



# State of Wisconsin

LEGISLATIVE REFERENCE BUREAU



## ☞ Appendix A ... segment II

### LRB BILL HISTORY RESEARCH APPENDIX

☞ The drafting file for 2015 LRB-1431/P4 (For: LRB)

has been copied/added to the drafting file for

**2015 LRB-0958** (For: DOA - Budget)

☞ Are These "Companion Bills" ?? ... No



# **RESEARCH APPENDIX - PLEASE KEEP WITH THE DRAFTING FILE**

Date Transfer Requested: 01/27/2015 (Per: MED)

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



TODAY if possible ~~but~~ first thing  
State of Wisconsin but on TUE OK  
2015 - 2016 LEGISLATURE too.

LRB-1431/P3

MED:cjs:jm

stays

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

Inserts

do NOT gen

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

*Analysis by the Legislative Reference Bureau*

**EMPLOYMENT**

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 15, 2015, final federal regulations have not been issued.

This bill requires DWD to establish a program to require claimants who apply for regular UI benefits to submit to drug tests. 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 <sup>to</sup> submit to such a test. ~~request that~~ <sup>require</sup>

The bill provides that, if the claimant declines to submit to such a test, the claimant is ineligible for UI benefits until 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 for 52 weeks or until a subsequent claim for benefits, whichever is later, except that following the positive test, the claimant may maintain his or her eligibility for UI benefits by enrolling in a state-sponsored substance abuse treatment program and undergoing a state-sponsored job skills assessment. The claimant remains eligible for benefits for each week the claimant is in full compliance with any requirements of the substance abuse treatment program and job skills assessment.

The bill also requires DWD to promulgate rules to identify occupations for which drug testing is regularly conducted in this state and to apply the above provisions for claimants for whom suitable work is only available in one of the occupations identified by DWD.

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 or that an individual declined to submit to such a test. If the results of the test indicate that the individual has tested positive for one or more controlled substances without a valid prescription, or if the individual declined to submit to such a test, the bill provides that there is a presumption, rebuttable as provided in rules promulgated by DWD, that the claimant has failed to accept suitable work when offered. If the presumption is not rebutted, the claimant is ineligible for UI benefits as if the claimant had tested positive in or declined to submit to 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) (ak) of the statutes is created to read:  
2           20.445 (1) (ak) *Unemployment insurance administration; substance abuse*  
3           *treatment.* Biennially, the amounts in the schedule to provide substance abuse  
4           treatment to claimants for unemployment insurance under s. 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.

5           **SECTION 2.** 20.445 (1) (aL) of the statutes is created to read:

1           20.445. (1) (aL) *Unemployment insurance administration; controlled*  
2 *substances testing.* Biennially, the amounts in the schedule to conduct testing for  
3 controlled substances and for related expenses under s. 108.133, other than  
4 providing substance abuse treatment under s. 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.

5           **SECTION 3.** 108.04 (8) (a) of the statutes is amended to read:

6           108.04 (8) (a) ~~If~~ Except as provided in par. (b), if an employee fails, without good  
7 cause, to accept suitable work when offered, the employee is ineligible to receive  
8 benefits until the employee earns wages after the week in which the failure occurs  
9 equal to at least 6 times the employee's weekly benefit rate under s. 108.05 (1) in  
10 employment or other work covered by the unemployment insurance law of any state  
11 or the federal government. For purposes of requalification, the employee's weekly  
12 benefit rate shall be that rate which would have been paid had the failure not  
13 occurred. This paragraph does not preclude an employee from establishing a benefit  
14 year during a period in which the employee is ineligible to receive benefits under this  
15 paragraph if the employee qualifies to establish a benefit year under s. 108.06 (2) (a).  
16 The department shall charge to the fund's balancing account any benefits otherwise  
17 chargeable to the account of an employer that is subject to the contribution  
18 requirements under ss. 108.17 and 108.18 whenever an employee of that employer  
19 fails, without good cause, to accept suitable work offered by that employer.

20           **SECTION 4.** 108.04 (8) (b) of the statutes is created to read:

21           108.04 (8) (b) There is a rebuttable presumption that an employee has failed,  
22 without good cause, to accept suitable work when offered if the employee declines to  
23 submit to a test for the presence of controlled substances in a test conducted on the

1 employee as preemployment screening or the employee tests positive for one or more  
2 controlled substances in such a test without evidence of a valid prescription, as  
3 evidenced by a report submitted to the department by an employing unit in  
4 accordance with s. 108.133 (4). <sup>If the employee declines</sup> In the case of an employee's declining to submit to  
5 such a test, the employee shall be ineligible for benefits as if the employee had  
6 declined to submit to a test under s. 108.133 (3) (a), beginning with the week in which  
7 the department receives the report. <sup>If the employee tests</sup> In the case of an employee's testing positive in  
8 such a test, <sup>without evidence of a valid prescription</sup> the employee shall be ineligible for benefits as if the employee had tested  
9 positive under s. 108.133 (3) (c), beginning with the week in which the department  
10 receives the report, except as provided under s. 108.133 (3) (d). The department shall  
11 promulgate rules specifying how a claimant may overcome the presumption in this  
12 paragraph. The department shall charge to the fund's balancing account any  
13 benefits otherwise chargeable to the account of an employer that is subject to the  
14 contribution requirements under ss. 108.17 and 108.18 whenever an employee of  
15 that employer fails, without good cause, to accept suitable work offered by that  
16 employer.

17 **SECTION 5.** 108.133 of the statutes is created to read:

18 **108.133 Testing for controlled substances.** (1) **DEFINITIONS.** In this  
19 section:

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

22 (b) "Job skills assessment" means an assessment conducted by the department  
23 under sub. (2) (d).

1 (c) "Occupation that regularly conducts drug testing" means an occupation  
2 identified in the regulations issued by the federal secretary of labor under 42 USC  
3 503 (1) (1) (A) (ii).

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

6 (e) "Substance abuse treatment program" means the program provided by the  
7 department under sub. (2) (c).

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

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

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

17 1. Identify occupations for which drug testing is regularly conducted in this  
18 state.

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

22 3. Identify the parameters for a substance abuse treatment program for  
23 claimants who misuse controlled substances and specify criteria that a claimant  
24 must satisfy in order to be considered in full compliance with requirements of the  
25 substance abuse treatment program.

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

3           5. Identify the parameters for a job skills assessment for claimants who misuse  
4 controlled substances and specify criteria that a claimant must satisfy in order to be  
5 considered in full compliance with the requirements of the job skills assessment.

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

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

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

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

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

19          5. If a screening conducted as required under subd. 3. or 4. indicates that the  
20 claimant should be required to submit to a test for the presence of controlled  
21 substances, <sup>e require</sup> request that the claimant submit to such a test.

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

24          (d) Create and conduct job skills assessments in accordance with the rules  
25 promulgated under par. (a) 5.

1 (3) DRUG TESTING. (a) If a claimant is <sup>is required</sup> requested under sub. (2) (b) 5. to submit  
2 to a test for the presence of controlled substances and the claimant declines to submit  
3 to such a test, the claimant is ineligible for benefits under this chapter until the  
4 claimant qualifies for benefits in a subsequent benefit year.

