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Joint Committee on Finance

Paper #740

Drug Testing for UI Program (DWD -- Unemployment Insurance)

[LFB 2015-17 Budget Summary: Page 555, #2]

CURRENT LAW

Under current state law, an unemployment insurance (UI) claimant is disqualified from receiving UI benefits if they are discharged for misconduct connected with employment. The definition of misconduct includes a violation of an employer's reasonable written drug and alcohol policy, if the claimant had knowledge of the policy and either admitted to the use of alcohol or drug or refused to take a test or tested positive in a test administered by the employer in accordance with a testing methodology approved by DWD. In order to requalify for benefits, seven weeks must elapse since the end of the week in which the discharge occurs and the employee must earn wages in covered employment equal to at least 14 times the weekly benefit rate he or she would have received if termination had not occurred.

Under current federal law, a state may require a UI claimant to submit to a test for controlled substances as an eligibility condition to receive unemployment benefits if the claimant: (a) was terminated from employment with his or her most recent employer because of the unlawful use of controlled substances; or (b) is an individual for whom suitable work, as defined under state law, is only available in an occupation that regularly conducts drug testing, as determined in regulations issued by the Secretary of the United States Department of Labor (USDOL). As of May 1, 2015, final federal regulations have not been issued.

GOVERNOR

DWD Drug Testing Program

Under the bill, a biennial GPR appropriation would be created for testing of controlled substances and for related expenses, although no funds would be appropriated for 2015-17. Further, the bill creates a substance abuse treatment biennial GPR appropriation and provides

\$500,000 beginning in 2016-17 to fund substance abuse treatment to claimants for UI benefits.

Under the bill, the Department would establish, by administrative rule, a program requiring certain UI claimants to submit to tests for the unlawful use of controlled substances. When a claimant applies for UI benefits, DWD would determine whether the claimant is an individual for whom suitable work is only available in an occupation that regularly conducts testing. The bill defines an occupation that regularly conducts drug testing to mean an occupation identified in guidelines issued by the USDOL Secretary or an occupation for which drug testing is regularly conducted in the state, as identified in rules promulgated by DWD.

If the claimant's only suitable work is in an occupation that regularly conducts drug testing, as determined by USDOL and DWD rules, DWD must screen the claimant in order to determine whether the claimant should be required to submit to a test for controlled substances.

The Department would create a screening process by administrative rule. If the screening shows that the claimant should be required to submit to a drug test, the claimant must submit to the test or become ineligible for UI benefits.

The test for controlled substances must comply with the federal Substance Abuse and Mental Health Services Administration (SAMHSA) testing guidelines. Under the bill, "controlled substance" is defined as it is under federal law (21 USC 802), meaning a drug or other substance included in federal schedules I through V (see the appendix) but does not include distilled spirits, wine, malt beverages, or tobacco. The Department would, by administrative rule, determine which drugs would be specifically tested. Most employers and the federal government use the standard five-panel test of illicit "street drugs", consisting of amphetamines (meth, speed, ecstasy), THC (cannabinoids, marijuana, hash), cocaine (coke, crack), opiates (heroin, opium, codeine, morphine), and phencyclidine (PCP).

If the test is negative for controlled substances, the claimant would be entitled to UI benefits if the claimant is otherwise eligible. If the test is positive for a controlled substance but the claimant has a valid prescription for the controlled substance, the claimant may be entitled to UI benefits if the claimant is otherwise eligible.

If the claimant refuses to submit to the test for controlled substances, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim for UI benefits in the subsequent year.

If the test is positive for a controlled substance for which the claimant does not have a valid prescription, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim for UI benefits in a subsequent year. However, a claimant who tests positive for a controlled substance may maintain eligibility for UI benefits for each week in which the claimant is in full compliance with a state-sponsored substance abuse treatment program and undergoes a state-sponsored job skills assessment. The bill requires DWD, by administrative rule, to identify the parameters for a substance abuse treatment program and to identify the parameters for a job skills assessment for claimants who misuse controlled substances.

Under the bill, an employer's UI account would be charged in the event that the claimant still qualifies for benefits.

Employer Drug Test Reporting Program

Under the bill, an employer may voluntarily submit to DWD the results of a test for the presence of controlled substances that was conducted on an individual as preemployment screening or notify the Department that an individual declined to submit to such a test as a condition of employment, along with information necessary to identify the individual.

