

2019 DRAFTING REQUEST

Bill

For: **Administration-Budget** Drafter: **mduchek**
 By: **Hynek** Secondary Drafters:
 Date: **2/16/2019** May Contact:

Same as LRB:

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

Pre Topic:

DOA:.....Hynek, BB0409 -

Topic:

UI Substantial Fault

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mduchek 2/16/2019	anienaja 2/17/2019			
/P1	mduchek 2/25/2019	aernstr 2/25/2019	chanaman 2/17/2019		State S&L
/P2			mbarman 2/25/2019		State S&L

FE Sent For:

<END>

Duchek, Michael

From: Cathlene Hanaman [REDACTED] >
Sent: Friday, February 15, 2019 9:02 PM
To: Duchek, Michael
Subject: Fwd: Statutory Language Drafting Request - 2019-21

Sent from my iPhone

Begin forwarded message:

Biennial Budget: 2019-21

Topic: Substantial Fault

Tracking Code: BB0409

SBO Team: EWD

SBO Analyst: Hynek, Sara - DOA

Phone: (608) 266-1037

E-mail: Sara.Hynek@Wisconsin.gov

Agency Acronym: 445

Agency Number: 445

Priority: Medium

Intent:

Reverse the changes in 2013 Act 20 regarding the discharge of an employee for substantial fault as it relates to UI. (see page 804 of the LFB summary - do not need to address the misconduct portion of that item).

Attachments: True

Please send completed drafts to SBOSatlanguage@spsmail.enterprise.wistate.us



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-2097/P1
MED:...

DOA:.....Hynek, BB0409 - UI Substantial Fault

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

SA-
Xref-
RWF-

No gen.

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

Analysis by the Legislative Reference Bureau

EMPLOYMENT

→ ***Unemployment insurance; substantial fault.***

Under current law, an employee whose work is terminated by his or her employer for substantial fault by the employee connected with the employee's work is ineligible to receive unemployment insurance (UI) benefits until seven weeks have elapsed since the end of the week in which the termination occurs and the employee earns wages, or certain other amounts treated as wages, after the week in which the termination occurs, equal to at least 14 times the employee's weekly benefit rate in covered employment. With certain exceptions, current law defines "substantial fault" to include those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer.

This bill repeals the provision on substantial fault and replaces it with a provision on absenteeism and tardiness by an employee. Under the bill, if an employee is discharged for failing to notify an employer of absenteeism or tardiness that becomes excessive under certain conditions, the employee is ineligible to receive benefits until at least six weeks have elapsed since the end of the week in which the discharge occurs and until the employee earns wages, or certain other amounts treated as wages, after the week in which the discharge occurs, equal to at least six times the employee's weekly benefit rate in covered employment. In addition, the bill

repeals a provision in the more stringent misconduct standard that addresses absenteeism and tardiness.

For further information see the *state and local* 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.** 102.43 (9) (e) of the statutes is amended to read:

2 ~~102.43 (9) (e)~~ The employee's employment with the employer has been
3 suspended or terminated due to misconduct, as defined in s. 108.04 (5), by the
4 employee connected with the employee's work or substantial fault, as defined for
5 failing to notify his or her employer of absenteeism or tardiness that becomes
6 excessive as provided in s. 108.04 (5g) (a), by the employee connected with the
7 employee's work.

History: 1971 c. 148; 1973 c. 150; 1975 c. 147; 1977 c. 195; 1979 c. 278; 1983 a. 98; 1985 a. 83; 1987 a. 179; 1993 a. 370, 492; 1995 a. 225, 413; 2001 a. 37; 2005 a. 172; 2009 a. 206; 2011 a. 183; 2015 a. 55, 180.

****NOTE: Subsequent to 2013 Act 20, in 2015 Act 180, the substantial fault and misconduct standards were also incorporated into the worker's compensation law. I therefore modified this provision so that it instead references the older absenteeism/tardiness standard here as well. But if you'd like to instead keep substantial fault for purposes of worker's compensation, let me know.