5 (b) If a claimant who is <sup>is required</sup> requested under sub. (2) (b) 5. to submit to a test for the  
6 presence of controlled substances submits to the test and does not test positive for  
7 any controlled substance or the claimant presents evidence satisfactory to the  
8 department that the claimant possesses a valid prescription for each controlled  
9 substance for which the claimant tests positive, the claimant may receive benefits  
10 under this chapter if otherwise eligible and may not be required to submit to any  
11 further test for the presence of controlled substances until a subsequent benefit year.

12 (c) If a claimant who is <sup>is required</sup> requested under sub. (2) (b) 5. to submit to a test for the  
13 presence of controlled substances <sup>(submits to the test and</sup> tests positive for one or more controlled substances  
14 without presenting evidence satisfactory to the department that the claimant  
15 possesses a valid prescription for each controlled substance for which the claimant  
16 tested positive, the claimant is ineligible for benefits under this chapter until 52  
17 weeks after the date of the test or until the claimant qualifies for benefits in a  
18 subsequent benefit year, whichever occurs later, except as provided in par. (d).

19 (d) A claimant who tests positive for one or more controlled substances without  
20 presenting evidence of a valid prescription as described in par. (c) may maintain his  
21 or her eligibility for benefits under this chapter by enrolling in the substance abuse  
22 treatment program and undergoing a job skills assessment. Such a claimant  
23 remains eligible for benefits under this chapter, if otherwise eligible, for each week  
24 the claimant is in full compliance with any requirements of the substance abuse



1 treatment program and job skills assessment, as determined by the department in  
2 accordance with the rules promulgated under sub. (2) (a) 3. and 5.

3 (4) PREEMPLOYMENT DRUG TESTING. (a) An employing unit may, in accordance  
4 with the rules promulgated by the department under par. (b), voluntarily submit to  
5 the department the results of a test for the presence of controlled substances that was  
6 conducted on an individual as preemployment screening or notify the department  
7 that an individual declined to submit to such a test as a condition of employment,  
8 along with information necessary to identify the individual. Upon receipt of any such  
9 results of a test conducted and certified in a manner approved by the department or  
10 notification that an individual declined to submit to such a test, the department shall  
11 determine whether the individual is a claimant receiving benefits. If the individual  
12 is a claimant receiving benefits, the department shall, in accordance with rules  
13 promulgated by the department under par. (b), use that information for purposes of  
14 determining eligibility for benefits under s. 108.04 (8) (b).

15 (b) The department shall promulgate rules necessary to implement par. (a).

16 (5) APPLICATION OF THIS SECTION. (a) Notwithstanding subs. (2) (b) to (d) and  
17 (3), subs. (2) (b) to (d) and (3) do not apply until the rules required under sub. (2) (a)  
18 take effect, except that the department may request approval of the joint committee  
19 on finance to delay implementation of subs. (2) (b) to (d) and (3) by submitting a  
20 request to the cochairpersons of the committee. If the cochairpersons notify the

21 department and the legislative reference bureau that the committee has approved  
22 a delay in implementation of subs. (2) (b) to (d) and (3) until a date specified by the  
23 committee, the department may delay implementation of subs. (2) (b) to (d) and (3)  
24 until the date specified by the committee. The department shall submit to the

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8-20

1 legislative reference bureau for publication in the Wisconsin administrative register  
2 a notice identifying the date on which subs. (2) (b) to (d) and (3) will be implemented.

3 (b) Notwithstanding sub. (4) (a) and s. 108.04 (8) (b), sub. (4) (a) and s. 108.04  
4 (8) (b) do not apply until the rules required under sub. (4) (b) take effect, except that  
5 the department may request approval of the joint committee on finance to delay  
6 implementation of sub. (4) (a) and s. 108.04 (8) (b) by submitting a request to the

7 cochairpersons of the committee. If the cochairpersons notify the department and  
8 the legislative reference bureau that the committee has approved a delay in  
9 implementation of sub. (4) (a) and s. 108.04 (8) (b) until a date specified by the  
10 committee, the department may delay implementation of sub. (4) (a) and s. 108.04  
11 (8) (b) until the date specified by the committee. The department shall submit to the

ins  
9-7

12 legislative reference bureau for publication in the Wisconsin administrative register  
13 a notice identifying the date on which sub. (4) (a) and s. 108.04 (8) (b) will be  
14 implemented.

ins 9-15

15 (c) The department may modify or suspend any provision of this section as  
16 provided in and in accordance with s. 108.14 (13).

17 SECTION 6. 108.14 (8n) (e) of the statutes is amended to read:

18 108.14 (8n) (e) The department shall charge this state's share of any benefits  
19 paid under this subsection to the account of each employer by which the employee  
20 claiming benefits was employed in the applicable base period, in proportion to the  
21 total amount of wages he or she earned from each employer in the base period, except  
22 that if s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b) or  
23 108.07 (3), (3r), or (5) (b) would have applied to employment by such an employer who  
24 is subject to the contribution requirements of ss. 108.17 and 108.18, the department  
25 shall charge the share of benefits based on employment with that employer to the

1 fund's balancing account, or, if s. 108.04 (1) (f) or (5) or 108.07 (3) would have applied  
2 to an employer that is not subject to the contribution requirements of ss. 108.17 and  
3 108.18, the department shall charge the share of benefits based on that employment  
4 in accordance with s. 108.07 (5) (a) and (b). The department shall also charge the  
5 fund's balancing account with any other state's share of such benefits pending  
6 reimbursement by that state.

7 **SECTION 7.** 108.141 (7) (a) of the statutes is amended to read:

8 108.141 (7) (a) The department shall charge the state's share of each week of  
9 extended benefits to each employer's account in proportion to the employer's share  
10 of the total wages of the employee receiving the benefits in the employee's base  
11 period, except that if the employer is subject to the contribution requirements of ss.  
12 108.17 and 108.18 the department shall charge the share of extended benefits to  
13 which s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b) or  
14 108.07 (3), (3r), or (5) (b) applies to the fund's balancing account.

15 **SECTION 8.** 108.16 (6m) (a) of the statutes is amended to read:

16 108.16 (6m) (a) The benefits thus chargeable under s. 108.04 (1) (f), (5), (5g),  
17 (7) (h), (8) (a) or (b), (13) (c) or (d) or (16) (e), 108.07 (3), (3r), (5) (b), (5m), or (6), 108.14  
18 (8n) (e), 108.141, 108.151, or 108.152 or sub. (6) (e) or (7) (a) and (b).

19 **SECTION 9151. Nonstatutory provisions; Workforce Development.**

20 (1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The department of workforce  
21 development shall present the statements of scope of the rules required under  
22 sections 108.04 (8) (b) and 108.133 (2) (a) and (4) (b) of the statutes, as created by this  
23 act, to the governor for approval under section 227.135 (2) of the statutes no later  
24 than the 180th day after the effective date of this subsection.


25

(END)


2015-2016 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-1431/P3ins  
MED:.....


INSERT 8-20

1  If the cochairpersons of the committee do not notify the department within 14  
2 working days after the date of the request that the committee has scheduled a  
3 meeting for the purpose of reviewing the delay as proposed by the department, the  
4 department may effect the delay as proposed by the department. If, within 14  
5 working days after the date of the request, the cochairpersons of the committee notify  
6 the department that the committee has scheduled a meeting for the purpose of  
7 reviewing the proposed delay, the department may effect the delay only upon  
8 approval of the committee.