If an individual tests positive for controlled substances (and lacks a valid prescription for the drug) or if the individual refuses to take the test, there is a rebuttable presumption that the claimant refused to accept suitable work. DWD would promulgate administrative rules specifying how a claimant may overcome the presumption.

If an employer reports that an individual refused to submit to a test for controlled substances or tested positive for a controlled substance for which the claimant does not have a valid prescription, the claimant would be ineligible for UI benefits for the latter for 52 weeks or when the claimant files a new claim for UI benefits in a subsequent year.

Like claimants whose only suitable work is in an occupation that regularly conducts drug testing, a claimant who tests positive for a controlled substance as part of a preemployment screening (without a valid prescription) may maintain eligibility for UI benefits for each week in which the claimant is in full compliance with a state-sponsored substance abuse treatment program and undergoes a state-sponsored job skills assessment.

Under the bill, the DWD Secretary may waive compliance with any state provision related to the proposed DWD drug testing program or the employer drug test reporting program in order for the Department to continue to receive federal grant funding to fund the UI Division or for employers to receive the maximum credit allowances under the Federal Unemployment Tax Act.

DISCUSSION POINTS

1. The bill states that the Department shall charge to the fund's balancing account any benefits otherwise chargeable to the account of an employer whenever an employee of the employer fails, without good cause, to accept suitable work offered "by that employer." The administration's errata would change "by that employer" to "by an employer", which would clarify a claimant's failure to accept suitable work at an employer, not just "that" employer which only refers back to the claimants previous employer.

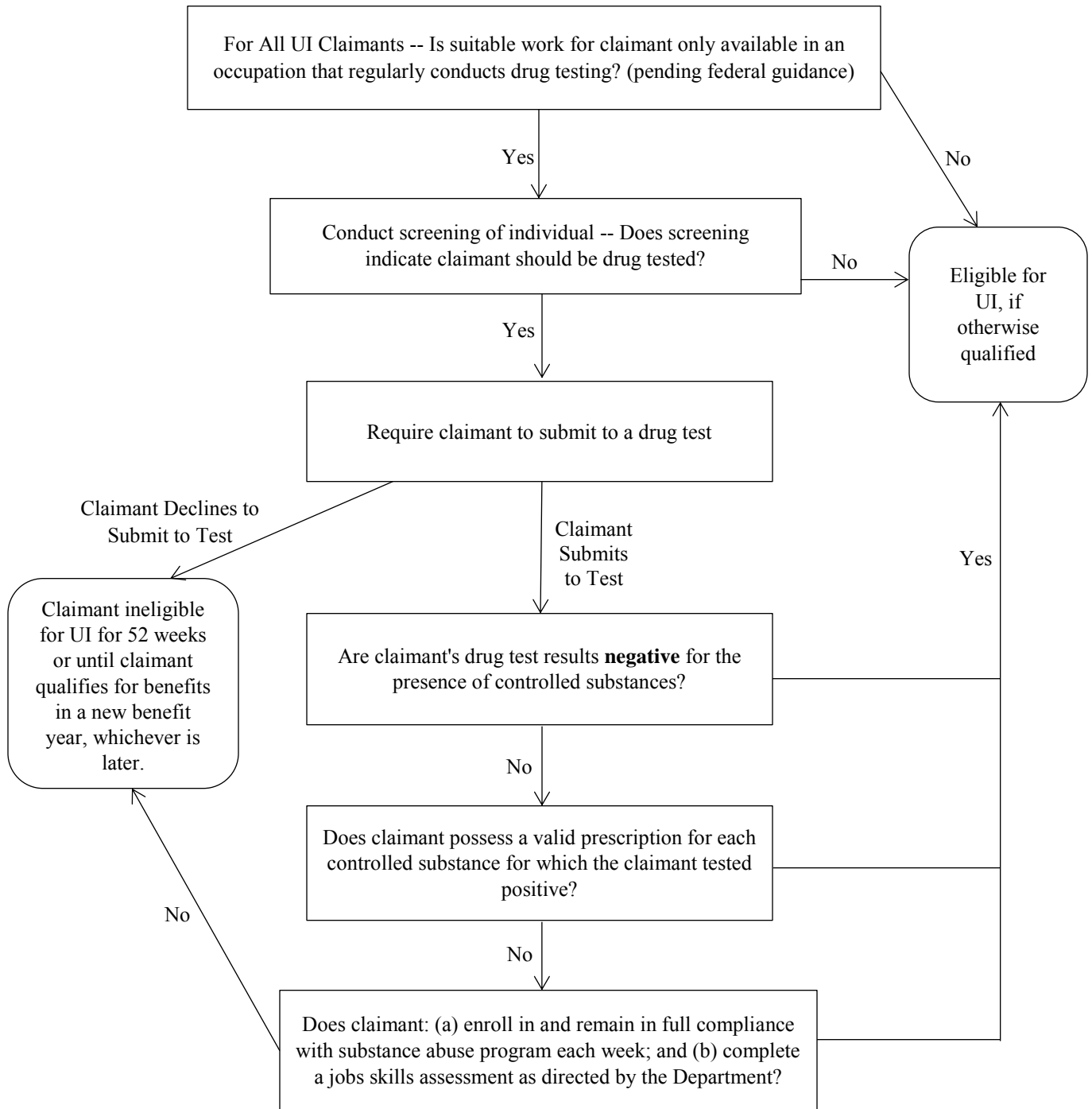
2. Two additional errata items from the administration would clarify the bill's DWD drug testing program provisions relating to the unlawful use of controlled substances and expired prescriptions. The current bill refers to "claimants who misuse controlled substances." Because "misuse" is subjective, the administration's errata would change the text to read "claimants who engage in the unlawful use of controlled substances." The current bill refers to "controlled substance

