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Joint Committee on Finance

Paper #425

Eliminate the Labor and Industry Review Commission (Labor and Industry Review Commission)

[LFB 2017-19 Budget Summary: Page 40, #5, Page 276, #2, and Page 496, #4]

CURRENT LAW

The Labor and Industry Review Commission (LIRC) is an independent, quasi-judicial agency responsible for resolving appeals of disputed unemployment insurance, worker's compensation, and equal rights decisions. LIRC is composed of three commissioners who are appointed by the Governor, subject to confirmation by the Senate. LIRC reviews administrative decisions of the Department of Workforce Development (DWD) relating to unemployment insurance and equal rights, and reviews administrative decisions of the Department of Administration's (DOA) Division of Hearings and Appeals (DHA) relating to worker's compensation.

2015 Act 55 transferred \$3,177,100 annually with 26.5 positions from DWD to LIRC appropriations to be budgeted separately under Chapter 20.427 of the appropriation schedule. Prior to Act 55, LIRC was budgeted as a program under DWD. Act 55 specified that LIRC be attached to DOA for administrative purposes only and that DOA submit LIRC's biennial budget request to the Governor without modification. The transfer included a one-time reduction to LIRC's federal unemployment administration funding of \$434,900 FED annually and, to the extent allowable under federal unemployment insurance (UI) law, provided these funds for DWD UI program integrity (fraud detection) purposes. Act 55 also converted 1.0 position from classified to unclassified, and specified that the Governor appoint an individual to serve at the pleasure of the Governor as general counsel for the Commission. LIRC has four unclassified staff, including the three Commissioners and the general counsel.

GOVERNOR

Eliminate LIRC and transfer the responsibility for administrative review of administrative decisions to DHA for worker's compensation decisions and to DWD for unemployment insurance decisions and equal rights decisions. Specify that the elimination of LIRC take effect on January 1, 2018, or on the first day of the sixth month beginning after publication, whichever is later.

Delete \$121,300 GPR, \$1,218,000 PR and \$382,000 SEG in 2017-18 and delete \$243,100 GPR, \$2,437,700 PR and \$764,000 SEG and 26.5 positions (1.3 GPR, 20.5 PR, and 4.7 SEG) in 2018-19.

Provide the Administrator of DWD's Division of Unemployment Insurance with the authority to review administrative decisions relating to unemployment insurance issued by the Division of Unemployment Insurance's administrative law judges.

Provide the Administrator of DWD's Division of Equal Rights with the authority to review administrative decisions relating to fair employment and discrimination ("equal rights") issued by the Division of Equal Right's administrative law judges.

Provide the Administrator of DOA's Division of Hearings and Appeals with the authority to review administrative decisions relating to worker's compensation issued by DHA hearing examiners.

Specify that a review that is before LIRC on the effective date of the bill would remain with LIRC for disposition until the date on which LIRC is eliminated. A person could file a petition for LIRC review within 21 days after the effective date of the bill if: (a) the allowable time period for filing a review has not expired; and (b) no petition for review has been filed with LIRC prior to the effective date of the bill. Otherwise the person could not file a petition for review by LIRC. Instead, the person could file a petition for review by the DWD Division Administrator (unemployment insurance and equal rights) or the DHA Administrator (worker's compensation).

Specify that a person could file an action for judicial review of a LIRC decision under the procedures in effect before LIRC's elimination if: (a) no action for judicial review of the decision has commenced as of the effective date of the bill; and (b) the allowable time period for commencing an action for judicial review has not expired.

Authorize DWD to promulgate any rules necessary to provide for review of unemployment insurance decisions. Under current law, DWD is authorized to promulgate rules necessary to provide for review of equal rights decisions. Authorize DHA to promulgate rules of procedure as necessary for the Division and the Administrator to perform their duties and functions under the worker's compensation statutes.

Authorize DHA and DWD to promulgate emergency rules to provide for review of administrative decisions under the provision. Notwithstanding current law procedures for

promulgating rules, DHA and DWD would not be required to provide evidence that promulgating the rule as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare, and would not be required to provide a finding of emergency for promulgating the rule. The emergency rules promulgated under the provision would remain in effect for two years after they become effective, or until the date on which permanent rules take effect, whichever is sooner, and the effective date of the emergency rules could not be extended.

On the effective date of the elimination of LIRC, provide that any of LIRC's assets and liabilities, tangible personal property, records, contracts, orders, and pending matters would be transferred to DHA for matters related to worker's compensation, and to DWD for matters related to unemployment insurance and equal rights.

All contracts entered into by LIRC that are primarily related to worker's compensation would remain in effect and be transferred to DOA. All contracts entered into by LIRC that are primarily related to unemployment insurance and equal rights would remain in effect and be transferred to DWD. DOA and DWD would be required to carry out the obligations of the contract until the contract is modified or rescinded by DOA or DWD to the extent allowed under the contract.

All orders issued by LIRC would remain in effect until their specified expiration date or until modified or rescinded by DOA or DWD.

All pending matters related to worker's compensation submitted to, or actions taken by, LIRC with respect to the pending matter would be considered as having been submitted to or taken by the Administrator of DHA. All pending matters related to unemployment insurance and equal rights submitted to or actions taken by LIRC with respect to the pending matter would be considered as having been submitted to or taken by DWD.