INSERT 9-7

9  If the cochairpersons of the committee do not notify the department within 14  
10 working days after the date of the request that the committee has scheduled a  
11 meeting for the purpose of reviewing the delay as proposed by the department, the  
12 department may effect the delay as proposed by the department. If, within 14  
13 working days after the date of the request, the cochairpersons of the committee notify  
14 the department that the committee has scheduled a meeting for the purpose of  
15 reviewing the proposed delay, the department may effect the delay only upon  
16 approval of the committee.

INSERT 9-15

17  The secretary may waive compliance with any provision under this section if  
18 the secretary determines that waiver of the provision is necessary to permit  
19 continued certification of this chapter for grants to this state under Title III of the  
20 federal Social Security Act or for maximum credit allowances to employers under the  
21 federal Employment Tax Act.

*and s. 108.04(8)(b)*

**Duchek, Michael**

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**From:** Knutson, Janell - DWD <Janell.Knutson@dwd.wisconsin.gov>  
**Sent:** Saturday, January 24, 2015 8:02 PM  
**To:** Dernbach, BJ - DWD; Duchek, Michael  
**Cc:** Sussman, Scott - DWD; Kirschbaum, Bryan W - DOA; Bernstein, Howard I - DWD  
**Subject:** Fwd: Follow-up to conversation of Wis. Stat. § 108.133(5) (Privileged and Confidential Attorney Client Communication)

Sorry for the delay. Please see Scott's summary below. I have the following additional comments:  
Under 2, I would say that if we can put the 7 day requirement in the rules, that would be preferable.

Also the benchmarks would be report to JFC or whatever would be appropriate but make it vague as to what needs to be accomplished by a certain date in case we run into problems.

For the last bullet point, the placeholder for GPR would be for general program administration for the drug testing provision (computer programming, staff training, etc.).

Also, we talked about instead of specific language regarding a second and third test, that would be included in the rules to provide flexibility to accommodate federal requirements.

There is the issue of how to deal with claimants who are receiving benefits while participating in approved training, and apply for a job but fail the pre-employment drug screening.

Finally, do we need language that would deal with the situation where the claimant is in a substance abuse program but regular benefits end before the program is over?

thanks!  
Janell

Sent from my iPad  
Begin forwarded message:

**From:** "Sussman, Scott - DWD" <Scott.Sussman@dwd.wisconsin.gov>  
**Date:** January 23, 2015 at 4:19:04 PM CST  
**To:** "Knutson, Janell - DWD" <Janell.Knutson@dwd.wisconsin.gov>  
**Subject:** Follow-up to conversation of Wis. Stat. § 108.133(5) (Privileged and Confidential Attorney Client Communication)

Janell – Below is a brief summary of the conference call just held pertaining to Wis. Stat. § 108.133(5) created by LRB-0958/P2:

- The statute should authorize the Department to promulgate admin. rules to create a form for employers who wish to voluntarily provide the Department the pre-employment drug test results. There are concerns that these employers may be exposing themselves to lawsuits under the Americans with Disability Act. By the Department creating the form, the Department may make employers aware of these concerns.
- The statute should provide that the employer only has seven days from when the employer receives the results of the drug test to provide these results to the Department on the aforementioned form.

- Eliminate that a claimant will be afforded the opportunity to retest the specimen that was used for his or her pre-employment drug test.
- Instead, provide that if an employer provides the drug test it creates a rebuttable presumption that the claimant is not available for suitable work and provide that the Department shall promulgate admin. rules that will enable the claimant to overcome this rebuttable presumption.
- Also amend Wis. Stat. § 108.04(8) (SUITABLE WORK) to provide a new subparagraph that would create a requalification of 52 weeks for a claimant who fails a pre-employment drug screening test.
- Provide that what constitutes successful completion of the substance abuse program shall be determined by administrative rule.
- Provide that a claimant who fails a pre-employment drug test must undergo a job skills assessment and what constitute successful completion of the assessment shall be determined by admin. rules. This will enable the Department to promulgate special rules for claimants who are in approved training programs.
- Provide that the effective date shall be when the Department has the technological capability to implement this program.
- Provide within the statute that there shall be bench marks for when the Department must complete the admin. rules.
- Include within the statute a marker for the Department to be provided GPR

Scott Sussman  
 Attorney, Bureau of Legal Affairs  
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 State of Wisconsin Department of Workforce Development  
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**Thank you very much.**

## Duchek, Michael

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**From:** Knutson, Janell - DWD <Janell.Knutson@dwd.wisconsin.gov>  
**Sent:** Monday, January 26, 2015 2:57 PM  
**To:** Duchek, Michael; Kirschbaum, Bryan W - DOA; Hynek, Sara - DOA  
**Cc:** Dernbach, BJ - DWD; Bernstein, Howard I - DWD  
**Subject:** RE: Draft review: LRB -1431/P2 Topic: Drug Testing for UI CONFIDENTIAL ATTORNEY WORK PRODUCT

**Importance:** High  
**Sensitivity:** Confidential

Hi Mike,

We have some suggested changes:

- In some sections it refers to the department "request" that the employee submit to a drug test. We would like that changed to "require".
- P. 4, lines 4 and 7, we suggest the language be changed to "if an employee declines to submit...  
If an employee tests positive
- P.8-9 starting at line 16, we would request that this be a passive review process by JFC for both (a) and (b)
- P 9 lines 15 and 16. We would request that (c) be rewritten. The current cross reference requires UIAC approval. We would like it patterned after 108.062(19) (minus the specific work share federal funding language). We also want to make sure that we have the technological ability to implement the program before it becomes effective. Finally, we would like protective language similar to that contained in state contracts that provides if sufficient funds are not appropriated, the program may be suspended.
- Just a point of clarification. Under current law, for claimants participating in approved training programs, the provisions of refusing suitable work do not apply to them. This is pursuant to federal law. So, the pre-employment drug screening disqualification will not apply to those claimants participating in approved training.

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**Sent:** Monday, January 26, 2015 10:20 AM  
**To:** Kirschbaum, Bryan W - DOA; Hynek, Sara - DOA  
**Cc:** Knutson, Janell - DWD; Dernbach, BJ - DWD; Bernstein, Howard I - DWD  
**Subject:** FW: Draft review: LRB -1431/P2 Topic: Drug Testing for UI

This (attached) is an alternate version of the drug testing draft that seeks to accomplish what DWD has requested, including the following:

- 1.) Instead of having the detailed re-testing and disqualification provisions, the draft instead provides that the claimant who fails an initial drug test is ineligible for 52 weeks or until a subsequent benefit year (claim for benefits) but may remain eligible for benefits for *each week the claimant is in compliance with the substance abuse program and job skills assessment* as determined by DWD. DWD could specify what it means to be in full compliance with the program and account for the fact that certain claimants may go off UI before they complete the program and could account for other factors such as claimants on approved training under federal law. I think they could also with this language specify that being in full compliance means having completed the program at some point.
- 2.) Providing that the preemployment screening drug tests would = a presumed failure to accept suitable work when offered, as DWD believes wording it this way makes the provision more likely to pass muster under federal law. The results of failing or refusing a drug test conducted by a potential employer would still be the same as a state-administered drug test. It also requires that the results be submitted in compliance with DWD rules and provides that a claimant can rebut the presumption in accordance with DWD rules, to address some of DWD's other concerns.
- 3.) Providing that the provisions don't take effect until DWD's rules take effect, but requiring DWD to submit its rules scope statements *within 6 months* (could be changed) and allowing for any further delays of these provisions, but only with joint finance approval.