for which the supply of the controlled substance indicated by the prescription has not run out." Because "run out" is imprecise, the administration's errata would replace the phrase with "expired."

3. The Committee may also choose to clarify that the Department charge to the fund's balancing account the cost of benefits paid to an individual subject to drug treatment requirements that are otherwise chargeable to the account of an employer if the claimant remains eligible for benefits and is in full compliance with any requirements of the substance abuse treatment program and job skills assessment, in accordance with the DWD drug testing program. This provision is not in the Governor's bill or the administration's errata. However, the provision would mirror language added to the recently introduced companion bill in the Assembly (AB 192).

4. The following chart provides a representation of the process that would be used in DWD's UI drug testing program.

**Process for Department to Drug test UI Claimants
2015 SB 21/AB 21**



Substance Abuse, Dependency and Employment

5. Unemployment is a significant risk factor associated with an increase in problematic substance use and conversely, problematic substance use has been found to increase the likelihood of unemployment and decreases the chance of finding and holding a job. Other risk factors of unemployment include increased housing instability, mental health issues, poor physical health and financial problems. The National Survey on Drug Use and Health issued by the U.S. Department of Health and Human Services is a source of data on illicit drug use and dependency. The 2013 survey finds that, among adults aged 18 or older, the rate of illicit drug use "in the past month" in the US was higher for those who were unemployed (18.2 percent) than for those who were employed full time (9.1 percent), employed part time (13.7 percent), or "other" (6.6 percent), which includes students, persons keeping house or caring for children full time, retired or disabled persons, or other persons not in the labor force. Similarly, a higher percentage of unemployed U.S. adults aged 18 or older were classified with having illicit drug dependency or abuse (7.4 percent) than were full-time employed adults (2.1 percent) or part-time employed adults (3.4 percent). State specific substance use data was not available by employment status.

6. Given the elevated rates of illicit drug use, abuse and dependency among unemployed persons in the US, and assuming that Wisconsin largely reflects national trends, it could be argued that a drug testing program targeted to the unemployed is warranted.

7. On the other hand, applicants for unemployment benefits are a subset of the overall unemployed population because UI claimants would have to be recently employed and, therefore, would be statistically less likely than the overall unemployed population to be a user or have dependency issues. According to Quest Diagnostics - a third party testing provider which analyzed 8.5 million workplace drug tests taken by the general U.S. workforce in 2013, 3.8% tested positive for illicit drugs in pre-employment urine tests. For pre-employment tests of federally-mandated safety-sensitive occupations, the positive rate was 1.8%.

8. Another established barrier to employment, alcohol abuse and dependency, would not be screened for or tested under either proposed UI drug testing program. The alcohol abuse and dependency incidence rate in Wisconsin (8.1%) is at nearly four times the state's illicit drug abuse and dependency rate (2.2%). Alcohol remains the largest substance of dependency and abuse among the full-time employed (8.2%), part-time employed (7.3%) and unemployed (10.4%) in the US.

