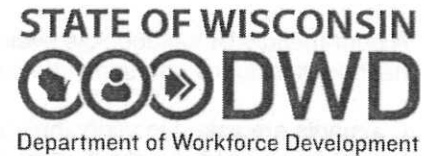


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Scott Walker, Governor  
Reginald J. Newson, Secretary

September 8, 2015

Senator Roth  
State Capitol  
306-South

Chairman Roth,

Thank you for the opportunity to address some of your questions regarding Senate Bill 140. Unfortunately, I will be unable to attend the hearing, but would be glad to answer any follow-up questions you may have.

**Question:** How does a claimant appeal a determination by the Department of Workforce Development (DWD) that the individual concealed a material fact related to eligibility?

**Response:** As is federally mandated in all states, Wisconsin is required to have a process for claimants and employers to appeal any DWD determination. Wisconsin has appellate levels available to either party:

- Either party may appeal an Unemployment Insurance (UI) determination to an Appeal Tribunal; a hearing held by an independent Administrative Law Judge (ALJ) within the UI Division. The ALJ decides the case based on the evidence provided at the hearing. According to law, the burden of proof is with DWD to present clear, satisfactory, and convincing evidence of concealment. The hearing usually is heard within 2-3 weeks of receipt of the appeal, with 83% of all decisions issued within 30 days, well above the federal standard.
- Either party may appeal the decision to the Labor and Industry Review Commission (LIRC), an independent appellate body.
- A decision by LIRC may be appealed to the circuit court, the Court of Appeals and the Wisconsin Supreme Court.

**Question:** How is concealment defined in state law?

**Response:** The definition of concealment enacted in 2007 Wisconsin Act 59 took effect in 2008. The Legislature approved the 2008 law changes in a bipartisan vote. The amendments strengthened deterrence and penalties for concealing work, wages and other facts material to a UI claim. DWD determines concealment on a case-by-case basis and staff must use the available information provided by the claimant to make a determination of "intent." As noted above, these decisions are subject to potential appeal and claimants are notified of their right to appeal in their determination letter.

**Question:** How does DWD inform UI claimants of their responsibility to accurately report work and wages?

**Response:** DWD clearly advises UI claimants of their responsibility to accurately report work and wages. For example, UI claimants are responsible to read and understand the *The Unemployment Insurance Handbook for Claimants*. The handbook clearly states:

*"(The claimant) must report all work, hours, and wages regardless of the amount. Failure to do so may result in an overpayment of benefits and penalties, including prosecution" (UCB-10-P).*

In addition, the weekly claim questions are listed for claimants to understand prior to filing a claim. Also included in the handbook is a specific section entitled, "When to Report that You Worked and Earned Wages."

A print-friendly UI handbook is available online and can be printed and mailed to a claimant upon request. The handbook includes phone numbers for claimants to call if they have questions regarding the UI claim filing process.

Claimants are asked to verify their answers before completing the claim. If they have any questions they are prompted to contact an unemployment specialist before certifying the claim as accurate.

**Question:** Has there been discussion about changing the weekly certification questions?

**Response:** As you are aware, eligibility for UI benefits must be certified weekly as required by state law. The questions request information required to ensure eligibility as determined pursuant to applicable federal and state requirements.

It is worth pointing out that changes made during the 2011 legislative session now require DWD to treat termination pay, sick pay, holiday pay and vacation pay as wages when calculating partial benefit payments for claimants (2011 Wisconsin Act 198). A claimant is required to provide this information because the amount of benefits due is dependent on this answer and cannot be accurately calculated without it.

DWD is taking an aggressive approach to educate claimants about the importance of proper reporting and the consequences of inaccurate reporting of necessary claim information, including potential penalties. These educational efforts are designed to prevent fraud attempts in the UI system and ultimately reduce intentional and unintentional improper payments.

