



State of Wisconsin
2023 - 2024 LEGISLATURE

LRB-0395/P3
ARG/MED/MIM:wlj

DOA:.....Kirschbaum, BB0009 - Worker misclassification

FOR 2023-2025 BUDGET -- NOT READY FOR INTRODUCTION

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

Analysis by the Legislative Reference Bureau

EMPLOYMENT

Worker classification notice and posting

Current law requires DWD to perform certain duties related to worker classification, including for purposes of promoting and achieving compliance by employers with state employment laws. This bill requires DWD to design and make available to employers a notice regarding worker classification laws, requirements for employers and employees, and penalties for noncompliance. Under the bill, all employers in this state must post the notice in a conspicuous place where notices to employees are customarily posted. Finally, the bill provides a penalty of not more than \$100 for an employer who does not post the notice as required.

Unemployment insurance; worker misclassification penalties

Current law requires DWD to assess an administrative penalty against an employer engaged in construction projects or in the painting or drywall finishing of buildings or other structures who knowingly and intentionally provides false information to DWD for the purpose of misclassifying or attempting to misclassify an individual who is an employee of the employer as a nonemployee under the UI law. The penalty under current law is \$500 for each employee who is misclassified, not to exceed \$7,500 per incident. In addition, current law provides for criminal fines of up to \$25,000 for employers who, after having previously been assessed such an

administrative penalty, commit another violation. Current law additionally requires DWD to assess an administrative penalty against such an employer who, through coercion, requires an employee to adopt the status of a nonemployee; the penalty amount is \$1,000 for each employee so coerced, but not to exceed \$10,000 per calendar year. Penalties are deposited into the unemployment program integrity fund.

The bill does the following: 1) removes the \$7,500 and \$10,000 limitations on the administrative penalties and provides that the penalties double for each act occurring after the date of the first determination of a violation; 2) removes the limitations on the types of employers to whom the prohibitions apply, making them applicable to any type of employer; and 3) specifies that DWD may make referrals for criminal prosecution for alleged criminal misclassification violations regardless of whether an employer has been subject to any other penalty or assessment under the UI law.

Worker's compensation; penalties for uninsured employers

Under current law, an employer who requires an employee to pay for any part of worker's compensation insurance or who fails to provide mandatory worker's compensation insurance coverage is subject to a forfeiture. If the employer violates those requirements, for the first 10 days, the penalty under current law is not less than \$100 and not more than \$1,000 for such a violation. If the employer violates those requirements for more than 10 days, the penalty under current law is not less than \$10 and not more than \$100 for each day of such a violation.

Under the bill, the forfeitures for an employer who requires an employee to pay for worker's compensation coverage or fails to provide the coverage (violation) are as follows:

1. For a first violation, \$1,000 per violation or the amount of the insurance premium that would have been payable, whichever is greater.
2. For a second violation, \$2,000 per violation or two times the amount of the insurance premium that would have been payable, whichever is greater.
3. For a third violation, \$3,000 per violation or three times the amount of the insurance premium that would have been payable, whichever is greater.
4. For a fourth or subsequent violation, \$4,000 per violation or four times the amount of the insurance premium that would have been payable, whichever is greater.

Under current law, if an employer who is required to provide worker's compensation insurance coverage provides false information about the coverage to his or her employees or contractors who request information about the coverage, or fails to notify a person who contracts with the employer that the coverage has been canceled in relation to the contract, the employer is subject to a forfeiture of not less than \$100 and not more than \$1,000 for each such violation.

Under the bill, the penalty for a first or second such violation remains as specified under current law, the penalty for a third violation is \$3,000, and the penalty for a fourth or subsequent violation is \$4,000.

Currently, an uninsured employer must pay to DWD an amount that is equal to the greater of the following: 1) twice the amount that the uninsured employer

would have paid for worker's compensation coverage during periods in which the employer was uninsured in the preceding three years or 2) \$750 or, if certain conditions apply, \$100 per day.

The bill provides that the amounts an uninsured employer must pay to DWD for a determination of a failure to carry worker's compensation insurance are as follows:

1. For a first or second determination, the amounts specified in current law.
2. For a third determination, the greater of the following: a) three times the amount that the uninsured employer would have paid for worker's compensation coverage during periods in which the employer was uninsured in the preceding three years or b) \$3,000.
3. For a fourth or subsequent determination, the greater of the following: a) four times the amount that the uninsured employer would have paid for worker's compensation coverage during periods in which the employer was uninsured in the preceding three years or b) \$4,000.