9. In 2013, the percentage of positive drug tests among the American workforce increased for the first time in over a decade, from 3.5% in 2012 to 3.7% in 2013, according to Quest Diagnostics. The 0.2 percentage point increase was predominantly driven by a 6.2% rise in positive marijuana test results from 2012 to 2013. Excluding Colorado and Washington which have recreational use laws, positive test results for marijuana increased 5 percent for the remainder of the US. In 2013, just over 45 percent of all positive drug test results were for marijuana.

10. The first state to institute drug testing of UI applicants was Indiana which passed a law requiring such tests during the 2011 legislative session. The fiscal note attached to the bill estimated that 330 unemployment recipients would test positive for drugs annually. Reports for the six-month period of July-December, 2011, indicate that of the 1,240 job applicants that were tested, only 13

recipients tested positive for drugs, or 1% of those tested. In part, the low number of positive tests may be attributed to users being discouraged from going through the process. To back this claim, the Indiana Workforce Development Department cited that in the three months before drug testing began, 1,903 people took part in the program. In the next three months, 1,689 participated (an 11% reduction). More recent data has not been made available.

Program Costs

11. According to USDOL guidance, current federal funding for the administration of state unemployment compensation programs may be insufficient to support the additional costs of establishing and operating a drug testing program. Permissible alternative funding sources are not readily available. States will need to fund the cost of the drug tests, staff costs for administration of the drug testing function, and technology costs to track drug testing outcomes. States will incur ramp up costs that will include implementing business processes necessary to determine whether an applicant is one for whom drug testing is permissible pursuant to the law; developing a process to refer and track applicants referred for drug testing; and the costs of testing that meets the standards required by the Secretary of Labor. States will also have to factor in increased costs of adjudication and appeals of both the determination of applicability of the drug testing to the individual and of the resulting determinations of benefit eligibility based on the test result.

12. DWD prepared a fiscal estimate for 2015 AB 192, a bill similar to the UI drug testing provision in the Governor's budget. Although largely the same proposal, AB192 differs in that it requires DWD to conduct, every 10 years, a survey of employers to identify occupations that require pre-employment, random, or reasonable suspicion drug testing as a condition of employment. AB 192 then requires DWD to promulgate rules identifying occupations for which more than 50 percent of surveyed employers indicated that drug testing is required as a condition of employment, as well as occupations that regularly involve work with children, that require the operation of a motorized vehicle, that are in the field of construction, that require the operation of heavy machinery, and where persons regularly carry a firearm. Based on these requirements, DWD estimated that up to 85% or 160,560 claimants could fall into one of the occupations that require drug testing as a condition of employment.

13. As opposed to the specific survey requirements contained in AB 192, the budget bill only states that DWD must promulgate rules identifying occupations for which drug testing is regularly conducted in this state. DWD notes that the two proposals have significant differences and the AB 192 fiscal note should not be used as a basis for comparison with the biennial budget bill. It is not clear whether the survey mechanism and occupational criteria detailed in AB 192 would result in similar occupations as those to be promulgated by the Department under the budget bill. Further, it is unclear the extent to which federal law (pending final federal regulations) would allow the broad reading DWD has applied to AB 192.

14. DWD estimates the drug testing program under AB 192 (excluding the survey that is not required under the biennial budget bill) may be expected to cost up to \$1.63 million in one-time IT and administrative costs. DWD estimated total ongoing costs to be \$973,200 annually and \$1.02 million net annual savings to the UI trust fund (see detail in Table 1). However, savings to the UI trust fund can only be used for the payment of benefits and cannot be used to administer any part of

the drug testing program.

DWD AB 192 Fiscal Estimate

| | | <u>Expenses</u> | <u>Savings to UI Trust Fund</u> |
|-------------------------------|--|-----------------------------|---|
| 189,000 Claimants | | | |
| 160,650 Claimants Screened | \$2 per drug screening | \$321,000 | |
| 4,042 claimants to be tested | | | |
| 300 claimants refuse test | \$3,950 average benefit reduction per claimant | | \$1,185,000 |
| 3,742 claimants tested | \$40 per drug test | 149,300 | |
| 318 claimants test positive | | | |
| 159 claimants enter treatment | \$2,700 per individual treatment | 429,300 | |
| 159 refuse treatment | \$3,950 average benefit reduction per claimant | | 628,100 |
| | Miscellaneous administrative costs | 73,600 | |
| | Reduced revenue to UI trust fund | <u> </u> | <u>-792,700</u> |
| | | \$973,200 | \$1,020,400 |

15. Regarding the AB 192 fiscal estimate for the employer drug test reporting program, DWD was not able to estimate the number of individuals whose test results would be furnished to the Department and as such, was unable to determine the cost of the provision.