If the decision is to go this route instead, I wanted to have a draft ready though we still do have time to make a few tweaks if needed I think either way.

**Mike Duchek**  
**Legislative Attorney**  
**Wisconsin Legislative Reference Bureau**  
**(608) 266-0130**



**Duchek, Michael**

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**From:** Knutson, Janell - DWD <Janell.Knutson@dwd.wisconsin.gov>  
**Sent:** Tuesday, January 27, 2015 10:38 AM  
**To:** Duchek, Michael  
**Cc:** Bernstein, Howard I - DWD; Dernbach, BJ - DWD; Kirschbaum, Bryan W - DOA  
**Subject:** correction

**Importance:** High  
**Sensitivity:** Confidential

Hi Mike,

We found an error on page 9 line 25 of the most recent draft. It should read: "federal Unemployment Tax Act" rather than "federal Employment Tax Act". That is an error that carried over from 108.062(19).

If we could get that corrected that would be great.

We are looking over everything one more time and will let you know if we see any other typos, etc.

Thank you!

Janell

P.S. I also left you a VM message.

**Duchek, Michael**

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**From:** Kirschbaum, Bryan W - DOA <Bryan.Kirschbaum@wisconsin.gov>  
**Sent:** Tuesday, January 27, 2015 11:48 AM  
**To:** Duchek, Michael  
**Subject:** FW: Drug Testing--DWD Comments- DRAFT / Attorney Work Product

Here is what Katie sent to me with the rest of DWD's suggestions...didn't know if this was included with my earlier email. Red is my recommendation, blue is Katie's.

***Bryan W. Kirschbaum***

Executive Policy and Budget Analyst  
Division of Executive Budget & Finance—Education & Workforce Development Team  
Department of Administration | State of Wisconsin  
**Office:** 608-266-8219  
**E-mail:** [bryan.kirschbaum@wisconsin.gov](mailto:bryan.kirschbaum@wisconsin.gov)

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**From:** Kirschbaum, Bryan W - DOA  
**Sent:** Monday, January 26, 2015 4:38 PM  
**To:** Ignatowski, Katie E - GOV  
**Cc:** Hynek, Sara - DOA  
**Subject:** Drug Testing--DWD Comments

Katie,

Here are the main points that DWD brought up in regards to the drafts. Our recommendations/suggestions are in red. If you have any questions, please let me know.

- The statute should authorize the Department to promulgate admin. rules to create a form for employers who wish to voluntarily provide the Department the pre-employment drug test results. There are concerns that these employers may be exposing themselves to lawsuits under the Americans with Disability Act. By the Department creating the form, the Department may make employers aware of these concerns. The statute should provide that the employer only has seven days from when the employer receives the results of the drug test to provide these results to the Department on the aforementioned form.
  - *Recommend, but should restrict the ability for department to use test results from employers within the 7-day window*

Okay.

- Eliminate that a claimant will be afforded the opportunity to retest the specimen that was used for his or her pre-employment drug test. Instead, provide that if an employer provides the drug test it creates a rebuttable presumption that the claimant is not available for suitable work and provide that the Department shall promulgate admin. rules that will enable the claimant to overcome this rebuttable presumption.
  - *Recommend, allows for greater flexibility for issues where a claimant may contest an employer's drug screen results*

Okay.

- Also amend Wis. Stat. § 108.04(8) (SUITABLE WORK) to provide a new subparagraph that would create a requalification of 52 weeks for a claimant who fails a pre-employment drug screening test.
  - *Recommend*

Okay, but only for those that fail a pre-employment drug test and don't overcome the rebuttable presumption, right?

- Provide that what constitutes successful completion of the substance abuse program shall be determined by administrative rule.
  - *Recommend*

Okay.

- Provide that a claimant who fails a pre-employment drug test must undergo a job skills assessment and what constitute successful completion of the assessment shall be determined by admin. rules. This will enable the Department to promulgate special rules for claimants who are in approved training programs.
  - *Recommend*

Aren't we in the current version already requiring the job skills assessment and treatment program for this category of people by subjecting them to the process laid out in (3)(d)?

- Provide that the effective date shall be when the Department has the technological capability to implement this program. Provide within the statute that there shall be bench marks for when the Department must complete the admin. rules, submit report to JCF through passive review
  - *Recommend: the department suggested two-years to complete admin. Rules and technology capability. Is this something we should set specifically in statute? How frequent should the reports be?*

I'll have to vet this one internally tomorrow.

- Include within the statute a marker for the Department to be provided GPR. The placeholder for GPR would be for general program administration for the drug testing provision (computer programming, staff training, etc.).
  - *Already created appropriations for testing and treatment. It is unknown as to how much will be appropriated beyond the \$500K for treatment, recommend withholding*

Okay.

- Instead of specific language regarding a second and third test, that would be included in the rules to provide flexibility to accommodate federal requirements
  - *Recommend*

Okay.

- Need language that would deal with the situation where the claimant is in a substance abuse program but regular benefits end before the program is over?
  - *Would be a less common occurrence, but leave up to the department as to how to proceed in admin rules*

Okay.

***Bryan W. Kirschbaum***

Executive Policy and Budget Analyst

Division of Executive Budget & Finance—Education & Workforce Development Team

Department of Administration | State of Wisconsin

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STATE OF WISCONSIN - LEGISLATIVE REFERENCE BUREAU

LRB

Research (608-266-0341)

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Legal (608-266-3561)

LRB

1/27/15

- DWD - make refusal same disqualifier as fail (52 weeks or subsequent benefit year)

- Gov - Elim JFC passive review, DWD can delay through rules language



~~6/15/15~~ TODAY

State of Wisconsin  
2015 - 2016 LEGISLATURE

LRB-1431/13  
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P4

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

SA

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

27

*Analysis by the Legislative Reference Bureau*

**EMPLOYMENT**

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 15, 2015, final federal regulations have not been issued.

This bill requires DWD to establish a program to require claimants who apply for regular UI benefits to submit to drug tests. 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 require the claimant to 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 a subsequent claim for benefits; if the claimant submits to the drug test, but does not test positive for any controlled

for 52 weeks or

whichever is later

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 for 52 weeks or until a subsequent claim for benefits, whichever is later, except that following the positive test, the claimant may maintain his or her eligibility for UI benefits by enrolling in a state-sponsored substance abuse treatment program and undergoing a state-sponsored job skills assessment. The claimant remains eligible for benefits for each week the claimant is in full compliance with any requirements of the substance abuse treatment program and job skills assessment.

The bill also requires DWD to promulgate rules to identify occupations for which drug testing is regularly conducted in this state and to apply the above provisions for claimants for whom suitable work is only available in one of the occupations identified by DWD.