Delete all LIRC appropriations on the effective date of the elimination of LIRC. Modify the following DWD appropriations to remove language which authorizes the Department to transfer funding to the appropriation accounts under LIRC: (a) FED unemployment insurance administration; (b) FED equal rights administration; and (c) SEG worker's compensation operations fund administration. No position authority is granted to DWD or to DHA to support additional administrative review responsibilities acquired by these agencies. The bill would not provide for the transfer of incumbent employees from LIRC to DWD or DHA.

Require DWD to maintain a searchable, electronic database of significant unemployment insurance decisions made by administrative law judges and the administrator. Authorize (but do not require) DWD to include in the database decisions of LIRC that were required to be maintained in the database under current law. Currently, LIRC is required to maintain a searchable, electronic database of significant unemployment insurance decisions made by LIRC.

DISCUSSION POINTS

The Administration's Errata to the Bill

1. The administration submitted numerous errata to the provision in the bill that would eliminate LIRC. All errata pertaining to this provision have been incorporated in LRBb0009/P3, which include the following.

2. The budget bill would eliminate LIRC and transfer the responsibility for review of administrative decisions to the administrator of DOA's Division of Hearing and Appeals for worker's compensation (WC) decisions, and the administrator of DWD's unemployment insurance division for unemployment insurance (UI) decisions, and the administrator of DWD's equal rights division for equal rights (ER) decisions. The administration's errata alters several provisions in the bill to provide that the division administrators of DHA and DWD would be responsible for the review of administrative law judge (ALJ) decisions. The errata also alters several provisions in the bill to provide that the courts would be responsible for the review of an order by a division administrator.

3. Under the bill, the DHA administrator, in reviewing a worker's compensation decision, would be required to affirm, remand, set aside, or modify the finding or order, in whole or in part, or direct the taking of additional evidence. The bill deletes "reverse" as one of the options that the administrator would have when reviewing a worker's compensation decision. The errata would restore "reverse" as an option.

4. Under the bill, the DWD equal rights division administrator and unemployment insurance division administrator would be required to decide how to rule on an appeal of a lower level decision based on a review of the evidence submitted. The errata adds that for a review, in the absence of fraud, the administrator would be required to adopt the ALJ's findings of fact unless the finding of fact are not supported by credible and substantial evidence.

5. Under current unemployment insurance law, DWD has the ability to seek judicial review of a LIRC decision or to issue a notice of nonacquiescence if the Department believes that LIRC construed a statute adversely to the Department. The bill deletes this provision. The errata maintains this provision and amends the provision to allow the Department to seek judicial review of the UI division administrator's decision or to issue a notice of nonacquiescence if the Department believes that the administrator construed a statute adversely to the Department. Further, the errata would reinstate language deleted by the bill that permits DWD, in judicial proceedings related to unemployment insurance, to appear by a licensed attorney who is a salaried employee of the Department and has been designated by it for that purpose.

6. In general, under unemployment insurance law and equal rights law, an initial determination is made by the Department regarding a claim. That determination can be appealed to a Department ALJ. An ALJ would then issue a decision on the initial determination. The ALJ's decision can then be appealed to the Division administrator who, under the bill, would then issue an order. The errata revises several provisions in the bill to provide the consistent use of "determination," "decision," and "order" in UI and ER law.

7. Under the bill, a person could file a petition for LIRC review within 21 days after the effective date of the bill if no petition for review has been filed with LIRC prior to the effective date of the bill. If a party filed a petition for review with LIRC and the budget was enacted during the party's 21 day appeal window, the review venue would change from LIRC to the appropriate division administrator. The errata deletes this provision. Under the errata, an ALJ decision issued prior to the effective date of the budget bill could be appealed to LIRC and an ALJ decision issued on and after the effective date of the bill could be appealed to the administrator.

8. Under current unemployment insurance law, in LIRC's review of a Department ALJ decision, the Commission must use the electronic recording of the hearing, a written synopsis of the testimony, or a transcript of the hearing prepared under the direction of the Department or Commission. The errata would delete the ability of the administrator to use a written synopsis of the testimony as prepared by the Department.

Governor's Rationale for the Proposal

9. The Governor's Budget in Brief states that the elimination of LIRC would "remove an unnecessary layer of government" and, as a result of transferring second-level review responsibilities from LIRC to DHA and DWD, the "time for second-level review of administrative law judge decisions will be substantially decreased and streamlined."

10. According to the Department of Administration's Executive Budget Summary, the Governor's proposal would "streamline review of equal rights, worker's compensation and unemployment insurance case decisions by eliminating the Labor and Industry Review Commission and the related 26.5 FTE positions."

11. In his statement to the Joint Committee on Finance on March 30, 2017, the Secretary of the Department of Workforce Development supported the Governor's proposal:

"This change also allows us to right-size staff-to-caseload ratios. The caseloads for LIRC have declined by more than half - 56 percent - since 2011, when the Governor took office. However, LIRC's budgets are not following this trajectory. Instead, they have increased budget requests for a decreasing caseload. Through the elimination of LIRC and transfer of duties to DWD and DOA, we will implement a system that provides faster turnaround on decisions, while maintaining a fair and independent appeals process."

12. DHA has expressed support for the Governor's budget proposal to eliminate LIRC by stating that DHA can provide a faster and more efficient appeals process.

13. In summary, support for the proposal from the Governor, DWD and DHA appears to be based on the view that second-level administrative appeals could be done faster and with fewer resources. The analysis contained in this issue paper will address the question of efficiency as well as concerns regarding the need to maintain a fair and independent appeals process.