False or fraudulent worker's compensation insurance applications

Current law specifies criminal penalties for various types of insurance fraud, which are punishable as either a Class A misdemeanor or a Class I felony, depending on the value of the claim or benefit. The bill adds to the list of criminally punishable insurance fraud the following: 1) the presentation of false or fraudulent applications for worker's compensation insurance coverage and 2) the presentation of applications for worker's compensation insurance coverage that falsely or fraudulently misclassify employees in order to lower premiums.

Also under current law, if an insurer or self-insured employer has evidence that a worker's compensation claim is false or fraudulent, the insurer or self-insured employer must generally report the claim to DWD. If, on the basis of the investigation, DWD has a reasonable basis to believe that criminal insurance fraud has occurred, DWD must refer the matter to the district attorney for prosecution. DWD may request assistance from DOJ to investigate false or fraudulent activity related to a worker's compensation claim. If, on the basis of that investigation, DWD has a reasonable basis to believe that theft, forgery, fraud, or any other criminal violation has occurred, DWD must refer the matter to the district attorney or DOJ for prosecution. The bill extends these requirements to insurers that have evidence that an application for worker's compensation insurance coverage is fraudulent or that an employer has committed fraud by misclassifying employees to lower the employer's worker's compensation insurance premiums.

Worker misclassification information

The bill requires DFI to provide informational materials and resources on worker misclassification to each person who files with DFI documents forming a business corporation, nonstock corporation, limited liability company, limited liability partnership, or limited partnership.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a 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:

SECTION 1. 102.125 (1m) of the statutes is created to read:

102.125 (1m) APPLICATION AND PREMIUM FRAUD. If an insurer has evidence that an application for worker's compensation insurance coverage is fraudulent or that an employer has committed fraud by misclassifying employees to lower the employer's worker's compensation insurance premiums in violation of s. 943.395, the insurer shall report the claim to the department. The department may require an insurer to investigate an allegedly fraudulent application or alleged fraud by misclassification of employees and may provide the insurer with any records of the department relating to that alleged fraud. An insurer that investigates alleged fraud under this subsection shall report the results of that investigation to the department.

SECTION 2. 102.125 (2) of the statutes is amended to read:

102.125 (2) ASSISTANCE BY DEPARTMENT OF JUSTICE. The department of workforce development may request the department of justice to assist the department of workforce development in an investigation under sub. (1) or (1m) or in the investigation of any other suspected fraudulent activity on the part of an employer, employee, insurer, health care provider, or other person related to worker's compensation.

SECTION 3. 102.125 (3) of the statutes is amended to read:

102.125 (3) PROSECUTION. If based on an investigation under sub. (1), (1m), or (2) the department has a reasonable basis to believe that a violation of s. 943.20, 943.38, 943.39, 943.392, 943.395, 943.40, or any other criminal law has occurred, the

department shall refer the results of the investigation to the department of justice or to the district attorney of the county in which the alleged violation occurred for prosecution.

SECTION 4. 102.16 (4) of the statutes is amended to read:

102.16 (4) The department and the division have jurisdiction to pass on any question arising out of sub. (3) and to order the employer to reimburse an employee or other person for any sum deducted from wages or paid by him or her in violation of that subsection. In addition to the any penalty provided in s. 102.85 (1), any employer violating sub. (3) shall be liable to an injured employee for the reasonable value of the necessary services rendered to that employee under any arrangement made in violation of sub. (3) without regard to that employee's actual disbursements for those services.

SECTION 5. 102.82 (2) (a) (intro.) of the statutes is amended to read:

102.82 (2) (a) (intro.) Except as provided in pars. (ag), (am), and (ar), all for a 1st or 2nd determination by the department that an employer was uninsured, an uninsured employers employer shall pay to the department the greater of the following:

SECTION 6. 102.82 (2) (ab) of the statutes is created to read:

102.82 (2) (ab) Except as provided in pars. (ag), (am), and (ar), for a 3rd determination by the department that an employer was uninsured, an uninsured employer shall pay to the department the greater of the following:

1. Three times the amount determined by the department to equal what the uninsured employer would have paid during periods of illegal nonpayment for worker's compensation in the preceding 3-year period, based on the employer's payroll in the preceding 3 years.