16. The budget bill provides \$500,000 in 2016-17 under a biennial GPR appropriation to provide a substance abuse treatment program for UI claimants who misuse controlled substances. Estimated treatment program costs are unknown because the universe of program participants for both the DWD drug testing program and the employer drug test reporting program are unknown at this time. The DWD Secretary stated that the drug testing appropriation and associated funding are essentially placeholders in the budget to be used for the implementation of a treatment program, once implemented.

17. Regarding program costs, the bill provides no position authority or funding for the development, administration and IT costs related to the screening, testing, and job-skill assessment provisions of the DWD drug test program. Existing staff would be charged with developing the extensive regulatory framework needed to implement the DWD drug testing program. The fact that administrative and IT costs are not funded under the bill may be in recognition of the fact that the program would have to wait an unknown period of time for USDOL to issue final regulatory guidance which would, in part, determine the scope of Wisconsin's program.

18. Regarding the employer drug test reporting program, the cost of the test would be paid by the business, not the Department. However, DWD would have to verify drug test results and chain of custody requirements, as required by administrative rules to be promulgated by the Department.

DWD Drug Testing Program

19. The argument in support of a DWD drug testing program for UI claimants is to help ensure that unemployed individuals are qualified and ready to work at available jobs. Substance abuse and addiction can be significant barriers to employment. The administration also reports hearing from employers that are having difficulty finding workers who are both qualified and are able to pass a drug test.

20. The Middle Class Tax Relief and Job Creation Act of 2012, signed into law by President Obama on February 22, 2012, permits states to drug test UI claimants if the person is an individual for whom "suitable work" is only available in an "occupation that regularly conducts drug testing", and to deny UI benefits based on a positive result of this drug test.

21. Currently, states are waiting for the federal government to finalize rules regarding which occupations meet the criteria of "occupation that regularly conducts drug testing". Draft federal guidelines were issued October 9, 2014, and opened for comments. Under these proposed federal guidelines, the following occupations would be subject to drug testing: an occupation that requires the employee to carry a firearm, aviation flight crew member, air traffic controllers, commercial drivers, railroad operating crew members, public transit operators, pipeline operation and maintenance crewmembers, maritime credential holders on a commercial vessel and crewmembers, and any occupation specifically identified as requiring an employee to be tested for controlled substances in state law that took effect no later than October 9, 2014. Despite the proposed October 9, 2014 cutoff date, the budget bill would direct DWD to identify occupations for which drug testing is regularly conducted in Wisconsin. In the event that USDOL decides to change the cutoff date to accommodate states that had not identified state-specific occupations as of October 9, 2014, then this provision in the budget bill could be in compliance. Under the bill, if USDOL decides not to change the cutoff date, the state would likely need to waive the state provision to remain in compliance.

22. The Governor and the DWD Secretary have submitted comments on the proposal. In their comments, the administration argued that USDOL's proposed regulations adopted such an arbitrarily narrow definition of "occupations that regularly conduct drug testing" that the potential number of applicants affected would be negligible. The administration stated that the rules, as proposed, failed to include many occupations that involve an inherent risk of injury and resulting liability to business if its employees are impaired. It is unclear the extent to which USDOL may alter the draft guidelines based on various concerns that have been raised. It is also unclear when the final guidelines will be issued.

23. Under the bill, and if the proposed federal regulations are finalized without changes, DWD has estimated that 126,630 workers in Wisconsin fall into the identified occupational categories that would be subject to testing (mainly trucking, taxi, and bus drivers). This figure represents 4.7% of Wisconsin's 2.7 million covered employees. The 4.7% figure could expand if USDOL decides to amend the proposed rules and allow states to add state-specific occupations to the list of "occupations that regularly conduct drug testing." The Department is careful to point out that the 126,630 estimate is not an estimate of the population that would be subject to drug screening if they were to claim UI benefits. The only individuals who would be drug screened are

those who are employed in the identified occupations and for whom suitable work is only available in an occupation on the occupation list. If there is suitable work available for the claimant outside these occupations they would not be subject to drug screening. According to DWD, the vast majority of individuals will have suitable work in at least one other occupation that does not regularly drug test, so they would not be required to be drug screened.