14. Elimination of LIRC and the transfer of administrative appeals to DWD and DHA were not requested by LIRC, DWD or DOA in their respective agency budget submissions.

History of LIRC

15. In 1911, a three-member commission, the State Industrial Commission, was created to administer the state's worker's compensation law and, later, the state's unemployment compensation law.

16. In 1967, the Industrial Commission was renamed the Department of Industry, Labor and Human Relations ("DILHR"). DILHR was given responsibility for the Governor's Commission on Civil Rights, which became the DILHR equal rights division. DILHR was headed by three commissioners, who decided appeals of Department decisions regarding unemployment insurance, worker's compensation, and equal rights.

17. In 1977, DILHR became a cabinet-level agency headed by a Secretary who was appointed by the Governor. At that time, the Labor and Industry Review Commission was created as a separate agency to hear appeals of decisions of the administrative law judges of DILHR.

The Appeals Process in LIRC cases

18. In general, worker's compensation, unemployment insurance and equal rights administrative decisions can be appealed to LIRC. In 2016, 1,736 ALJ decisions were appealed to LIRC, of which 1,462 were unemployment insurance decisions (8% of all UI ALJ decisions), 202 were worker's compensation decisions (59% of all WC ALJ decisions), and 72 were equal rights decisions (26% of all ER ALJ decisions).

19. Table 1 shows the number of appeals received by LIRC between 2006 and 2016 for each appeals category. The overall number of appeals received by LIRC is driven by the Commission's unemployment insurance caseload which is closely tied to the number of unemployment insurance claimants and the health of the overall economy. Between 2006 and 2011, the number of appeals received by LIRC increased 55% (reflecting the effect of the national recession). Between 2011 and 2016, the number of appeals received by LIRC declined 58%. Over the entire period, from 2006 to 2016, the number of appeals received by LIRC declined 35%.

20. Table 2 shows the number of decisions issued by LIRC between 2006 and 2016 for each appeals category. The number of decisions issued by LIRC does not exactly correspond to the number of appeals received (Table 1) due to the time needed to issue a decision. In particular, if an appeal is received toward the end of the calendar year, then that appeal would likely be decided in the following year and recorded as a decision in that year.

TABLE 1**Number of Appeals Received (CY)**

	<u>Unemployment Insurance</u>	<u>Worker's Compensation</u>	<u>Equal Rights</u>	<u>Total</u>
2006	2,325	250	96	2,671
2007	2,349	304	101	2,754
2008	2,493	275	96	2,864
2009	3,152	251	118	3,521
2010	3,539	238	129	3,906
2011	3,866	185	91	4,142
2012	3,127	200	91	3,418
2013	2,785	176	63	3,024
2014	2,480	191	77	2,748
2015	1,794	214	77	2,085
2016	1,462	202	72	1,736
Percent Change 2006-2011	66.3%	-26.0%	-5.2%	55.1%
Percent Change 2011-2016	-58.7%	-15.1%	-44.2%	-58.1%
Percent Change 2006-2016	-37.1%	-19.2%	-25.0%	-35.0%

TABLE 2**Number of Decisions Issued (CY)**

	<u>Unemployment Insurance</u>	<u>Worker's Compensation</u>	<u>Equal Rights</u>	<u>Total</u>
2006	2,320	282	91	2,693
2007	2,281	263	85	2,629
2008	2,504	306	101	2,911
2009	2,697	253	88	3,038
2010	3,591	236	88	3,915
2011	3,384	208	106	3,698
2012	3,494	204	99	3,797
2013	2,966	177	111	3,254
2014	2,556	181	107	2,844
2015	1,819	230	94	2,143
2016	1,505	199	64	1,768
Percent Change 2006-2011	45.9%	-26.2%	16.5%	37.3%
Percent Change 2011-2016	-58.1%	-15.7%	-27.3%	-52.2%
Percent Change 2006-2016	-35.1%	-29.4%	-29.7%	-34.3%

21. Regarding unemployment insurance claims, LIRC reviews the decision of the ALJ based on the evidence which was submitted at the hearing before the ALJ. There is no hearing before LIRC. Based on its review, the Commission may affirm, reverse, modify or set aside the decision of the ALJ, or it may order the taking of additional evidence, or it may remand the matter to the Department for further proceedings.

22. Regarding worker's compensation claims, based on its review of the record made before the ALJ, and without any separate hearing before it, LIRC will either affirm, reverse, set aside, or modify the findings or order of the ALJ in whole or in part, or direct the taking of additional evidence.

23. Regarding equal rights claims, based on its review of the record made before the ALJ, and without any separate hearing before it, the Commission may affirm, reverse, or modify the findings or order in whole or in part, or set aside the findings and order and remand to the Department for further proceedings.

24. LIRC decisions may be appealed to the Circuit Court, the Court of Appeals and eventually to the Wisconsin Supreme Court. In 2016, 88 LIRC decisions were subsequently appealed to Circuit Court (5% of all decisions issued by LIRC).

Deference to the Body of Law Established by LIRC

25. Judicial deference is the condition of a court yielding or submitting its judgment to that of another legitimate authority. The Labor and Industry Review Commission has a 106 year history of deciding administrative appeals cases in Wisconsin and, over that time, deference to LIRC's conclusions of law has been granted by the courts.