The UI system is supported through a tax that the federal government levies on covered employers in Wisconsin. These dollars are then redistributed to the states based on a formula to pay for the administration of the program. As you may be aware, the federal government is reducing administrative grant funding to states, and there are no additional state resources to fund the administration of the program in Wisconsin. Changing the weekly certification questions would require IT resources and would shift the federal government's already diminishing financial support away from core functions of the program.

**Question:** Does DWD refer enough UI fraud/concealment cases to local district attorneys for potential prosecution?

**Response:** The Department recognizes that criminal prosecution can help deter attempts to defraud the UI system and is working with the Department of Justice and district attorneys to increase prosecution activities. DWD is referring more cases to law enforcement to consider for prosecution.

DWD has some of the strongest administrative tools in the country to pursue more expeditious recoupment of benefits and protect the integrity of the UI Trust Fund. In 2013 alone, DWD assessed approximately \$12 million in forfeitures to claimants, holding them accountable and strengthening the UI Trust Fund.

Looking forward, the continued cooperation of law enforcement and our partners in the Legislature will be critical to successful prosecution of UI fraud. This holds true as UI fraud causes can take years to resolve in criminal courts, and often result in repayment orders and monetary penalties, rather than imprisonment. Enacting stricter criminal penalties for UI fraud in state law could encourage more prosecutions and deter future fraud attempts.

The Department remains committed to preventing and deterring improper payments in the UI system and will continue to share information, strengthen existing relationships and forge new strategies in an effort to ensure that the UI system remains a fair and reliable system for Wisconsin employers and Wisconsin workers who properly utilize the UI system.

Please don't hesitate to contact me with additional questions.

Sincerely,

BJ Dernbach  
Legislative Liaison  
Department of Workforce Development

**Individuals who unintentionally provided inaccurate information accounted for 84.7 percent of the number of overpayments DWD identified from FY 2011-12 through FY 2013-14.**

As shown in Table 11, individuals who unintentionally provided inaccurate information accounted for 84.7 percent of the number of overpayments DWD identified from FY 2011-12 through FY 2013-14. These overpayments totaled \$61.8 million. Individuals who intentionally provided inaccurate information accounted for 9.5 percent of the number of overpayments that DWD identified, and these overpayments totaled \$86.3 million.

Table 11

**Overpayments of Unemployment Benefits Identified by DWD, by Reason  
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Reason	Number	Percentage of Total	Amount (in millions)	Percentage of Total
Individual Fault (unintentional)	577,000	84.7%	\$ 61.8	36.8%
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<b>Total</b>	<b>681,400</b>	<b>100.0%</b>	<b>\$167.9</b>	<b>100.0%</b>

<sup>1</sup> Includes overpayments made from a now-discontinued federal program funded by the American Recovery and Reinvestment Act of 2009.

2011 Wisconsin Act 236, which was enacted in April 2012, requires DWD to impose a 15.0 percent penalty on all overpayments made because an individual intentionally provided inaccurate information relating to his or her eligibility for benefits, wages earned, or hours worked. Act 236 required the penalties to be assessed starting in October 2012. DWD assessed \$0.7 million in penalties in FY 2012-13 and \$2.9 million in FY 2013-14.

### Waivers and Write-Offs

DWD does not attempt to recoup all identified overpayments. Statutes require it to waive recoupment if an overpayment occurred because of a DWD error that was not the result of an individual intentionally providing inaccurate information that was used to determine eligibility or weekly benefit amounts. Federal law requires DWD to waive recoupment of federally funded trade adjustment assistance benefits in certain circumstances, such as when individuals unintentionally provided inaccurate information.



**TO:** Members, Senate Committee on Workforce Development, Public Works, and Military Affairs

**FROM:** Vicky Selkove, Attorney & Legislative Director, Legal Action of Wisconsin

**RE:** SB 140/AB 212, 7-Year Ban on Unemployment Insurance Benefits

**DATE:** September 8, 2015

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Legal Action of Wisconsin (LAW) is a nonprofit law firm that provides free legal services to low-income people in 39 Wisconsin counties, across a territory that extends from the southeastern corner of the state up through Brown County in the east and La Crosse County in the west. Legal Action's staff attorneys regularly represent clients across the state in Unemployment Insurance (UI) matters. All of our clients are extremely low-income, and for those clients and their families, Unemployment Insurance benefits are often the only source of income they have to keep their families afloat in-between jobs.