24. If the Committee finds that federal guidelines, as currently written, are so narrowly constructed as to render any potential state program likely to have a narrow impact (low number of positive tests) and to substantially increase state UI program costs, the Committee could delete the Governor's recommendation for a DWD drug testing program [Alternative A2]. A drug testing plan could be reconsidered by the administration and/or the Unemployment Insurance Advisory Council (UIAC) once federal regulations are known and a more detailed plan and cost estimate have been developed in light of these standards.

25. Mississippi and Texas are the two states that, to date, have passed conforming UI drug testing laws. Both states are waiting for the USDOL to finalize proposed rules. Texas enacted UI drug testing legislation in 2013 and the program was to become effective February 1, 2014. However, the program is on hold awaiting federal guidance. Like the Wisconsin proposal, the Texas program would limit drug testing to those claimants whose only "suitable work" would regularly require a drug test.

26. If the Committee finds that higher rates of drug use among unemployed is a significant barrier to employment in Wisconsin and wishes to offer a drug testing program as allowed by recently enacted federal law, the Committee could approve the Governor's recommendation, as corrected, for a DWD drug testing program [Alternative A1].

27. Regarding privacy concerns, the confidentiality of an employee's information are expected to be addressed in the USDOL rules. The proposed rule states that the results of, or even the fact of, a drug test for a UI applicant is confidential under federal code (20 CFR 603.2j) and, therefore, must adhere to the confidentiality requirements under federal unemployment compensation law which requires "maintaining the confidentiality of any UI information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foreseeably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information." Given DWD's drug testing program would need USDOL approval prior to implementation, DWD would need to adhere to any USDOL privacy standards when promulgating state rules and implementing the program.

Employer Drug Test Reporting Program

28. The administration states that the employer drug test reporting provision is to ensure that individuals are ready to work. The potential of having a drug test result submitted to the state for the purposes of UI benefit eligibility could act as an effective deterrent to drug use for job seekers. The hope is that the reporting program will compel employers, who fund the UI program and maintain individual accounts with the state, to voluntarily notify DWD that a person was not offered employment because of a failed drug test or for declining to take a drug test.

29. To the extent that employers voluntarily comply with the program and send in valid test results, and the test results confirm a positive test for controlled substances or a refusal to take a test, and the positive test or refusal can be connected to a current UI recipient, and that current UI recipient is unable to provide a medical prescription for the controlled substance or is unable to rebut the statutory presumption, and the claimant refuses to enroll in (or comply with) a substance abuse treatment program and undergo a job skills assessment, the law could reduce UI benefit payments from the state's UI trust fund. It is unknown how many claimants would be disqualified from receiving benefits due to failing or refusing employer drugs tests. However, the Department has indicated that UI benefit payment reductions would likely total less than \$350,000 annually. Total Wisconsin UI benefit expenditures were \$642 million in 2014.

30. Despite the potential to modestly lower the amount of benefits paid from the state's UI trust fund, it could be argued that there is a limited incentive for employers to send in test results or notify DWD of a failure to submit to testing. Because test results can come from any employer, rather than just a prior employer of an employee (as when an employer discharges an employee for a failed drug test), employers could be called into unemployment hearings for former job applicants who want to contest their disqualification from UI benefits. The program could add paperwork and compliance costs for those employers that chose to volunteer for the program.

31. In some cases, prospective employees will not show up for a drug test because they are no longer interested in the job. Under the bill, a job applicant who "refuses" a drug test is presumptively treated the same as an applicant who fails a test. A claimant who does not show for a drug test is generally considered to have refused the test, and would risk having their unemployment benefits suspended because of this refusal to take a test. One concern for employers is that they could be paying for additional tests because applicants will be compelled to take tests regardless of actual interest in the job.

32. An additional concern raised by some employers is if the policy would cause a chilling effect on the number of job applicants. It could be argued that the proposal may discourage individuals from looking for work if they thought that there would be a chance that their test results (positive or negative) or notification of a failure to submit to a test, could be turned over to a public authority.