26. In comments submitted to the Legislative Fiscal Bureau, the Wisconsin Court System issued the following statement regarding deference to LIRC decisions:

"Circuit courts have accorded deference to LIRC. Using the court's reasoning from past cases, it is unlikely that deference will be afforded to the work of the administrative reviewers who are given that responsibility in the proposed state budget. The low rate of petitions for judicial review from LIRC decisions is a reflection of the role LIRC has played. There is a level of certainty because of the stability of the law in this area. Attorneys representing either claimants or employers are well aware that LIRC's decisions may be given deference by circuit courts. If LIRC's role is removed, it is likely that more claims will be brought to circuit court."

27. Some have expressed a concern that LIRC's interpretation of the law, and deference to that body of law by the courts, would not continue if LIRC is eliminated. There is a possibility that cases would likely be appealed to the courts to test whether the existing deference to LIRC remained and, if not, whether deference would instead be granted to the ALJs that originally decided the case. In a recent ruling by the Wisconsin Supreme Court (*Operton v. LIRC*, May 4, 2017), in a concurring opinion, Justice Rebecca Bradley stated:

"Equally troubling is the possibility that seven elected justices -- or, indeed, any elected judge accountable to the people of Wisconsin -- might give "great weight" deference to an agency decision by a single, unelected administrative law judge or hearing examiner against

whom the people have no recourse. ... Judicial deference to executive interpretations further widens the gap between the people and the laws that govern them.when the legislature delegates broad authority to an executive agency, which in turn interprets and enforces that delegated authority, the judiciary risks the liberty of all citizens if it abdicates its constitutional responsibility to check executive interpretations of the law."

28. Some have also expressed concern that the courts would likely not grant deference to decisions rendered by various ALJs located exclusively in the executive branch of government and, thus, the first opportunity to get a true resolution and consistency in decision will either be at the Circuit Court level or at the Court of Appeals. Appellate litigation is costly and this would likely increase litigation costs for businesses and employees to the degree that cases are appealed to the higher courts. LIRC estimates that all WC cases would be appealed to the Circuit Court, as well as most ER cases and roughly half of the UI cases currently appealed to LIRC. Based on LIRC's current caseload, this would mean that there would be approximately 1,000 cases per year that LIRC estimates would be appealed to the courts, as opposed to 88 LIRC cases that were appealed to the courts in 2016.

29. The Wisconsin Court System did not provide an estimate of the expected increase in cases as a result of the elimination of LIRC. However, the courts did note that administrative agency review cases are not subject to constitutional or statutory time deadlines, as are some other types of cases (criminal cases, for example). Accordingly, during times of higher caseloads, additional administrative review cases would be the type of cases that could be vulnerable to delays.

30. Besides the deference given LIRC decisions in general, there are other areas of law in which LIRC's reviews are of assistance to the circuit and appellate courts. For instance, LIRC's role in evaluating the credibility of witnesses has been recognized in case law. For example, in *Hakes v. LIRC* (1994), "the ultimate responsibility for credibility determinations is vested with the commission, not the ALJ" and "the ALJ may make initial determinations on witness credibility, but these determinations are subject to LIRC's independent review." The adoption of a new appeals authority may result in uncertainty in how the courts would evaluate the credibility of witnesses.

The Nature of Review

31. LIRC's standard of review is currently "de novo", meaning that the Commission is not bound by the ALJ's findings of fact and conclusions of law based upon the evidence in the hearing record created by the ALJ.

32. The budget bill, inclusive of the errata, would require the DWD UI division administrator to adopt the ALJ's findings of fact unless the findings of fact are not supported by credible and substantial evidence. Therefore, the nature of the second level review conducted by the administrator would not be de novo.

33. Currently, there is a dispute between LIRC and DWD regarding the nature of administrative review in relation to the decision of unemployment insurance appeals. In general, DWD contends that the purpose of a higher authority appeal is not to retry a case but to be an error correcting body, while LIRC contends that its purpose is to provide a thorough de novo review of the case.

34. LIRC argues that the Legislature has established LIRC's de novo review authority in worker's compensation cases in Wis. Stat. 102.18(3), in equal rights cases in Wis. Stat. 111.39(5) and unemployment insurance cases in Wis. Stat. 108.09(6)(d). Under the statutes, LIRC contends that it must always make findings of fact and conclusion of law. Furthermore, LIRC argues that the legislative intent that the Commission exercise de novo review has been understood, interpreted, and upheld by the courts, pointing to several Wisconsin Supreme Court cases including *DILHR v. LIRC (1991)* where the court opined: "The legislature intended to give final review authority of the ALJ decision to the commission. When it created LIRC as a separate agency in 1977, the legislature intended the commission to be the ultimate finder of fact and law review by the courts."

35. In summarizing how DWD would implement the bill, the Department states that the division administrator's review will be error correcting only and briefing may be limited to cases where necessary to address unique issues. The Department contends that the treatment of cases in this way will significantly decrease the time to review and issue a decision.

36. A recently released publication from the United States Department of Labor (USDOL, May, 2017) entitled "Comparison of State Unemployment Insurance Laws," which provides state-by-state comparison of state unemployment insurance laws, found that most states specify that findings of fact, conclusions of law, or final orders made by a UI hearing officer will not be binding in any separate or subsequent proceeding brought in any judicial, administrative, or arbitration proceeding in that state or of the U.S. government. The only states that do not currently specify that findings, conclusions, or orders of hearing officers are not binding in any other proceeding include Alabama, Delaware, Hawaii, Kentucky, Maryland, Mississippi, Rhode Island, South Carolina and West Virginia.