8 **SECTION 2.** 108.04 (5) (intro.) of the statutes is amended to read:

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10 disqualification, an employee whose work is terminated by an employing unit for
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12 receive benefits until 7 weeks have elapsed since the end of the week in which the
13 discharge occurs and the employee earns wages after the week in which the
14 discharge occurs equal to at least 14 times the employee's weekly benefit rate under
15 s. 108.05 (1) in employment or other work covered by the unemployment insurance
16 law of any state or the federal government. For purposes of requalification, the
17 employee's weekly benefit rate shall be the rate that would have been paid had the

1 discharge not occurred. The wages paid to an employee by an employer which
2 terminates employment of the employee for misconduct connected with the
3 employee's employment shall be excluded from the employee's base period wages
4 under s. 108.06 (1) for purposes of benefit entitlement. This subsection does not
5 preclude an employee who has employment with an employer other than the
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7 year using the base period wages excluded under this subsection if the employee
8 qualifies to establish a benefit year under s. 108.06 (2) (a). The department shall
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10 account of an employer that is subject to the contribution requirements under ss.
11 108.17 and 108.18 from which base period wages are excluded under this subsection.
12 For purposes of this subsection, "misconduct" means one or more actions or conduct
13 evincing such willful or wanton disregard of an employer's interests as is found in
14 deliberate violations or disregard of standards of behavior which an employer has a
15 right to expect of his or her employees, or in carelessness or negligence of such degree
16 or recurrence as to manifest culpability, wrongful intent, or evil design of equal
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19 employer. In addition, "misconduct" includes:

History: 1971 c. 40, 42, 53, 211; 1973 c. 247; 1975 c. 24, 343; 1977 c. 127, 133, 286, 418; 1979 c. 52, 176; 1981 c. 28, 36, 315, 391; 1983 a. 8, 27, 99, 168; 1983 a. 189 s. 329 (28); 1983 a. 337, 384, 468, 538; 1985 a. 17, 29, 40; 1987 a. 38 ss. 23 to 59, 107, 136; 1987 a. 255, 287, 403; 1989 a. 77; 1991 a. 89; 1993 a. 112, 122, 373, 492; 1995 a. 118, 417, 448; 1997 a. 35, 39; 1999 a. 9, 15, 83; 2001 a. 35; 2003 a. 197; 2005 a. 86; 2007 a. 59; 2009 a. 11, 287; 2011 a. 32, 123, 198, 236; 2013 a. 11, 20, 36; 2013 a. 173 ss. 13, 33; 2013 a. 276; 2015 a. 55, 86, 195; 2015 a. 197 s. 51; 2015 a. 334; 2017 a. 157; 2017 a. 364 s. 49; 2017 a. 366, 370; s. 13.92 (2) (i).

Cross-reference: See also chs. DWD 132 and 133, Wis. adm. code.

****NOTE: I restored language in 2013 Act 20 that said that if the absenteeism and misconduct standard applies, then the more strict misconduct standard under s. 108.04 (5) would not apply. OK? However, although I know the instructions were to leave misconduct alone, s. 108.04 (5) (e) also puts certain instances of excessive absenteeism and tardiness under misconduct (and that provision has been further interpreted by the supreme court in *DWD v. LIRC*, 2018 WI 77). It seems to me that s. 108.04 (5) (e) would actually still potentially swallow up s. 108.04 (5g) in many cases (because s. 108.04 (5) (e) has a much lower standard that would result in misconduct before s. 108.04 (5g) would

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1 **SECTION 3.** 108.04 (5g) of the statutes is repealed and recreated to read:

2 × **108.04 (5g) DISCHARGE FOR FAILURE TO NOTIFY EMPLOYER OF ABSENTEEISM OR**
3 **TARDINESS.** (a) If an employee is discharged for failing to notify his or her employer
4 of absenteeism or tardiness that becomes excessive, and the employer has complied
5 with the requirements of par. (d) with respect to that employee, the employee is
6 ineligible to receive benefits until 6 weeks have elapsed since the end of the week in
7 which the discharge occurs and the employee earns wages after the week in which
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9 under s. 108.05 (1) in employment or other work covered by the unemployment
10 insurance law of any state or the federal government. For purposes of
11 requalification, the employee's weekly benefit rate shall be the rate that would have
12 been paid had the discharge not occurred.