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 or that an individual declined to submit to such a test. If the results of the test indicate that the individual has tested positive for one or more controlled substances without a valid prescription, or if the individual declined to submit to such a test, the bill provides that there is a presumption, rebuttable as provided in rules promulgated by DWD, that the claimant has failed to accept suitable work when offered. If the presumption is not rebutted, the claimant is ineligible for UI benefits as if the claimant had tested positive in or declined to submit to 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) (ak) of the statutes is created to read:  
 2           20.445 (1) (ak) *Unemployment insurance administration; substance abuse*  
 3 *treatment.* Biennially, the amounts in the schedule to provide substance abuse  
 4 treatment to claimants for unemployment insurance under s. 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.

5           **SECTION 2.** 20.445 (1) (aL) of the statutes is created to read:

1           20.445 (1) (aL) *Unemployment insurance administration; controlled*  
2 *substances testing.* Biennially, the amounts in the schedule to conduct testing for  
3 controlled substances and for related expenses under s. 108.133, other than  
4 providing substance abuse treatment under s. 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.

5           **SECTION 3.** 108.04 (8) (a) of the statutes is amended to read:

6           108.04 (8) (a) ~~If Except as provided in par. (b),~~ if an employee fails, without good  
7 cause, to accept suitable work when offered, the employee is ineligible to receive  
8 benefits until the employee earns wages after the week in which the failure occurs  
9 equal to at least 6 times the employee's weekly benefit rate under s. 108.05 (1) in  
10 employment or other work covered by the unemployment insurance law of any state  
11 or the federal government. For purposes of requalification, the employee's weekly  
12 benefit rate shall be that rate which would have been paid had the failure not  
13 occurred. This paragraph does not preclude an employee from establishing a benefit  
14 year during a period in which the employee is ineligible to receive benefits under this  
15 paragraph if the employee qualifies to establish a benefit year under s. 108.06 (2) (a).  
16 The department shall charge to the fund's balancing account any benefits otherwise  
17 chargeable to the account of an employer that is subject to the contribution  
18 requirements under ss. 108.17 and 108.18 whenever an employee of that employer  
19 fails, without good cause, to accept suitable work offered by that employer.

20           **SECTION 4.** 108.04 (8) (b) of the statutes is created to read:

21           108.04 (8) (b) There is a rebuttable presumption that an employee has failed,  
22 without good cause, to accept suitable work when offered if the employee declines to  
23 submit to a test for the presence of controlled substances in a test conducted on the

1 employee as preemployment screening or the employee tests positive for one or more  
2 controlled substances in such a test without evidence of a valid prescription, as  
3 evidenced by a report submitted to the department by an employing unit in  
4 accordance with s. 108.133 (4). If the employee declines to submit to such a test, the  
5 employee shall be ineligible for benefits as if the employee had declined to submit to  
6 a test under s. 108.133 (3) (a), beginning with the week in which the department  
7 receives the report. If the employee tests positive in such a test without evidence of  
8 a valid prescription, the employee shall be ineligible for benefits as if the employee  
9 had tested positive under s. 108.133 (3) (c), beginning with the week in which the  
10 department receives the report, except as provided under s. 108.133 (3) (d). The  
11 department shall promulgate rules specifying how a claimant may overcome the  
12 presumption in this paragraph. The department shall charge to the fund's balancing  
13 account any benefits otherwise chargeable to the account of an employer that is  
14 subject to the contribution requirements under ss. 108.17 and 108.18 whenever an  
15 employee of that employer fails, without good cause, to accept suitable work offered  
16 by that employer.

17 **SECTION 5.** 108.133 of the statutes is created to read:

18 **108.133 Testing for controlled substances. (1) DEFINITIONS.** In this  
19 section:

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

22 (b) "Job skills assessment" means an assessment conducted by the department  
23 under sub. (2) (d).



1 (c) "Occupation that regularly conducts drug testing" means an occupation  
2 identified in the regulations issued by the federal secretary of labor under 42 USC  
3 503 (l) (1) (A) (ii).

4 (d) "Screening" means the screening process created by the department under  
5 sub. (2) (a) <sup>e3.</sup> (4.)

6 (e) "Substance abuse treatment program" means the program provided by the  
7 department under sub. (2) (c).

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

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

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

17 ~~1) Identify~~ occupations for which drug testing is regularly conducted in this  
18 state. *Move to p. 6*

19 <sup>e1.</sup> 2) Establish a process to test claimants for the presence of controlled  
20 substances. In establishing the process, the department shall adhere to any  
21 applicable federal requirements regarding drug testing.

22 <sup>e2.</sup> 3) Identify the parameters for a substance abuse treatment program for  
23 claimants who misuse controlled substances and specify criteria that a claimant  
24 must satisfy in order to be considered in full compliance with requirements of the  
25 substance abuse treatment program.

material from p. 5

<sup>e 3.</sup>  
④ (am) Promulgate rules identifying n

x  
x

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

3       ⑤. Identify the parameters for a job skills assessment for claimants who misuse  
4 controlled substances and specify criteria that a claimant must satisfy in order to be  
5 considered in full compliance with the requirements of the job skills assessment.

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

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

10           2. Determine whether the claimant is an individual for whom suitable work is  
11 only available in an occupation identified in the rules promulgated under par. (a) 1. <sup>e(am)</sup>

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

15           4. If the claimant is determined by the department under subd. 2. to be an  
16 individual for whom suitable work is only available in an occupation identified in the  
17 rules promulgated under par. (a) 1. <sup>e(am)</sup> conduct a screening on the claimant if a  
18 screening is not already required under subd. 3.

19           5. If a screening conducted as required under subd. 3. or 4. indicates that the  
20 claimant should be required to submit to a test for the presence of controlled  
21 substances, require that the claimant submit to such a test.

22           (c) Create and provide a substance abuse treatment program in accordance  
23 with the rules promulgated under par. (a) 3. <sup>e 2.</sup> ✓

24           (d) Create and conduct job skills assessments in accordance with the rules  
25 promulgated under par. (a) 5. ✓

4.

52 weeks after the date of the ~~test~~ or until declining

1 (3) DRUG TESTING. (a) If a claimant is required under sub. (2) (b) 5. to submit  
2 to a test for the presence of controlled substances and the claimant declines to submit  
3 to such a test, the claimant is ineligible for benefits under this chapter until the  
4 claimant qualifies for benefits in a subsequent benefit year, whichever occurs later

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

12 (c) If a claimant who is required under sub. (2) (b) 5. to submit to a test for the  
13 presence of controlled substances submits to the test and tests positive for one or  
14 more controlled substances without presenting evidence satisfactory to the  
15 department that the claimant possesses a valid prescription for each controlled  
16 substance for which the claimant tested positive, the claimant is ineligible for  
17 benefits under this chapter until 52 weeks after the date of the test or until the  
18 claimant qualifies for benefits in a subsequent benefit year, whichever occurs later,  
19 except as provided in par. (d).