Currently, if a claimant is determined to have obtained UI benefits by fraud, in addition to having to repay all benefits obtained by fraud, the claimant faces the following significant penalties:

- Loss of benefits from two times to eight times the claimant's weekly benefit amount;
- Surcharge of 40% of the overpayment; and
- Possible criminal charges that could result in a fine of up to \$500 and 90 days in jail.

This legislation proposes to add to that list of penalties a seven-year ban on UI benefits if the claimant is found to have committed two acts of "concealment."

**We are most concerned about the likelihood that people who have not committed fraud, but who have instead made honest, unintentional mistakes, will be subject to this bill's exceedingly harsh years-long period of ineligibility.** This is a reasonable and well-grounded concern given the unfortunate current practices of the Department of Workforce Development's Unemployment Insurance Division.

The Legislative Audit Bureau (LAB)'s December 2014 report, titled "Initial Claims Processing for Unemployment Insurance," found that 84.7% of UI overpayments were the result of unintentional mistakes and only 9.5% of overpayments were due to fraud. **Despite that overwhelming finding that the vast majority of Wisconsin's unemployed workers who receive overpayments are not intentionally committing fraud, it is our experience that, far too frequently, DWD's confusing, compound question claims process results in honest unintentional mistakes being labeled as fraud or concealment.**

**The legislature should carefully consider whether the state should increase the penalties to such a massive degree when they are highly likely to be applied inappropriately.**

## The Compound Question Problem

At the heart of this problem is the Department of Workforce Development's "compound question" usage in its UI claims process, questions that one Wisconsin judge recently labeled "gobbledegook."

Claimants for UI benefits must file weekly claims, and during that process answer questions about their job search and current employment and earnings. Fraud allegations typically arise when a computer match is not exactly the same as the information reported by the claimant during his/her weekly claim filing. It is, therefore, important that the claim questions asked be unambiguous and clear. Unfortunately, DWD persists in asking almost incomprehensibly ambiguous questions. The key question asked of claimants is about their employment and earnings during the week for which the claim is being made.

Prior to October, 2012, that question was worded as follows:

*"Did you work and earn wages during the week?"*

This is a straightforward question that runs little risk of confusing claimants.

However, beginning in October, 2012, the UI Division created a compound question that usually has different answers to the different parts:

*"During the week, did you work or did you receive or will you receive sick pay, bonus pay or commission?"*

A second question asks about receipt of "... holiday pay, vacation pay or dismissal pay."

**Instead of a question asking only about employment and wages, the UI Division requires claimants to answer two compound questions regarding seven possible sources of income, and asks that a single "yes" or "no" answer apply to both past and future receipt of the income. This is inherently confusing to many claimants.**

For example, the UI Division says that a claimant must answer "yes" to the question about working or receiving sick pay, bonus pay, or commission even if the worker received worker's compensation during the week, despite the fact that the question does not even ask about worker's compensation. It would seem that, if the UI Division wants claimants to report on receipt of worker's compensation, it would ask if worker's compensation was received, instead of asking a complicated compound question that does not even mention workers' compensation.

Errors from simple logistics are compounded by a number of commonly recurring questions workers have:

- Gross or net pay?
- Before or after child support?
- What about tips?
- Before or after EITC credits or HSA deductions?

- What about mileage reimbursements or Affordable Care Act subsidies?
- Do wages count if they are from a non-base period employer?
- What if the wages are self-employment income?
- What about a payment for work completed before the layoff?

There are certainly answers to all of these questions, but they are not self-evident.