13 (b) For purposes of this subsection, tardiness becomes excessive if an employee
14 is late for 6 or more scheduled workdays in the 12-month period preceding the date
15 of the discharge without providing adequate notice to his or her employer.

16 (c) For purposes of this subsection, absenteeism becomes excessive if an
17 employee is absent for 5 or more scheduled workdays in the 12-month period
18 preceding the date of the discharge without providing adequate notice to his or her
19 employer.

20 (d) 1. The requalifying requirements under par. (a) apply only if the employer
21 has a written policy on notification of tardiness or absences that satisfies all of the
22 following:

23 a. Defines what constitutes a single occurrence of tardiness or absenteeism.

1 b. Describes the process for providing adequate notice of tardiness or absence.

2 c. Notifies the employee that failure to provide adequate notice of an absence
3 or tardiness may lead to discharge.

4 2. The employer shall provide a copy of the written policy under subd. 1. to each
5 employee and shall have written evidence that the employee received a copy of that
6 policy.

7 3. The employer must have given the employee at least one warning concerning
8 the employee's violation of the employer's written policy under subd. 1. within the
9 12-month period preceding the date of the discharge.

10 4. The employer must apply the written policy under subd. 1. uniformly to all
11 employees of the employer.

12 (e) The department shall charge to the fund's balancing account the cost of any
13 benefits paid to an employee that are otherwise chargeable to the account of an
14 employer that is subject to the contribution requirements under ss. 108.17 and
15 108.18 if the employee is discharged by that employer and par. (a) applies.

16 (em) If an employee is not disqualified under this subsection, the employee may
17 nevertheless be subject to the disqualification under sub. (5).

****NOTE: This change repeals current s. 108.04 (5g) and replaces it with the pre-2013 Wisconsin Act 20 standard regarding absenteeism and tardiness. I took this to be what the instruction meant by "reverse the changes." While this is ancient history now, I would just note that I believe the Unemployment Insurance Advisory Council agreed on a number of changes to this standard in its 2013 agreed-upon bill process. Those included: a) reducing the standard under s. 108.04 (5g) (b) and (c) and from 6 and 4 to 5 and 2 tardy and absent days, respectively, b) reducing the time window in s. 108.04 (5g) (b), (c), and (d) 3. from 12 months to 120 days; and c) requiring employers to give employees a reasonable amount of time to provide notice of absenteeism and tardiness. Those changes were not enacted, and instead the legislature enacted the more encompassing substantial fault standard we have now. But I just thought I would note them in case you wanted to incorporate any of those changes.

18 **SECTION 9350. Initial applicability; Workforce Development.**

1 (1) UNEMPLOYMENT INSURANCE; SUBSTANTIAL FAULT. The treatment of s. 108.04
2 (5) (intro.) and (5g) first applies to first apply with respect to determinations issued
3 under section 108.09 on the effective date of this subsection.

4 **SECTION 9450. Effective dates; Workforce Development.**

5 (1) UNEMPLOYMENT INSURANCE; SUBSTANTIAL FAULT. The treatment of s. 108.04
6 (5) (intro.) and (5g) and SECTION 9350 (1) of this act take effect on January 5, 2020.

***NOTE: To give time to implement the changes standard, I included an effective
date similar to what was included in 2013 Act 20. Let me know if you'd like a different
effective date.

7

(END)



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-2097/P1

MED:amn

P2
↑
ahe

DOA:.....Hynek, BB0409 - UI Substantial Fault

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

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

Analysis by the Legislative Reference Bureau

EMPLOYMENT

1. Unemployment insurance; substantial fault.

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LRB-2097/P2
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