20 (d) A claimant who tests positive for one or more controlled substances without  
21 presenting evidence of a valid prescription as described in par. (c) may maintain his  
22 or her eligibility for benefits under this chapter by enrolling in the substance abuse  
23 treatment program and undergoing a job skills assessment. Such a claimant  
24 remains eligible for benefits under this chapter, if otherwise eligible, for each week  
25 the claimant is in full compliance with any requirements of the substance abuse

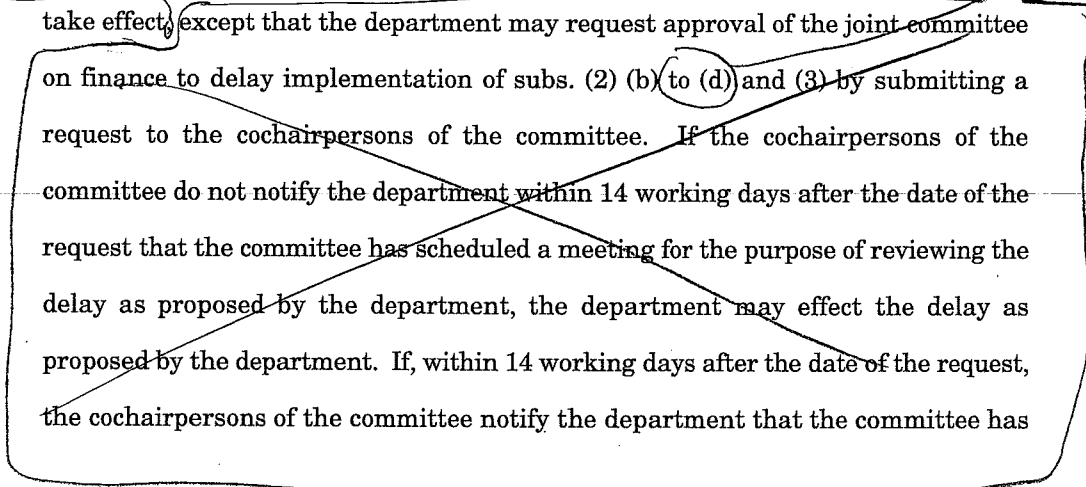
1 treatment program and job skills assessment, as determined by the department in  
2 accordance with the rules promulgated under sub. (2) (a) 3. and 5. e 2. and 4.

3 (4) PREEMPLOYMENT DRUG TESTING. (a) An employing unit may, in accordance  
4 with the rules promulgated by the department under par. (b), voluntarily submit to  
5 the department the results of a test for the presence of controlled substances that was  
6 conducted on an individual as preemployment screening or notify the department  
7 that an individual declined to submit to such a test as a condition of employment,  
8 along with information necessary to identify the individual. Upon receipt of any such  
9 results of a test conducted and certified in a manner approved by the department or  
10 notification that an individual declined to submit to such a test, the department shall  
11 determine whether the individual is a claimant receiving benefits. If the individual  
12 is a claimant receiving benefits, the department shall, in accordance with rules  
13 promulgated by the department under par. (b), use that information for purposes of <sup><use 2x></sup>  
14 determining eligibility for benefits under s. 108.04 (8) (b).

15 (b) The department shall promulgate rules necessary to implement par. (a).

16 (5) APPLICATION OF THIS SECTION (a) Notwithstanding subs. (2) (b) (to (d)) and  
17 (3), subs. (2) (b) (to (d)) and (3) do not apply until the rules required under sub. (2) (a)  
18 take effect, except that the department may request approval of the joint committee  
19 on finance to delay implementation of subs. (2) (b) (to (d)) and (3) by submitting a  
20 request to the cochairpersons of the committee. If the cochairpersons of the  
21 committee do not notify the department within 14 working days after the date of the  
22 request that the committee has scheduled a meeting for the purpose of reviewing the  
23 delay as proposed by the department, the department may effect the delay as  
24 proposed by the department. If, within 14 working days after the date of the request,  
25 the cochairpersons of the committee notify the department that the committee has

1. 3, 5 and 5. 1 (c) and (d)



Ins 9-5

1 scheduled a meeting for the purpose of reviewing the proposed delay, the department  
2 may effect the delay only upon approval of the committee. The department shall  
3 submit to the legislative reference bureau for publication in the Wisconsin  
4 administrative register a notice identifying the date on which subs. (2) (b) (to (d)) and  
5 (3) will be implemented.

1, 2, 3, and 5 (c) and (d)

6 (b) Notwithstanding sub. (4) (a) and s. 108.04 (8) (b), sub. (4) (a) and s. 108.04  
7 (8) (b) do not apply until the rules required under sub. (4) (b) take effect, except that

8 the department may request approval of the joint committee on finance to delay  
9 implementation of sub. (4) (a) and s. 108.04 (8) (b) by submitting a request to the  
10 cochairpersons of the committee. If the cochairpersons of the committee do not notify  
11 the department within 14 working days after the date of the request that the  
12 committee has scheduled a meeting for the purpose of reviewing the delay as  
13 proposed by the department, the department may effect the delay as proposed by the  
14 department. If, within 14 working days after the date of the request, the  
15 cochairpersons of the committee notify the department that the committee has  
16 scheduled a meeting for the purpose of reviewing the proposed delay, the department  
17 may effect the delay only upon approval of the committee. The department shall

18 submit to the legislative reference bureau for publication in the Wisconsin  
19 administrative register a notice identifying the date on which sub. (4) (a) and s.  
20 108.04 (8) (b) will be implemented.

21 (c) The secretary may waive compliance with any provision under this section  
22 and s. 108.04 (8) (b) if the secretary determines that waiver of the provision is  
23 necessary to permit continued certification of this chapter for grants to this state  
24 under Title III of the federal Social Security Act or for maximum credit allowances  
25 to employers under the federal Employment Tax Act.

Unemployment

1           **SECTION 6.** 108.14 (8n) (e) of the statutes is amended to read:

2           108.14 (8n) (e) The department shall charge this state's share of any benefits  
3 paid under this subsection to the account of each employer by which the employee  
4 claiming benefits was employed in the applicable base period, in proportion to the  
5 total amount of wages he or she earned from each employer in the base period, except  
6 that if s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b) or  
7 108.07 (3), (3r), or (5) (b) would have applied to employment by such an employer who  
8 is subject to the contribution requirements of ss. 108.17 and 108.18, the department  
9 shall charge the share of benefits based on employment with that employer to the  
10 fund's balancing account, or, if s. 108.04 (1) (f) or (5) or 108.07 (3) would have applied  
11 to an employer that is not subject to the contribution requirements of ss. 108.17 and  
12 108.18, the department shall charge the share of benefits based on that employment  
13 in accordance with s. 108.07 (5) (a) and (b). The department shall also charge the  
14 fund's balancing account with any other state's share of such benefits pending  
15 reimbursement by that state.

16           **SECTION 7.** 108.141 (7) (a) of the statutes is amended to read:

17           108.141 (7) (a) The department shall charge the state's share of each week of  
18 extended benefits to each employer's account in proportion to the employer's share  
19 of the total wages of the employee receiving the benefits in the employee's base  
20 period, except that if the employer is subject to the contribution requirements of ss.

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21 108.17 and 108.18 the department shall charge the share of extended benefits to  
22 which s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b) or  
23 108.07 (3), (3r), or (5) (b) applies to the fund's balancing account.

24           **SECTION 8.** 108.16 (6m) (a) of the statutes is amended to read:

1           108.16 (6m) (a) The benefits thus chargeable under s. 108.04 (1) (f), (5), (5g),  
2           (7) (h), (8) (a) or (b), (13) (c) or (d) or (16) (e), 108.07 (3), (3r), (5) (b), (5m), or (6), 108.14  
3           (8n) (e), 108.141, 108.151, or 108.152 or sub. (6) (e) or (7) (a) and (b).