2. Three thousand dollars.

SECTION 7. 102.82 (2) (ad) of the statutes is created to read:

102.82 (2) (ad) Except as provided in pars. (ag), (am), and (ar), for a 4th or subsequent determination by the department that an employer was uninsured, an uninsured employer shall pay to the department the greater of the following:

1. Four times the amount determined by the department to equal what the uninsured employer would have paid during periods of illegal nonpayment for worker's compensation in the preceding 3-year period, based on the employer's payroll in the preceding 3 years.

2. Four thousand dollars.

SECTION 8. 102.82 (2) (am) of the statutes is amended to read:

102.82 (2) (am) The department may waive any payment owed under par. (a), (ab), or (ad) by an uninsured employer if the department determines that the uninsured employer is subject to this chapter only because the uninsured employer has elected to become subject to this chapter under s. 102.05 (2) or 102.28 (2).

SECTION 9. 102.82 (2) (ar) of the statutes is amended to read:

102.82 (2) (ar) The department may waive any payment owed under par. (a), (ab), (ad), or (ag) or sub. (1) if the department determines that the sole reason for the uninsured employer's failure to comply with s. 102.28 (2) is that the uninsured employer was a victim of fraud, misrepresentation or gross negligence by an insurance agent or insurance broker or by a person whom a reasonable person would believe is an insurance agent or insurance broker.

SECTION 10. 102.85 (1) of the statutes is repealed and recreated to read:

102.85 (1) (a) If an employer has failed to comply with s. 102.16 (3) or 102.28 (2), the employer shall, for a first violation, forfeit the greater of \$1,000 or the amount

of the premium that would have been payable for each time the employer failed to comply with s. 102.16 (3) or 102.28 (3).

(b) If an employer has failed to comply with s. 102.16 (3) or 102.28 (2), the employer shall, for a 2nd violation, forfeit the greater of \$2,000 or 2 times the amount of the premium that would have been payable for each time the employer failed to comply with s. 102.16 (3) or 102.28 (3).

(c) If an employer has failed to comply with s. 102.16 (3) or 102.28 (2), the employer shall, for a 3rd violation, forfeit the greater of \$3,000 or 3 times the amount of the premium that would have been payable for each time the employer failed to comply with s. 102.16 (3) or 102.28 (3).

(d) If an employer has failed to comply with s. 102.16 (3) or 102.28 (2), the employer shall, for a 4th or subsequent violation, forfeit the greater of \$4,000 or 4 times the amount of the premium that would have been payable for each time the employer failed to comply with s. 102.16 (3) or 102.28 (3).

SECTION 11. 102.85 (2) of the statutes is repealed and recreated to read:

102.85 (2) (a) No employer who is required to provide worker's compensation insurance coverage under this chapter may give false information about the coverage to his or her employees, the department, or any other person who contracts with the employer and who requests evidence of worker's compensation in relation to that contract.

(b) No employer who is required to provide worker's compensation insurance coverage under this chapter may fail to notify a person who contracts with the employer that the coverage has been canceled in relation to that contract.

(c) 1. An employer who violates par. (a) or (b) shall, except as provided in subsds. 2. and 3., forfeit not less than \$100 and not more than \$1,000.

2. An employer who violates par. (a) or (b) shall forfeit \$3,000 for a 3rd violation of par. (a) or (b).

3. An employer who violates par. (a) or (b) shall forfeit \$4,000 for a 4th violation of par. (a) or (b).

SECTION 12. 103.06 (1) (b) (intro.) of the statutes is amended to read:

103.06 (1) (b) (intro.) “Employee” means, for purposes of compliance with the requirements specified in sub. (3) (a), any of the following who is employed by an employer:

SECTION 13. 103.06 (1) (c) (intro.) of the statutes is amended to read:

103.06 (1) (c) (intro.) “Employer” means, for purposes of compliance with the requirements specified in sub. (3) (a), any of the following that is engaged in the work described in s. 108.18 (2) (c):

SECTION 14. 103.06 (2) of the statutes is renumbered 103.06 (10), and 103.06 (10) (intro.) and (a), as renumbered, are amended to read:

103.06 (10) WORKER CLASSIFICATION COMPLIANCE; DUTIES OF DEPARTMENT. (intro.) ~~For purposes of promoting and achieving compliance by employers with the laws specified in sub. (3) (a) through the proper classification of persons performing services for an employer as employees and nonemployees, the~~ The department shall do all of the following:

(a) Educate employers, employees, nonemployees, and the public about the proper classification of persons performing services for an employer as employees and nonemployees. The department shall establish and maintain on the department’s website information regarding worker classification laws, requirements for employers and employees, penalties for noncompliance, and contact information at each state agency that administers worker classification laws.