33. If enacted, and if an employer chose to participate in the program, Wisconsin employers would need to review and update their pre-employment drug testing policies and practices to adhere to state standards for drug testing and chain of custody protocol. Federal agencies conducting drug testing must follow standardized procedures established by the Substance Abuse and Mental Health Services Administration (SAMHSA). While private employers are not required to follow SAMHSA's guidelines, doing so may be required under rules promulgated by the Department so as to align with the DWD's own in-house drug testing program.

34. 2011 Act 32 created a preemployment drug testing program, but was repealed six months later under 2011 Act 198. The 2011 provision is similar to the current proposal, but with several key exceptions. The 2011 law required an employer to report a claimant's positive drug test or refusal to take a drug test to DWD, while the current version is voluntary. The 2011 law specified that DWD must retain drug test information obtained from the employer for purposes of

determining eligibility for benefits. The current version of the bill is silent on the specifics of how and how long test results would be retained by the Department. Perhaps most importantly, the current version creates a rebuttable presumption that the claimant has failed to accept suitable work when offered if the claimant has tested positive for drugs or declined to submit to such a test. This presumption can be rebutted under rules to be promulgated by DWD. The 2011 provision was unanimously recommended for repeal by the Unemployment Insurance Advisory Commission (UIAC), an advisory body made up of five management and five labor representatives. At the time, UIAC members voiced concerns over privacy (confidentiality of records maintained by the state and employer), administrative costs to operate the program, and how the proposal could potentially discourage individuals from looking for work.

35. Based on the potential for increased compliance costs and administrative burden for employers, privacy concerns for job seekers, the potential to discourage individuals from looking for work, and unfunded IT, administrative, and startup costs for DWD, the Committee could delete the provision for an employer drug test reporting program from the bill [Alternative B2].

36. Other states have adopted similar statutory language to establish preemployment drug test programs. Tennessee, Arkansas, Arizona, Georgia and Indiana currently have similar laws in place. States vary on how they choose to implement such programs. Some have relied on screening individual UI applicants to tell the state if they failed or refused a drug test in the job application process. Other states, like Wisconsin's proposed law, specifically ask employers to voluntarily report applicant's drug test failures and refusals. Michigan's one-year pilot preemployment drug testing program ended October 29, 2014, and was not renewed. Like the proposal in Wisconsin, the Michigan law allowed, but did not require, prospective employers to report any test failures or refusals to the state. No reports could be found on the extent to which employers participated in these state programs.

37. Based on the program having some promise to be an effective deterrent to drug use for job applicants, the program could help ensure a more ready workforce for Wisconsin employers. The Committee could approve the Governor's recommendation, as modified, for an employer drug-test reporting program [Alternative B1].

Employer Drug Test Reporting Program - Privacy Issues

38. Drug tests are generally considered to be searches for the purposes of the Fourth Amendment of the United States Constitution and Article 1, Section 11 of the Wisconsin Constitution. Historically, courts have found that in order for the search to be reasonable, it must be based upon individualized suspicion or a special need (or important governmental interest) which goes beyond the need for law enforcement, such as public safety. Regulation in other states which conditioned the receipt of public assistance upon suspicionless drug testing, such as Florida and Michigan, have been struck down by courts as unreasonable searches.

39. The proposed employer drug test reporting program is not intended to serve a law enforcement purpose. As stated above, the intent is to help the unemployed with addiction and help ensure a ready labor force for employers. However, the bill does not provide for drug testing procedures that would restrict the sharing of test results or limit the negative consequences of failed

test to UI claimants. As opposed to the DWD drug testing program, the employer drug test reporting program would apply to all workers in Wisconsin in all occupations. Even if a person never applies for UI benefits, that person's failed drug test results could be submitted to DWD. Under the bill, the Department would define by rule how information is submitted and any other necessary rules to implement the program. The Department has stated that their intent would not be to retain information on individuals who are not UI recipients. The bill, however, does not indicate who would maintain the records of the testing results or whether such results could be shared with other parties, such as law enforcement officials or courts that rule on UI matters. As a result, the bill could create unintended consequences for applicants if the drug testing results are shared in ways which negatively impact participants and violate their expectation of privacy.