4           **SECTION 9151. Nonstatutory provisions; Workforce Development.**

5           (1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The department of workforce  
6           development shall present the statements of scope of the rules required under  
7           sections 108.04 (8) (b) and 108.133 (2) (a) and (4) (b) of the statutes, as created by this  
8           act, to the governor for approval under section 227.135 (2) of the statutes no later  
9           than the 180th day after the effective date of this subsection.

10

(END)

and (am)

2015-2016 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-1431/P4ins  
MED:.....

⑨(b)

INSERT 9-5

1 ~~Notwithstanding~~ sub. (2) (b) 2. and 4., sub. (2) (b) 2. and 4. do not apply until  
2 the rules required under sub. (2) (am) take effect. The department shall submit to  
3 the legislative reference bureau for publication in the Wisconsin administrative  
4 register a notice identifying the date on which (2) (b) 2. and 4. will be implemented.

Sub.





State of Wisconsin  
2015 - 2016 LEGISLATURE

LRB-1431/P4  
MED:cjs:rs

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

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

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*Analysis by the Legislative Reference Bureau*

**EMPLOYMENT**

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 27, 2015, final federal regulations have not been issued.

This bill requires DWD to establish a program to require claimants who apply for regular UI benefits to submit to drug tests. 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 require the claimant to 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 for 52 weeks or until a subsequent claim for benefits, whichever is later; 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 for 52 weeks or until a subsequent claim for benefits, whichever is later, except that following the positive test, the claimant may maintain his or her eligibility for UI benefits by enrolling in a state-sponsored substance abuse treatment program and undergoing a state-sponsored job skills assessment. The claimant remains eligible for benefits for each week the claimant is in full compliance with any requirements of the substance abuse treatment program and job skills assessment.

The bill also requires DWD to promulgate rules to identify occupations for which drug testing is regularly conducted in this state and to apply the above provisions for claimants for whom suitable work is only available in one of the occupations identified by DWD.

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 or that an individual declined to submit to such a test. If the results of the test indicate that the individual has tested positive for one or more controlled substances without a valid prescription, or if the individual declined to submit to such a test, the bill provides that there is a presumption, rebuttable as provided in rules promulgated by DWD, that the claimant has failed to accept suitable work when offered. If the presumption is not rebutted, the claimant is ineligible for UI benefits as if the claimant had tested positive in or declined to submit to 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.

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

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.* Biennially, the amounts in the schedule to provide substance abuse  
4           treatment to claimants for unemployment insurance under s. 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.

5           **SECTION 2.** 20.445 (1) (aL) of the statutes is created to read:

1           20.445 (1) (aL) *Unemployment insurance administration; controlled*  
2 *substances testing.* Biennially, the amounts in the schedule to conduct testing for  
3 controlled substances and for related expenses under s. 108.133, other than  
4 providing substance abuse treatment under s. 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.

5           **SECTION 3.** 108.04 (8) (a) of the statutes is amended to read:

6           108.04 (8) (a) ~~If Except as provided in par. (b),~~ if an employee fails, without good  
7 cause, to accept suitable work when offered, the employee is ineligible to receive  
8 benefits until the employee earns wages after the week in which the failure occurs  
9 equal to at least 6 times the employee's weekly benefit rate under s. 108.05 (1) in  
10 employment or other work covered by the unemployment insurance law of any state  
11 or the federal government. For purposes of requalification, the employee's weekly  
12 benefit rate shall be that rate which would have been paid had the failure not  
13 occurred. This paragraph does not preclude an employee from establishing a benefit  
14 year during a period in which the employee is ineligible to receive benefits under this  
15 paragraph if the employee qualifies to establish a benefit year under s. 108.06 (2) (a).  
16 The department shall charge to the fund's balancing account any benefits otherwise  
17 chargeable to the account of an employer that is subject to the contribution  
18 requirements under ss. 108.17 and 108.18 whenever an employee of that employer  
19 fails, without good cause, to accept suitable work offered by that employer.

20           **SECTION 4.** 108.04 (8) (b) of the statutes is created to read:

21           108.04 (8) (b) There is a rebuttable presumption that an employee has failed,  
22 without good cause, to accept suitable work when offered if the employee declines to  
23 submit to a test for the presence of controlled substances in a test conducted on the

1 employee as preemployment screening or the employee tests positive for one or more  
2 controlled substances in such a test without evidence of a valid prescription, as  
3 evidenced by a report submitted to the department by an employing unit in  
4 accordance with s. 108.133 (4). If the employee declines to submit to such a test, the  
5 employee shall be ineligible for benefits as if the employee had declined to submit to  
6 a test under s. 108.133 (3) (a), beginning with the week in which the department  
7 receives the report. If the employee tests positive in such a test without evidence of  
8 a valid prescription, the employee shall be ineligible for benefits as if the employee  
9 had tested positive under s. 108.133 (3) (c), beginning with the week in which the  
10 department receives the report, except as provided under s. 108.133 (3) (d). The  
11 department shall promulgate rules specifying how a claimant may overcome the  
12 presumption in this paragraph. The department shall charge to the fund's balancing  
13 account any benefits otherwise chargeable to the account of an employer that is  
14 subject to the contribution requirements under ss. 108.17 and 108.18 whenever an  
15 employee of that employer fails, without good cause, to accept suitable work offered  
16 by that employer.

17 **SECTION 5.** 108.133 of the statutes is created to read:

18 **108.133 Testing for controlled substances. (1) DEFINITIONS.** In this  
19 section:

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

22 (b) "Job skills assessment" means an assessment conducted by the department  
23 under sub. (2) (d).

1 (c) “Occupation that regularly conducts drug testing” means an occupation  
2 identified in the regulations issued by the federal secretary of labor under 42 USC  
3 503 (l) (1) (A) (ii).

4 (d) “Screening” means the screening process created by the department under  
5 sub. (2) (a) 3.

6 (e) “Substance abuse treatment program” means the program provided by the  
7 department under sub. (2) (c).

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

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

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

17 1. Establish a process to test claimants for the presence of controlled  
18 substances. In establishing the process, the department shall adhere to any  
19 applicable federal requirements regarding drug testing.

20 2. Identify the parameters for a substance abuse treatment program for  
21 claimants who misuse controlled substances and specify criteria that a claimant  
22 must satisfy in order to be considered in full compliance with requirements of the  
23 substance abuse treatment program.

24 3. Create a screening process for determining whether a claimant should be  
25 required to submit to a test for the presence of controlled substances.

1           4. Identify the parameters for a job skills assessment for claimants who misuse  
2 controlled substances and specify criteria that a claimant must satisfy in order to be  
3 considered in full compliance with the requirements of the job skills assessment.

4           (am) Promulgate rules identifying occupations for which drug testing is  
5 regularly conducted in this state.

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

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

10           2. Determine whether the claimant is an individual for whom suitable work is  
11 only available in an occupation identified in the rules promulgated under par. (am).

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

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

19           5. If a screening conducted as required under subd. 3. or 4. indicates that the  
20 claimant should be required to submit to a test for the presence of controlled  
21 substances, require that the claimant submit to such a test.

22           (c) Create and provide a substance abuse treatment program in accordance  
23 with the rules promulgated under par. (a) 2.