**The failure to quickly make the correct judgment about all of these things can result in the claimant's unintentional mistake being deemed concealment. There is no doubt that the issue of this "compound question" in DWD's claim filing system is resulting in incorrect DWD fraud determinations.<sup>1</sup>**

It is understandable that a claimant who receives benefits not owed to him/her - even though due to an unintentional mistake - must repay those benefits. However, to impose **an additional harsh penalty on a claimant who may simply have not been able to correctly navigate this confusing web of questions is unfair. To dramatically increase the penalty for fraud, without first making the claims process one that claimants can understand and correctly respond to, is inappropriate and unjust.**

#### **DWD Has Been Told by LIRC & DOL to Stop Using Compound Questions**

The Labor and Industry Review Commission (LIRC) is the independent Wisconsin administrative agency established to provide a fair and impartial review of the decisions of the administrative law judges of the Department of Workforce Development (DWD), in cases involving UI, Worker's Compensation, and Equal Rights. LIRC has repeatedly pointed out the problems of the "compound question." In an April 2015 memo by LIRC's General Counsel, LIRC notes that DWD has recently brought a series of lawsuits against LIRC on the concealment issue. As that memo states, "In all of these cases, the courts have agreed with LIRC's findings that the claimants did not conceal work and wages from the DWD when they filed their claims."

In LIRC's May 2014 decision Wallenkamp v. Arby's Restaurant, LIRC strongly criticized the UI Division for changing the question asked during the weekly claims process:

"Contrary to the ALJ's finding, Question No. 4 in its current incarnation is not simple and straightforward. While the department's former "Did you work?" version may have been straightforward and not easily susceptible to misinterpretation, the department's current version presents at least two distinct, alternative questions within one compound question. There are inherent dangers in inviting a "Yes" or "No" answer to a compound question, because it is often not possible be certain to which part, or parts, a single response applies. This is especially true when a claimant files claims by telephone, where the last question heard is not "Did you work?" When the answer to a compound question

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<sup>1</sup> It must also be noted that DWD has also recently proposed amending the current definition of concealment to make claimants guilty of concealment if they make unintentional mistakes. The DWD proposal would prevent claimants from demonstrating that mistakes were unintentional or caused by confusion, mistake, or even disability. In other words, this definitional change would amount to strict liability for claimants for any mistake they make, and makes SB 140/AB 212's proposed increased penalty even more concerning.

relates to the substantive issues and the ultimate outcome in a case, as it does here, the commission will not infer an intent on the part of the claimant to mislead or defraud the department because both the question and the answer can be misunderstood.”

The United States Department of Labor (DOL) fraud detection program letter ([UIPL 19-11](#)) addressed the specific problem of compound questions in the UI context nearly four years ago. That federal DOL letter to states told states to get rid of two-part questions because they cause confusion which leads to improper payments. As LIRC noted in its April 2015 memo, “a significant number of the fraud cases that are appealed to the commission involved claimants confused by the question.” **DWD still has not corrected its procedures which, as DOL points out, are causing improper payments in occur the first place.**

### **Conclusion**

SB 140/AB 212’s proposed ban on UI benefits is tremendously concerning in light of DWD’s insistence on basing its concealment determinations upon questions that confuse many claimants and that result in unintentional mistakes. When paired with DWD’s pending proposal to amend the definition of “concealment” in a way that would find make it even easier for DWD to find “concealment” based on honest mistakes, Wisconsin will have created a system where our state’s unemployed workers face strict liability for any mistakes they make in filing their UI benefit claims.

Increasing penalties for fraud determinations does nothing to increase the accuracy of DWD’s fraud determinations. Nor does it stop erroneous, and non-fraudulent, overpayments. Increased penalties will serve only to threaten Wisconsin’s Unemployment Insurance claimants who are unable to navigate the seemingly-deliberately confusing compound question traps the Department of Workforce Development has laid for our state’s unemployed workers.

**The legislature should carefully consider whether the state should increase the penalties to such a massive degree when they are highly likely to be applied inappropriately.**

Thank you. Please do not hesitate to contact me if you have questions or need more information. I can be reached at [yss@legalaction.org](mailto:yss@legalaction.org) or 608-620-2011.

