



State of Wisconsin
2009 - 2010 LEGISLATURE

LRBs0219/3
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**ASSEMBLY SUBSTITUTE AMENDMENT 1,
TO 2009 ASSEMBLY BILL 40**

April 19, 2010 – Offered by Representative GARTHWAITE.

1 **AN ACT** *to amend* 109.03 (5), 109.03 (6), 109.09 (1), 109.09 (2) (a), 109.09 (2) (b)
2 1., 109.09 (2) (b) 2., 109.09 (2) (b) 3., 109.09 (2) (c) 1m., 109.09 (2) (c) 2., 109.09
3 (2) (c) 3. and 109.11 (2) (a); and *to create* 109.09 (2) (c) 1r. and 109.09 (2) (d) of
4 the statutes; **relating to:** the filing of a wage claim or the bringing of a wage
5 claim action by a collective bargaining representative on behalf of an employee
6 and the priority of a wage claim lien over a prior lien of a commercial lending
7 institution and over the rights of a purchaser of any property of the employer.

Analysis by the Legislative Reference Bureau

Under current law, the Department of Workforce Development (DWD) must investigate and attempt to adjust any claim by an employee that his or her employer has not paid the employee any wages that are owed to the employee (wage claim). Currently, DWD or an employee who brings a wage claim action has a lien upon all property of the employer, real and personal, located in this state for the full amount of any wages owed to the employee (wage claim lien). Currently, a wage claim lien takes precedence over all other debts, judgments, decrees, liens, or mortgages against an employer, except for a lien of a commercial lending institution that originates before the wage claim lien takes effect (prior lien), regardless of whether

those other debts, judgments, decrees, liens, or mortgages originated before or after the wage claim lien takes effect. Current law provides, however, that a wage claim lien takes precedence over a prior lien of a commercial lending institution as to the first \$3,000 of unpaid wages covered under the wage claim lien that are earned within the six months preceding the filing of the wage claim with DWD or the commencement of an action by the employee to recover the wages due.

This substitute amendment increases that \$3,000 cap to \$4,500, eliminates that six-month time limit, and applies that cap to the aggregate of all prior liens of commercial lending institutions so that under the substitute amendment the first \$4,500 of unpaid wages covered under a wage claim lien *that are earned at any time* takes precedence over the aggregate of all prior liens of commercial lending institutions.

The substitute amendment also requires the secretary of workforce development (secretary), at least once every five years or more frequently if DWD finds reasonable cause to believe that the cap should be adjusted, to appoint a wage claim lien review committee (committee) for the purpose of studying the need for an adjustment to the cap and making recommendations to the legislature for any adjustments to the cap. In conducting that study and making those recommendations, the committee may consider any changes in the consumer price index and the effect that an adjustment to the cap might have on the economy of the state. The committee must submit a report of its recommendations, together with an explanation for those recommendations and any proposed legislation that may be necessary to implement those recommendations, to the secretary, the governor, the speaker of the assembly, the senate majority leader, and the minority leaders of each house of the legislature and to the standing committees of each house of the the legislature that are concerned with labor issues and issues affecting financial institutions. Those standing committees must then review and conduct public hearings on those recommendations.

In addition, the substitute amendment provides that a wage claim lien takes precedence over the rights of any person that purchases any property of the employer after the lien is created, including any bona fide purchaser. This change reverses *In Re Globe Building Materials, Inc.*, 463 F. 3d 631 (7th Cir. 2006), which held that the trustee in bankruptcy could avoid a wage claim lien because under the current wage claim lien law a wage claim does not expressly take precedence over the rights of a bona fide purchaser under the federal bankruptcy law.

Finally, the substitute amendment permits a recognized or certified collective bargaining representative of an employee to file a wage claim with DWD, or to bring a wage claim action in court, on behalf of an employee and grants a wage claim lien to a collective bargaining representative that brings a wage claim action.