SECTION 15. 103.06 (10) (f) of the statutes is created to read:

103.06 (10) (f) Design and make available to employers a notice regarding worker classification laws, requirements for employers and employees, and penalties for noncompliance. The department shall promulgate rules to implement this paragraph.

SECTION 16. 103.06 (11) of the statutes is created to read:

103.06 (11) NOTICE. All employers shall post, in one or more conspicuous places where notices to employees are customarily posted, the notice designed by the department under sub. (10) (f). Any employer who violates this subsection shall forfeit not more than \$100 for each offense.

SECTION 17. 108.221 (1) (a) of the statutes is renumbered 108.221 (1) (a) (intro.) and amended to read:

108.221 (1) (a) (intro.) Any employer ~~described in s. 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures~~ who knowingly and intentionally provides false information to the department for the purpose of misclassifying or attempting to misclassify an individual who is an employee of the employer as a nonemployee shall, for each incident, be assessed a penalty by the department as follows:

1. For each act occurring before the date of the first determination of a violation of this subsection, the employer shall be assessed a penalty in the amount of \$500 for each employee who is misclassified, but not to exceed \$7,500 per incident.

SECTION 18. 108.221 (1) (a) 2. of the statutes is created to read:

108.221 (1) (a) 2. For each act occurring after the date of the first determination of a violation of this subsection, the employer shall be assessed a penalty in the amount of \$1,000 for each employee who is misclassified.

SECTION 19. 108.221 (2) of the statutes is renumbered 108.221 (2) (intro.) and amended to read:

108.221 (2) (intro.) Any employer ~~described in s. 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures~~ who, through coercion, requires an individual to adopt the status of a nonemployee shall be assessed a penalty by the department as follows:

(a) For each act occurring before the date of the first determination of a violation of this subsection, the employer shall be assessed a penalty in the amount of \$1,000 for each individual so coerced, but not to exceed \$10,000 per calendar year.

SECTION 20. 108.221 (2) (b) of the statutes is created to read:

108.221 (2) (b) For each act occurring after the date of the first determination of a violation of this subsection, the employer shall be assessed a penalty in the amount of \$2,000 for each individual so coerced.

SECTION 21. 108.24 (2m) of the statutes is amended to read:

108.24 (2m) Any employer ~~described in s. 108.18 (2) (c) or engaged in the painting or drywall finishing of buildings or other structures~~ who, after having previously been assessed an administrative penalty by the department under s. 108.221 (1), knowingly and intentionally provides false information to the department for the purpose of misclassifying or attempting to misclassify an individual who is an employee of the employer as a nonemployee shall be fined \$1,000 for each employee who is misclassified, subject to a maximum fine of \$25,000 for each

violation. The department may, regardless of whether an employer has been subject to any administrative assessment under s. 108.221 or any other penalty or assessment under this chapter, refer violations of this subsection for prosecution by the department of justice or the district attorney for the county in which the violation occurred.

SECTION 22. 182.01 (8) of the statutes is created to read:

182.01 (8) INFORMATION TO BE PROVIDED WITH BUSINESS FORMATION FILINGS. The department shall provide informational materials and resources on worker misclassification to each person who files with the department any of the following:

- (a) Articles of incorporation under s. 180.0202 or 181.0202.
- (b) Articles of organization under s. 183.0201.
- (c) A statement of qualification under s. 178.0901.
- (d) A certificate of limited partnership under s. 179.0201.

SECTION 23. 943.395 (1) (e) of the statutes is created to read:

943.395 (1) (e) Presents an application for worker's compensation insurance coverage that is false or fraudulent or that falsely or fraudulently misclassifies employees to lower worker's compensation insurance premiums.

(END)