24           (d) Create and conduct job skills assessments in accordance with the rules  
25 promulgated under par. (a) 4.

1           (3) DRUG TESTING. (a) If a claimant is required under sub. (2) (b) 5. to submit  
2 to a test for the presence of controlled substances and the claimant declines to submit  
3 to such a test, the claimant is ineligible for benefits under this chapter until 52 weeks  
4 after the date of the declining or until the claimant qualifies for benefits in a  
5 subsequent benefit year, whichever occurs later.

6           (b) If a claimant who is required under sub. (2) (b) 5. to submit to a test for the  
7 presence of controlled substances submits to the test and does not test positive for  
8 any controlled substance or the claimant presents evidence satisfactory to the  
9 department that the claimant possesses a valid prescription for each controlled  
10 substance for which the claimant tests positive, the claimant may receive benefits  
11 under this chapter if otherwise eligible and may not be required to submit to any  
12 further test for the presence of controlled substances until a subsequent benefit year.

13           (c) If a claimant who is required under sub. (2) (b) 5. to submit to a test for the  
14 presence of controlled substances submits to the test and tests positive for one or  
15 more controlled substances without presenting evidence satisfactory to the  
16 department that the claimant possesses a valid prescription for each controlled  
17 substance for which the claimant tested positive, the claimant is ineligible for  
18 benefits under this chapter until 52 weeks after the date of the test or until the  
19 claimant qualifies for benefits in a subsequent benefit year, whichever occurs later,  
20 except as provided in par. (d).

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21           (d) A claimant who tests positive for one or more controlled substances without  
22 presenting evidence of a valid prescription as described in par. (c) may maintain his  
23 or her eligibility for benefits under this chapter by enrolling in the substance abuse  
24 treatment program and undergoing a job skills assessment. Such a claimant  
25 remains eligible for benefits under this chapter, if otherwise eligible, for each week

1 the claimant is in full compliance with any requirements of the substance abuse  
2 treatment program and job skills assessment, as determined by the department in  
3 accordance with the rules promulgated under sub. (2) (a) 2. and 4.

4 (4) **PREEMPLOYMENT DRUG TESTING.** (a) An employing unit may, in accordance  
5 with the rules promulgated by the department under par. (b), voluntarily submit to  
6 the department the results of a test for the presence of controlled substances that was  
7 conducted on an individual as preemployment screening or notify the department  
8 that an individual declined to submit to such a test as a condition of employment,  
9 along with information necessary to identify the individual. Upon receipt of any such  
10 results of a test conducted and certified in a manner approved by the department or  
11 notification that an individual declined to submit to such a test, the department shall  
12 determine whether the individual is a claimant receiving benefits. If the individual  
13 is a claimant receiving benefits, the department shall, in accordance with rules  
14 promulgated by the department under par. (b), use that information for purposes of  
15 determining eligibility for benefits under s. 108.04 (8) (b).

16 (b) The department shall promulgate rules necessary to implement par. (a).

17 (5) **APPLICATION OF THIS SECTION.** (a) Notwithstanding subs. (2) (b) 1., 3., and  
18 5., (c), and (d) and (3), subs. (2) (b) 1., 3., and 5., (c), and (d) and (3) do not apply until  
19 the rules required under sub. (2) (a) take effect. The department shall submit to the  
20 legislative reference bureau for publication in the Wisconsin administrative register  
21 a notice identifying the date on which subs. (2) (b) 1., 3., and 5., (c), and (d) and (3)  
22 will be implemented.

23 (b) Notwithstanding sub. (2) (b) 2. and 4., sub. (2) (b) 2. and 4. do not apply until  
24 the rules required under sub. (2) (am) take effect. The department shall submit to  
25 the legislative reference bureau for publication in the Wisconsin administrative



1 register a notice identifying the date on which sub. (2) (b) 2. and 4. will be  
2 implemented.

3 (c) Notwithstanding sub. (4) (a) and s. 108.04 (8) (b), sub. (4) (a) and s. 108.04  
4 (8) (b) do not apply until the rules required under sub. (4) (b) take effect. The  
5 department shall submit to the legislative reference bureau for publication in the  
6 Wisconsin administrative register a notice identifying the date on which sub. (4) (a)  
7 and s. 108.04 (8) (b) will be implemented.

8 (d) The secretary may waive compliance with any provision under this section  
9 and s. 108.04 (8) (b) if the secretary determines that waiver of the provision is  
10 necessary to permit continued certification of this chapter for grants to this state  
11 under Title III of the federal Social Security Act or for maximum credit allowances  
12 to employers under the federal Unemployment Tax Act.

13 **SECTION 6.** 108.14 (8n) (e) of the statutes is amended to read:

14 108.14 (8n) (e) The department shall charge this state's share of any benefits  
15 paid under this subsection to the account of each employer by which the employee  
16 claiming benefits was employed in the applicable base period, in proportion to the  
17 total amount of wages he or she earned from each employer in the base period, except  
18 that if s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b) or  
19 108.07 (3), (3r), or (5) (b) would have applied to employment by such an employer who  
20 is subject to the contribution requirements of ss. 108.17 and 108.18, the department  
21 shall charge the share of benefits based on employment with that employer to the  
22 fund's balancing account, or, if s. 108.04 (1) (f) or (5) or 108.07 (3) would have applied  
23 to an employer that is not subject to the contribution requirements of ss. 108.17 and  
24 108.18, the department shall charge the share of benefits based on that employment  
25 in accordance with s. 108.07 (5) (a) and (b). The department shall also charge the

1 fund's balancing account with any other state's share of such benefits pending  
2 reimbursement by that state.

3 **SECTION 7.** 108.141 (7) (a) of the statutes is amended to read:

4 108.141 (7) (a) The department shall charge the state's share of each week of  
5 extended benefits to each employer's account in proportion to the employer's share  
6 of the total wages of the employee receiving the benefits in the employee's base  
7 period, except that if the employer is subject to the contribution requirements of ss.  
8 108.17 and 108.18 the department shall charge the share of extended benefits to  
9 which s. 108.04 (1) (f), (5), (7) (a), (c), (e), (L), (q), (s), or (t), (7m) or (8) (a) or (b) or  
10 108.07 (3), (3r), or (5) (b) applies to the fund's balancing account.

11 **SECTION 8.** 108.16 (6m) (a) of the statutes is amended to read:

12 108.16 (6m) (a) The benefits thus chargeable under s. 108.04 (1) (f), (5), (5g),  
13 (7) (h), (8) (a) or (b), (13) (c) or (d) or (16) (e), 108.07 (3), (3r), (5) (b), (5m), or (6), 108.14  
14 (8n) (e), 108.141, 108.151, or 108.152 or sub. (6) (e) or (7) (a) and (b).

15 **SECTION 9151. Nonstatutory provisions; Workforce Development.**

16 (1) UNEMPLOYMENT INSURANCE; DRUG TESTING. The department of workforce  
17 development shall present the statements of scope of the rules required under  
18 sections 108.04 (8) (b) and 108.133 (2) (a) and (am) and (4) (b) of the statutes, as  
19 created by this act, to the governor for approval under section 227.135 (2) of the  
20 statutes no later than the 180th day after the effective date of this subsection.

21

(END)