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

1 109.03 (5) ENFORCEMENT. Except as provided in sub. (1), no employer may by
2 special contract with employees or by any other means secure exemption from this
3 section. Each employee shall have a right of action against any employer for the full
4 amount of the employee's wages due on each regular pay day as provided in this
5 section and for increased wages as provided in s. 109.11 (2), in any court of competent
6 jurisdiction. An employee may bring an action under this subsection on his or her
7 own behalf or the recognized or certified collective bargaining representative of the
8 employee may bring an action against an employer under this subsection on behalf
9 of the employee. An employee or collective bargaining representative may bring an
10 action against an employer under this subsection without first filing a wage claim
11 with the department under s. 109.09 (1). An employee who or collective bargaining
12 representative that brings an action against an employer under this subsection shall
13 have a lien upon all property of the employer, real or personal, located in this state
14 as described in s. 109.09 (2).

15 **SECTION 2.** 109.03 (6) of the statutes is amended to read:

16 109.03 (6) WAGE CLAIM. In an action by an employee, a collective bargaining
17 representative, or the department against the employer on a wage claim, no security
18 for payment of costs is required. In any such proceeding the court may allow the
19 prevailing party, in addition to all other costs, a reasonable sum for expenses. No
20 person other than an employee, a collective bargaining representative, or the
21 department shall be benefited or otherwise affected by this subsection.

22 **SECTION 3.** 109.09 (1) of the statutes, as affected by 2009 Wisconsin Act 28, is
23 amended to read:

24 109.09 (1) The department shall investigate and attempt equitably to adjust
25 controversies between employers and employees as to alleged wage claims. An

1 employee may file a wage claim under this subsection on his or her own behalf or the
2 recognized or certified collective bargaining representative of the employee may file
3 a wage claim under this subsection on behalf of the employee. The department may
4 receive and investigate any wage claim which is filed with the department, or
5 received by the department under s. 109.10 (4), no later than 2 years after the date
6 the wages are due. The department may, after receiving a wage claim, investigate
7 any wages due from the employer against whom the claim is filed to any employee
8 during the period commencing 2 years before the date the claim is filed. The
9 department shall enforce this chapter and ss. 66.0903, 66.0904, 103.02, 103.49,
10 103.82, 104.12, and 229.8275. In pursuance of this duty, the department may sue the
11 employer on behalf of the employee to collect any wage claim or wage deficiency and
12 ss. 109.03 (6) and 109.11 (2) and (3) shall apply to such actions. Except for actions
13 under s. 109.10, the department may refer such an action to the district attorney of
14 the county in which the violation occurs for prosecution and collection and the
15 district attorney shall commence an action in the circuit court having appropriate
16 jurisdiction. Any number of wage claims or wage deficiencies against the same
17 employer may be joined in a single proceeding, but the court may order separate
18 trials or hearings. In actions that are referred to a district attorney under this
19 subsection, any taxable costs recovered by the district attorney shall be paid into the
20 general fund of the county in which the violation occurs and used by that county to
21 meet its financial responsibility under s. 978.13 (2) (b) for the operation of the office
22 of the district attorney who prosecuted the action.

23 **SECTION 4.** 109.09 (2) (a) of the statutes is amended to read:

24 109.09 (2) (a) The department of workforce development, under its authority
25 under sub. (1) to maintain actions for the benefit of employees, or an employee who

1 brings an action under s. 109.03 (5), or the recognized or certified collective
2 bargaining representative of an employee that brings an action under s. 109.03 (5),
3 shall have a lien upon all property of the employer, real or personal, located in this
4 state for the full amount of any wage claim or wage deficiency. A lien under this
5 paragraph is created when the services for which the wages are due are performed.

6 **SECTION 5.** 109.09 (2) (b) 1. of the statutes is amended to read:

7 109.09 (2) (b) 1. A lien under par. (a) upon real property ~~takes effect~~ is perfected
8 when the department of workforce development ~~or, employee, or collective~~
9 bargaining representative files a notice of the lien with the clerk of the circuit court
10 of the county in which the services or some part of the services were performed, pays
11 the fee specified in s. 814.61 (5) to that clerk of circuit court, and serves a copy of ~~that~~
12 ~~petition~~ the notice on the employer by personal service in the same manner as a
13 summons is served under s. 801.11 or by certified mail with a return receipt
14 requested. The clerk of circuit court shall enter the notice of the lien on the judgment
15 and lien docket kept under s. 779.07.