40. The Committee may wish to modify the Governor's proposal for an employer drug test reporting program to: (a) restrict the use of testing results to determining eligibility for UI benefits; and (b) require that drug test results and information on an applicant's refusal of a preemployment drug test be kept confidential except for authorized Department staff [Alternative B1].

UI Advisory Council

41. The state's UI law establishes the Unemployment Insurance Advisory Council to advise DWD in carrying out the purpose of Wisconsin's unemployment insurance law. The Council is composed of five employer and five employee representatives who are appointed by the Secretary of DWD to serve six-year terms. The Council can submit its recommendations for changes in UI law to the Legislature and report its views on any other pending legislation which relates to UI. The Council generally presents an "agreed upon" bill for consideration by the Legislature in the fall of each odd-numbered year. Historically, the Council's recommended changes in UI law presented to the Legislature have been adopted with few, if any, amendments. In 2011 and 2013, the Governor, and subsequently Joint Finance and the Legislature, made significant changes to the state's UI law through the budget process. This was a significant departure from how the Council's recommended changes to UI law had historically been presented to the Legislature. Given that both proposed UI drug programs have significant policy implications for the program, the Committee could find that there is merit in vetting any program through the UIAC process [Alternative A2].

ALTERNATIVES

A. DWD Drug Testing Program

1. Approve the Governor's recommendation to create a DWD drug testing program for UI claimants. Further, clarify that UI benefits for persons in the drug treatment and skills assessment program be charged to the balancing account, rather than the employer account. In addition, accept the administration's erratum which clarify language related to the unlawful use of controlled substances and expired prescriptions.

2. Delete provision. [The administration and/or the UIAC could consider recommending a drug testing program after final federal guidelines are issued and costs are identified.]

| | |
|---------------|-----------------------|
| ALT A2 | Change to Bill |
| GPR | - \$500,000 |

B. Employer Drug Test Reporting Program

1. Adopt the Governor's employer drug test reporting recommendation, as modified to restrict the use of drug screening, testing, and treatment results to determining eligibility for UI benefits. Further, clarify that the Department shall charge benefit payments to the fund's balancing account if a claimant fails to accept suitable work offered by "an" employer.
2. Delete provision.

Prepared by: Ryan Horton

APPENDIX

Definition of Controlled Substance Schedules

Drugs and other substances that are considered controlled substances under the Controlled Substances Act (CSA) are divided into five schedules. An updated and complete list of the schedules is published annually in Title 21 Code of Federal Regulations (C.F.R.) §§ 1308.11 through 1308.15. Substances are placed in their respective schedules based on whether they have a currently accepted medical use in treatment in the United States, their relative abuse potential, and likelihood of causing dependence when abused.

Schedule I Controlled Substances. Substances in this schedule have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse. Some examples of substances listed in Schedule I are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), peyote, methaqualone, and 3, 4-methylenedioxymethamphetamine ("Ecstasy").

Schedule II Controlled Substances. Substances in this schedule have a high potential for abuse which may lead to severe psychological or physical dependence. Examples of Schedule II narcotics include: meperidine (Demerol®), oxycodone (OxyContin®, Percocet®), and fentanyl (Sublimaze®, Duragesic®). Other Schedule II narcotics include: morphine, opium, codeine, and hydrocodone. Examples of Schedule II stimulants include: amphetamine (Dexedrine®, Adderall®), methamphetamine (Desoxyn®), and methylphenidate (Ritalin®).

Schedule III Controlled Substances. Substances in this schedule have a potential for abuse less than substances in Schedules I or II and abuse may lead to moderate or low physical dependence or high psychological dependence. Examples of Schedule III narcotics include: products containing not more than 90 milligrams of codeine per dosage unit (Tylenol with Codeine®), and buprenorphine (Suboxone®). Examples of Schedule III non-narcotics include: ketamine and anabolic steroids such as Depo®-Testosterone.

Schedule IV Controlled Substances. Substances in this schedule have a low potential for abuse relative to substances in Schedule III. Examples of Schedule IV substances include: alprazolam (Xanax®), diazepam (Valium®), and lorazepam (Ativan®).

Schedule V Controlled Substances. Substances in this schedule have a low potential for abuse relative to substances listed in Schedule IV and consist primarily of preparations containing limited quantities of certain narcotics. Examples of Schedule V substances include: cough preparations containing not more than 200 milligrams of codeine per 100 milliliters or per 100 grams (Robitussin AC®).