37. Another concern expressed about the bill is that appeals to the courts could increase if there is a perception that the division administrators were not engaging in a meaningful review of the case. The adoption of a new appeals authority would likely result in additional litigation, not only to test decisions made by administrators, but also to develop the law in this area. Currently, LIRC maintains case digests for its unemployment insurance decisions and workers compensation decisions. These provide guidance to practitioners in how their issues are likely to be handled during the review process. The only source for guidance under the new system of review would be Court of Appeals decisions because there is no compilation of Circuit Court decisions available. Under the provisions of the budget bill, DWD would be required to maintain an electronic database of unemployment insurance decisions made by the administrator and by the ALJs. It would take time to compile a sufficient database equal to the guidance now provided. In addition, when administrators change at DHA and DWD, there could be changes in how cases are handled, thereby complicating the establishment of a consistent body of case law.

38. In comments submitted to the Legislative Fiscal Bureau, the Wisconsin Court System stated the following in regards to the nature of review:

"The budget language is unclear in regard to the level of review that would be undertaken by the administrator, and there is no support staff provided to the administrator. Under these circumstances, it is unlikely that the administrator will be able to provide the thorough review now given by LIRC."

39. DHA stated that it has no opinion on the form of appellate review that would be conducted for workers compensation administrative appeals. However, DHA did state that it would not establish procedures or guidelines that would limit the ability of the DHA Division Administrator to complete the record and provide due process. DHA states: "The Division Administrator would conduct a similar method of review to LIRC, but with a smaller scope; after an appeal is filed and briefing finished, the Administrator would review the record created and make a decision on that record."

Conflicts of Interest

40. The bill would eliminate LIRC and house both the administrative hearings and administrative appeals in the same agency. The bill does not specify what the process would be for appeals other than to specify that appeals would be decided by division administrators at DWD and DHA.

41. DWD stated that attorneys assigned to review appeals to the administrator will be dedicated to that task and that attorneys currently performing duties as ALJs will not be assigned to review cases while on the hearing docket. The Department also stated that supervision of ALJs and attorneys assigned to review appeals would also be separated.

42. According to DHA, staff would be separated organizationally with appeals arriving in a separate mail or email box to be retrieved by staff dedicated to answering appeals. A designated appellate ALJ would review briefs and the record, discuss with the division administrator, and draft a decision to be edited by the administrator, much like current appeal cases that DHA handles. DHA adjudicated 3,437 corrections hearings in 2016 and received 1,089 administrative appeals of those decisions.

43. While DHA and DWD offer assurances that they would separate administrative hearings and administrative appeals functions within each division, it could be argued that there could be the appearance or perception that decisions would not be fairly reviewed by administrators, who may be tempted to make decisions based on fiscal and supervisory considerations rather than an independent review of the facts and law in the case. For example, for DWD's UI program, since DWD has a monetary incentive to find fraud in cases to fund administrative activities, the independence of the administrator in these cases could be called into question. As a result, appeals to the courts could increase if there is a perception that the attorneys that draft decisions for the division administrators are not engaging in a fair review of the case.

Independent Review

44. Under current law, LIRC is composed of three commissioners who are appointed by the Governor, subject to confirmation by the Senate, and who serve staggered six-year terms. Given that commissioners are appointed for a fixed, six-year term, they retain their position throughout the six-year period. Some suggest this increases the independence of the commissioners. Others suggest the decisions of LIRC may vacillate depending on which party holds the Governor's office and appoints the commissioners.

45. Division administrators at DWD are appointed by the Secretary of DWD. DWD Division administrators are accountable to their agency secretaries, are at-will employees and can be replaced at any time. The Division Administrator at DHA is appointed by the Secretary of DOA from the classified service. In comments submitted to the Legislative Fiscal Bureau, the Wisconsin Court System stated the following:

"...when administrators change, there could be changes in how cases are reviewed. There would be less stability than that now provided by LIRC's three commissioners, with staggered terms of office."

Timeliness of Second Level Appeals

46. The administration has stated that once LIRC is eliminated and responsibilities are transferred to DWD and DHA, "time for second-level review of administrative law judge decisions will be substantially decreased and streamlined." DHA stated that it would assume LIRC's functions and resolve WC appeals in a shorter time. Similarly, DWD stated that it would administer the UI and ER appeals process more efficiently. In his statement to the Joint Committee on Finance on March 30, 2017, the DWD Secretary supported the Governor's proposal and stated that "through the elimination of LIRC and transfer of duties to DWD and DOA, we will implement a system that provides faster turnaround on decisions..."

47. In general, UI decisions are less complex than WC and ER decisions and, therefore, the handling of a typical UI appeal is less time consuming than the handling of WC and ER appeals. However, UI appeals are the large majority (84% in 2016) of cases that are appealed to LIRC. In addition, because the UI appeal caseload largely mirrors the condition of the national economy, during the peak of a recession the number of UI appeals grows to be an even larger majority (93% in 2011) of cases that are appealed to LIRC. Given the volume of UI appeals handled by LIRC, UI processing timeliness measures are important when reviewing the overall timeliness of appeals processing at LIRC.