16 **SECTION 6.** 109.09 (2) (b) 2. of the statutes is amended to read:

17 109.09 (2) (b) 2. A lien under par. (a) upon personal property ~~takes effect~~ is
18 perfected when the department of workforce development ~~or, employee, or collective~~
19 bargaining representative files a notice of the lien with the department of financial
20 institutions in the same manner, and ~~form, and place~~ as financing statements are
21 filed ~~under subch. V of ch. 409 regarding debtors who are located in this state,~~ pays
22 the same fee provided in s. 409.525 for filing financing statements, and serves a copy
23 of the notice on the employer by personal service in the same manner as a summons
24 is served under s. 801.11 or by certified mail with a return receipt requested. The

1 department of financial institutions shall place the notice of the lien in the same file
2 as financing statements are filed under subch. V of ch. 409.

3 **SECTION 7.** 109.09 (2) (b) 3. of the statutes is amended to read:

4 109.09 (2) (b) 3. The department of workforce development ~~or~~, employee, or
5 collective bargaining representative must file the notice under subd. 1. or 2. within
6 2 years after the date on which the wages were due. The notice shall specify the
7 nature of the claim and the amount claimed, describe the property upon which the
8 claim is made, and state that the person filing the notice claims a lien on that
9 property.

10 **SECTION 8.** 109.09 (2) (c) 1m. of the statutes is amended to read:

11 109.09 (2) (c) 1m. A lien under par. (a) takes precedence over all other debts,
12 judgments, decrees, liens, interests, or mortgages against the employer, except a lien
13 of a commercial lending institution as provided in ~~subd. 3.,~~ subds. 1r. and 2. and 3., a
14 lien of a financial institution as provided in subd. 3., or a lien under s. 292.31 (8) (i)
15 or 292.81, regardless of whether those other debts, judgments, decrees, liens,
16 interests, or mortgages ~~originate~~ are created before or after the lien under par. (a)
17 ~~takes effect~~ is perfected. A lien under par. (a) also takes precedence over the rights
18 of any person that purchases any property of the employer after the lien is created,
19 including any bona fide purchaser. A lien under par. (a) may be enforced in the
20 manner provided in ss. 779.09 to 779.12, 779.20, and 779.21, insofar as those
21 provisions are applicable. The lien ceases to exist if the department of workforce
22 development ~~or the~~, employee, or collective bargaining representative does not bring
23 an action to enforce the lien within the period prescribed in s. 893.44 for the
24 underlying wage claim.

25 **SECTION 9.** 109.09 (2) (c) 1r. of the statutes is created to read:

1 109.09 (2) (c) 1r. Except as provided in this subdivision, a lien under par. (a)
2 does not take precedence over a lien of a commercial lending institution against the
3 employer that is perfected before the lien under par. (a) is perfected. Subject to subds.
4 2. and 3., a lien under par. (a) takes precedence over the aggregate of all liens of
5 commercial lending institutions against the employer that are perfected before the
6 lien under par. (a) is perfected only as to the first \$4,500 of unpaid wages covered
7 under the lien.

8 **SECTION 10.** 109.09 (2) (c) 2. of the statutes is amended to read:

9 109.09 (2) (c) 2. Except as provided in this subdivision, a lien under par. (a) does
10 not take precedence over a lien of a commercial lending institution against the
11 employer that is perfected as of the day before the effective date of this subdivision
12 ... [LRB inserts date], and that originates is perfected before the lien under par. (a)
13 takes effect is perfected or over a lien of a commercial lending institution against the
14 employer for any amount advanced by the commercial lending institution after a lien
15 under par. (a) is perfected under a contract entered into before the effective date of
16 this subdivision ... [LRB inserts date], including any renewal or time extension of
17 such a contract. Subject to subd. 3., a lien under par. (a) takes precedence over ~~a lien~~
18 ~~of a~~ the aggregate of all liens of commercial lending institution institutions against
19 the employer that are perfected as of the day before the effective date of this
20 subdivision ... [LRB inserts date], and that originates are perfected before the lien
21 under par. (a) ~~takes effect is perfected, or over the aggregate of all liens of commercial~~
22 lending institutions against the employer for any amount advanced by the
23 commercial lending institutions after a lien under par. (a) is perfected under
24 contracts entered into before the effective date of this subdivision ... [LRB inserts
25 date], including any renewal or time extension of such contracts, only as to the first