STANDING COMMITTEES:

Energy, Consumer Protection, and  
Government Reform, Chair

State and Federal Relations, Vice-Chair

Transportation, Public Safety,  
and Veterans and Military Affairs



JOINT COMMITTEES

Audit Committee, Co-Chair  
Information Policy and Technology  
Transportation Projects Commission

September 8, 2015

**Testimony on Senate Bill 140**  
**Senator Rob Cowles**

This bill is the result of a finding from Audit Report 14-15: Initial Claims Processing for Unemployment Insurance. The audit found that 64,700 claims made to the Department of Workforce Development from individuals who intentionally provided false information resulted in over \$86.3 million of overpayments. For scale, intentional fault claims (as determined by the Department of Workforce Development) accounted for merely 9.5% of the total claims made that resulted in overpayments, however in terms of total dollars, these claims accounted for over 50% (51.4%) of the overpayments.

It is important to note that while you may think of each claim as one individual, the actuality is that 64,700 claims were made by less than 45,000 individuals (Social Security numbers). Looking at the gap of individuals and claims draws the obvious conclusion that these people, who are intentionally defrauding the state, are doing so multiple times.

This bill is an outcome of the hard and thorough work of the Legislative Audit Bureau and a prime example of how the audit process can result in ways to fight waste, fraud and abuse. As you can see in the fiscal estimate, the Department of Workforce Development estimates that the UI trust fund will see savings by the second year and will stabilize in the seventh year and save \$1.9 million annually moving forward. These savings are realized on a small investment to update DWD IT system and funding for appeals processing.

This bill makes repeat unemployment insurance benefit fraudsters ineligible for UI benefits for seven years if they commit two acts of UI fraud. By giving the Department of Workforce Development a powerful new tool to address repeat fraudsters, we will strengthen our anti-fraud efforts and Wisconsin's UI Trust Fund.

I want commend DWD Sec. Reggie Newson and his team for their continuing efforts to fight fraud and hope that this new tool will help to serve in that fight.





STATE REPRESENTATIVE

**SAMANTHA KERKMAN**

**Senate Bill 140**

**Unemployment Insurance Benefit Fraud "2-Strikes"**

Senate Committee on Workforce Development, Public Works, and Military Affairs  
Tuesday, September 8, 2015

Chairman Roth and committee members: good morning and thank you for holding a hearing on Senate Bill 140, the Unemployment Insurance Fraud "2-Strikes" bill.

This common-sense legislation creates a "2-strikes" provision for unemployment benefits fraud by making repeat unemployment insurance benefit fraudsters ineligible for UI benefits for seven years.

The legislation was prompted by findings in the Legislative Audit Bureau Report 14-15, which examined unemployment claims processing. As shown in the audit on page 31, 64,700 unemployment benefit overpayments were made to individuals who were intentionally committing fraud. Although these overpayments accounted for just 9.5% of the total number of benefit overpayments, fraudulent claims accounted for \$86.3 million (51.4%) of the total overpayment dollars.

Furthermore, additional communication with the Department indicated that the 64,700 fraudulent payments could be attributed to 44,488 unique social security numbers. An astonishing 14,543 of them were involved in two or more instances of fraud during the audit period.

Fraud is THEFT.

Although DWD has a number of methods in place to detect fraud and recover fraudulently paid benefits, there is no reason to give someone who has already committed two acts of UI fraud an additional opportunity to do so. A seven-year ineligibility period for benefits is a reasonable safeguard against individuals who have twice demonstrated their intention to defraud the system.

**Individuals who unintentionally provided inaccurate information accounted for 84.7 percent of the number of overpayments DWD identified from FY 2011-12 through FY 2013-14.**

As shown in Table 11, individuals who unintentionally provided inaccurate information accounted for 84.7 percent of the number of overpayments DWD identified from FY 2011-12 through FY 2013-14. These overpayments totaled \$61.8 million. Individuals who intentionally provided inaccurate information accounted for 9.5 percent of the number of overpayments that DWD identified, and these overpayments totaled \$86.3 million.

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