48. The United States Department of Labor (USDOL) compiles data on the performance of state UI systems. As part of their monitoring effort which tracks over 50 metrics related to the performance of state UI programs, USDOL also tracks a more select group of core measures related to state UI performance and, connected with these core measures, issues uniform national Acceptable Levels of Performance (ALPs). Any state that does not meet the ALP criteria for any of the core measures must submit a corrective action plan. In 2004, in the wake of the prior national recession and with increased workloads and commissioner vacancies, LIRC failed to meet the timeliness standards and was subject to a corrective action plan. As part of that plan, certain processes were moved from DWD to LIRC and LIRC hired limited-term employees to assist with the workload and reduce the case backlog. LIRC has been able to meet DOL timeliness standards since that time, including through the most recent recession.

49. USDOL's ALP for the average age of higher authority appeals, effective April 1, 2008, is for the average age of pending cases not to exceed 40 days. To determine whether the ALP has been met, the average age of pending appeals is measured as of March 31, the last day of the performance year (USDOL Unemployment Insurance program letter No. 14-05). The calculation

behind the average age of pending higher authority appeals is the sum of the ages, in days from filing, of all of the higher authority's pending single-claimant UI cases, divided by the number of its single-claimant UI cases. Wisconsin has met the 40-day ALP standard since the standard took effect on April 1, 2008. The average age of LIRC's pending UI single-claimant benefit cases on March 31 reached a high of 36 days in 2013, a low of 26 days in 2016 and, most recently was 27 days in 2017.

50. Using an alternative timeframe, although not an official USDOL core measure, the average age of LIRC's pending UI single-claimant benefit cases on January 31, 2016, showed an average age of 54 days. The Commission has stated that LIRC's performance in 2016 reflected a period when the Commission was operating under a reduced budget (referring to the Act 55 expenditure authority reductions) and reduced staff due to two LIRC attorneys that needed to use family medical leave.

Other States

51. The Social Security Act requires states to offer "opportunity for a fair hearing before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Hence, the laws of all states provide for a right to appeal. However, states are not required to provide a second level of appeal.

52. Three states (Hawaii, Minnesota and Nebraska) and the District of Columbia do not have second level UI appeals. In these states, there is a process for parties to request that the ALJ reconsider the decision or the ALJ decision is reviewed by the agency administrator or secretary. The next level of appeal in these states is circuit court.

53. About half of the 47 states that have established second-level appeals have a board of review, board of appeals, or appeals board to hear cases appealed from the decision of the lower appeal tribunal. Like LIRC in Wisconsin, almost all of these boards consist of three members. The members of the appeals boards generally represent labor, employers and the public.

54. In the rest of the states with second-level appeals, appeals are handled by an existing commission or agency head. In four states (Arkansas, New Mexico, North Dakota and South Dakota) and Puerto Rico, higher authority appeals are decided by the equivalent of the department secretary.

Federal UI Funding

55. DWD appropriations contain language which authorizes the Department to transfer funding to certain appropriations under LIRC. DWD transfers the amounts in the LIRC appropriations schedule, from: (a) federal monies for the purposes of unemployment insurance administration; (b) federal monies for the purposes of equal rights administration; and (c) segregated monies from the workers compensation operations fund for the purposes of worker's compensation operations activities.

56. Base level funding for LIRC is \$265,500 GPR, \$1,953,300 PR (transfer of federal UI monies from DWD), \$181,200 PR (transfer of federal ER monies from DWD) and \$777,100 SEG

(transfer of SEG monies from DWD's worker's compensation operations fund) annually. Based on these amounts, 60% of LIRC's total annual expenditure authority is funding transferred from DWD's federal UI administration appropriation.

57. DWD's federal UI administration appropriation receives base funding from USDOL. Federal UI base funding levels are derived from a formula that draws on data submitted by the state on the actual costs of operating the state's UI program. For federal fiscal year 2017, the total federal UI base allotment received by DWD was \$56.0 million. Part of the base allotment formula is derived from the cost of processing appeals, from which DWD received \$3.7 million in the 2017 federal fiscal year. The formula does not differentiate between first and second level appeals.

58. State UI agencies have the flexibility to move federal UI resources among various UI program categories (such as appeals, program integrity, and initial claims). Given the flexible nature of these funds the Department indicates that federal UI base funds retained by DWD due to not having to fund LIRC beyond January 1, 2018, would be used to fund program integrity staff and Department modernization initiatives. DWD stated that the Department will use existing staff and resources to comply with the Governor's budget request.

59. Beyond the ability to retain federal UI base funds that would otherwise be transferred to LIRC, DWD suggests that it would process lower and higher authority UI appeals faster and more efficiently, thereby receiving an increased share of federal base funding. USDOL's method for determining UI base funding is designed to provide each state with a funding amount that will support a roughly equal level of services across states to beneficiaries and employers. To achieve this objective, allocations are tied to the cost of doing business in each state and to each state's share of national workloads. To this end, states report annually to USDOL how much staff time is devoted to a particular workload activity (such as appeals) and the amount of workload processed for the most recent 12 month period. From these data points, a state's minutes per unit (MPU) measure can be calculated. According to USDOL, of all the variables in the UI base funding formula, states have most control over the MPU measure and can influence them through efficient operational procedures. The base funding formula is designed to reduce the funding amount allotted to higher MPU states. According to DWD, LIRC's higher costs contribute to a higher MPU, which results in a lower reimbursement rate for both higher and lower authority appeals.

60. Wisconsin's MPU for appeals processing (first and second level appeals) for federal fiscal year 2017 was 107% of the national average. The 107% figure ranks Wisconsin with the 11th highest appeals MPU of 53 state and national territories that are awarded UI base funding. USDOL also calculates an average MPU for all states, and identifies an acceptable range around that measure. Although Wisconsin has a higher than average MPU, it was deemed by this USDOL metric to be within the "acceptable range" as compared to other states.

Worker's Compensation Funding

61. LIRC receives approximately 25% of its funding as a transfer from DWD's worker's compensation operation fund. Wisconsin's worker's compensation system, including the costs of ALJs, is funded by an assessment against WC insurers (Wis. Stat. 102.75). Any change in the cost of operating the WC Division or in the cost of handling workers compensation claims is factored

into the assessment rate charged to insurers. Any change in the assessment charged to insurers would then be passed on to employers through a change in the rate structures. If the system costs more to operate (such as the system becomes more litigious, and/or the time to close cases increases) then rates would be expected to increase. Under the bill, it could be argued that there would be an increased risk that worker's compensation premiums would increase in Wisconsin, given the likelihood that more WC cases would be appealed to DHA, the Circuit Court and the Court of Appeals.

62. DHA charges DWD for its costs based on the FTE workload required to service WC hearings and appellate reviews. Thus, DHA indicates it may charge DWD more in the future if there is a potential increase in DHA workload for WC. Currently, LIRC's worker's compensation review requires 4.7 FTE. According to DHA, the Division would reallocate 2.0 FTE for one experienced ALJ and a legal associate to work on WC appeals. DHA states that additional staff may be needed to fill in, at least initially. Preliminarily, \$240,000 a year would be reallocated towards this function. DHA has stated that additional WC appeals would be expected, at least initially.

LIRC Position Authority

63. In the 2015-17 biennial budget, the Joint Committee on Finance reduced LIRC's UI appropriation by \$434,900 PR annually. LIRC indicates that this funding reduction resulted in a layoff plan initiated in 2015. At the time, one attorney resigned, one attorney (0.8 FTE) accepted a voluntary layoff, and two legal associates were laid off. During 2016-17, two attorneys, two legal associates and one legal secretary retired. The legal secretary position was subsequently filled. According to LIRC, due to the budget cut and the reduced UI workload, no other vacant positions were filled during the biennium. Subsequent to the release of the Governor's budget, as of April 28, 2017, two additional legal secretary positions also have been vacated.

64. There are currently 26.5 positions at LIRC. Four of these positions are appointed by the Governor (three commissioners and one general counsel). The remaining 22.5 positions are classified and include 16.8 FTE PR unemployment insurance positions, 3.2 FTE SEG workers compensation positions, 1.5 FTE PR equal rights positions, and 1.0 FTE GPR funded through LIRC's general program operations appropriation.

65. Currently, of the 22.5 classified positions authorized for LIRC, 7.8 positions are vacant (35% of all classified positions). This figure is exclusive the recent legal secretary position vacancies. Of the 7.8 FTE vacant positions, 6.8 FTE are funded from the Commission's unemployment insurance PR appropriation (2.8 attorney positions and 4.0 legal associate positions), and one attorney position is funded as 0.5 GPR and 0.5 SEG. According to LIRC, leaving positions vacant has historically been the way the Commission has responded to periods of low levels of unemployment and low UI appeals.

66. Currently, LIRC has 1.0 LTE worker's compensation attorney position. LIRC indicates that hiring an additional LTE could be an option given recent retirements. Adding an LTE employee(s) could give LIRC additional flexibility in handling fluctuating caseloads, the ability to retain the knowledge and experience of recent retirees, and the potential to control costs with a lower fringe rate.

67. LIRC's overall caseload has fallen by 58% over the past five years (Table 1). DWD notes that there was not a corresponding reduction to LIRC's staffing and spending levels over the same period of time. DWD stated that it will use existing staff and funding to comply with the Governor's budget request. To the extent that DWD would be able to reduce the number of staff hours devoted to the review of first level and second level appeals in relation to the total appeals workload in a given year (thereby improving DWD's MPU), DWD could realize an increase in its UI base allotment, depending on DWD's efficiency in the remainder of their UI operation. DWD suggests this would provide the opportunity to reallocate money from the administration of appeals to the Department's program integrity efforts. The Committee could choose to approve the Governor's recommendation and eliminate LIRC, effective January 1, 2018, and transfer a more limited second-level administrative review to DWD for unemployment insurance and equal rights decisions and to DHA for workers compensation decisions [Alternative 1].

68. Given the concerns highlighted in this paper with the proposal to eliminate LIRC, but acknowledging DWD's concern that funding levels for LIRC have not followed overall caseload reductions, the Committee could choose to retain LIRC and, instead, eliminate a certain number of vacant positions and the salary and fringe expenditure authority related to those positions.

69. The Committee could choose to delete \$220,400 PR annually associated with 4.0 vacant unemployment insurance legal associate positions. The selection of this alternative would retain 3.8 vacant attorney positions at LIRC to absorb any potential increase in UI and WC caseloads. UI caseloads are at a historically low level. An increase from the current level of appeals due to worsening economic conditions would likely increase the UI appeals workload. Under this alternative, LIRC could choose to not hire additional FTE employees with the remaining 3.8 vacant positions and instead use the expenditure authority associated with these vacant positions to contract with LTE employees or temporary service agencies to assist LIRC in fulfilling its duties. [Alternative 2a].