1 \$3,000 of unpaid wages covered under the lien that are earned by an employee within
2 the 6 months preceding the date on which the employee or collective bargaining
3 representative files the wage claim under sub. (1) or brings the action under s. 109.03
4 (5) or the date on which the department receives the wage claim under s. 109.10 (4)
5 (a), whichever is applicable.

6 **SECTION 11.** 109.09 (2) (c) 3. of the statutes is amended to read:

7 109.09 (2) (c) 3. Notwithstanding ~~subd. subds. 1r. and 2.,~~ a lien of a financial
8 institution that ~~exists on~~ is perfected as of November 30, 2003, and that ~~originates~~
9 is perfected before a lien under par. (a) ~~takes effect~~ is perfected takes precedence over
10 the lien under par. (a), and a lien of a financial institution for any amount advanced
11 by the financial institution after a lien under par. (a) ~~takes effect~~ is perfected under
12 a contract entered into before December 1, 2003, including any ~~extension or renewal~~
13 or time extension of such a contract, takes precedence over the lien under par. (a).
14 Notwithstanding ~~subd. subds. 1r. and 2.,~~ a lien under par. (a) that ~~exists on~~ is
15 perfected as of November 30, 2003, takes precedence over a lien of a commercial
16 lending institution that is not a financial institution, regardless of whether the lien
17 of the commercial lending institution ~~originates~~ is perfected before or after the lien
18 under par. (a) ~~takes effect~~ is perfected.

19 **SECTION 12.** 109.09 (2) (d) of the statutes is created to read:

20 109.09 (2) (d) 1. In this paragraph, “consumer price index” means the average
21 of the consumer price index over each 12-month period for all urban consumers, U.S.
22 city average, as determined by the bureau of labor statistics of the U.S. department
23 of labor.

24 2. At least once every 5 years, or more frequently if upon investigation the
25 department finds that there is reasonable cause to believe that the amount specified

1 in par. (c) 1r. should be adjusted, the secretary of workforce development shall
2 appoint a wage claim lien review committee under s. 15.04 (1) (c), selected so as fairly
3 to represent employers, employees, commercial lending institutions, and the public,
4 for the purpose of studying the need for an adjustment to that amount and making
5 recommendations to the legislature for any adjustments to that amount.

6 3. In conducting the study and making the recommendations under subd. 2.,
7 the wage claim lien review committee may consider any of the following:

8 a. The percentage difference between the consumer price index for the
9 12-month period ending on the last day of the month in which the amount specified
10 in par. (c) 1r. was last adjusted and the consumer price index for the 12-month period
11 ending on the last day of the month in which the committee is appointed.

12 b. The effect that an adjustment to the amount specified in par. (c) 1r. might
13 have on the economy of the state, including the effect of such an adjustment on job
14 creation, retention, and expansion; on the availability of entry-level jobs; and on
15 regional economic conditions within the state.

16 4. The wage claim lien review committee shall submit a report of its
17 recommendations, together with an explanation for those recommendations and any
18 proposed legislation that may be necessary to implement those recommendations, to
19 the secretary of workforce development, the governor, the speaker of the assembly,
20 the senate majority leader, and the minority leaders of each house of the legislature
21 and to the standing committees of each house of the the legislature that are
22 concerned with labor issues and issues affecting financial institutions under s.
23 13.172 (3). Those standing committees shall review and conduct public hearings on
24 those recommendations.

25 **SECTION 13.** 109.11 (2) (a) of the statutes is amended to read:

