTION involves a change in an appropriation that must be reflected in the revised schedule in s. 20.005, stats.

INSERT 4-10

6 3. Identify the parameters for a substance abuse treatment program for
7 claimants who misuse controlled substances, which shall specify what a claimant
8 must satisfy in order to have successfully completed the substance abuse treatment
9 program. ^

criteria
INSERT 4-14

10 5. Specify what a claimant must satisfy in order to have successfully completed
11 a job skills assessment. ^

INSERT 5-10

12 (c) Create and provide a substance abuse treatment program in accordance
13 with the rules promulgated under par. (a) 3. ✓