70. The Committee could choose to delete \$353,200 PR annually associated with 6.0 vacant positions (4.0 vacant UI legal associate positions and 2.0 vacant UI attorney positions). The selection of this alternative would retain 1.8 vacant attorney positions at LIRC. Under this alternative, a 0.8 FTE UI-funded position could be utilized to absorb a more modest increase in UI appeals. The remaining 1.0 vacant position could also be filled, in part, for worker's compensation purposes, as requested by LIRC in their agency budget request. LIRC's agency budget submission requested 1.0 FTE SEG project attorney position to address the projected increased caseload associated with changes made to Wisconsin's worker's compensation under 2015 Act 180 (the Worker's Compensation Advisory Council's agreed upon bill). Under this alternative, LIRC could choose to not hire additional FTE employees to fill the remaining 1.8 vacant positions and instead use the expenditure authority associated with these vacant positions to contract with LTE employees or temporary service agencies to assist LIRC in fulfilling its duties [Alternative 2b].

71. The Committee could also choose to delete all 7.8 vacant positions [6.8 FTE UI funded positions and 1.0 FTE (0.5 GPR and 0.5 SEG) attorney position] at LIRC. Instead of eliminating all funding related to these positions, this alternative would eliminate only the funding identified in Alternative 2b, \$353,200 PR annually associated with 6.0 UI related vacant positions. By not

eliminating all of the cash associated with the deleted positions, this alternative would allow LIRC to contract with LTE employees and temporary service agencies to assist LIRC in fulfilling its duties. However, this alternative would not permit LIRC to hire additional FTE staff if UI or WC appeals increase in the 2017-19 biennium. If workload increases, LIRC could request additional position authority and associated funding for those positions at a quarterly meeting of the Joint Committee on Finance under s. 13.10 (SEG or GPR) or under a 16-day passive review submittal under s. 16.505/16.515 (PR) [Alternative 2c].

72. Alternatively, it could be argued the amount of savings that would be generated from eliminating LIRC would be negligible. As previously discussed, the number of workers compensation, unemployment insurance and equal rights appeals to the higher courts would likely increase, thus delaying case processing times and increasing costs. It could also be argued that the amount of savings that would be generated from processing appeals more efficiency may be overstated. According to the efficiency metric used by USDOL to determine UI funding levels, the Wisconsin appeals process (first level review at DWD and second level review at LIRC) was deemed to be within the acceptable range of performance as compared to other states. The Committee could choose to maintain the current law status of LIRC and adopt base level funding for the 2017-19 biennium [Alternative 3].

ALTERNATIVES

1. Approve the Governor's recommendation as corrected by the administration's erratum, to eliminate the Labor and Industry Review Commission and transfer appeals to the Department of Workforce Development and the Department of Administration.

ALT 1	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
GPR	- \$364,400	- 1.30	\$0	0
PR	- 3,655,700	- 20.50	0	0
SEG	<u>- 1,146,000</u>	<u>- 4.70</u>	<u>0</u>	<u>0</u>
Total	- \$5,166,100	- 26.50	\$0	0

2. Retain LIRC under current law as Wisconsin's second level appeals commission for unemployment insurance, worker's compensation and equal rights appeals. In addition, approve one of the following numbers of position deletions:

a. Delete \$220,400 PR annually with 4.0 vacant unemployment insurance legal associate positions.

ALT 2a	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
GPR	\$0	0.00	\$364,400	1.30
PR	- 440,800	- 4.00	3,214,900	16.50
SEG	<u>0</u>	<u>0.00</u>	<u>1,146,000</u>	<u>4.70</u>
Total	- \$440,800	- 4.00	\$4,725,300	22.50

b. Delete \$353,200 PR annually and 6.0 positions, including 4.0 vacant unemployment insurance legal associate positions and 2.0 vacant unemployment insurance attorney positions.

ALT 2b	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
GPR	\$0	0.00	\$364,400	1.30
PR	- 706,400	- 6.00	2,949,300	14.50
SEG	<u>0</u>	<u>0.00</u>	<u>1,146,000</u>	<u>4.70</u>
Total	- \$706,400	- 6.00	\$4,459,700	20.50

c. Delete \$353,200 PR annually and 6.0 positions, including 4.0 vacant unemployment insurance legal associate positions and 2.0 vacant unemployment insurance attorney positions. In addition, delete 0.8 vacant PR unemployment insurance attorney position and a 1.0 vacant attorney position (0.5 GPR and 0.5 SEG).

ALT 2c	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
GPR	\$0	0.50	\$364,400	0.80
PR	- 706,400	- 6.80	2,949,300	13.70
SEG	<u>0</u>	<u>0.50</u>	<u>1,146,000</u>	<u>4.20</u>
Total	- \$706,400	- 7.80	\$4,459,700	18.70

3. Maintain current law.

ALT 3	Change to Base		Change to Bill	
	Funding	Positions	Funding	Positions
GPR	\$0	0.00	\$364,400	1.30
PR	0	0.00	3,655,700	20.50
SEG	<u>0</u>	<u>0.00</u>	<u>1,146,000</u>	<u>4.70</u>
Total	\$0	0.00	\$5,166,100	26.50

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