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State of Wisconsin  
**Labor and Industry Review Commission**

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**COMMENTS ON DWD PROPOSAL D15-11**

**Concerns with the D15-11 proposal:**

- *Proposed sec. 108.09(7)(c)4. requires that all parties must answer a complaint seeking judicial review of a commission decision. Currently, the successful parties at the commission level may rely on the commission to defend its decision and need not incur litigation expenses by answering.*
  - **This could be a trap for incorporated employers, especially small businesses, because an officer or shareholder of an incorporated business who is not a lawyer cannot represent the business in court.** For example, any business operated as an LLC would have to hire an attorney to represent it in court and file an answer.
  - If an employer or employee fails to answer, it is not clear from the proposal if the court would be required to issue a default decision against that employer or employee. If so, a court could enter a default judgment against an employer who failed to answer and require that employer to pay unemployment insurance benefits before reviewing the underlying commission decision that denied benefits.
- *Proposed sec. 108.09(7)(c)1. provides that “any party,” not just aggrieved parties, may bring an action for judicial review.*
  - This tracks the language of current Wis. Stat. § 108.09(7)(a), but does not pick up the “party aggrieved thereby” language included by the current cross-reference to sec. 102.23(1)(a). (Note that proposed sec. 108.09(7)(g) provides that any “party aggrieved” by a circuit court judgment may appeal to the court of appeals.) The proposed language would allow an appeal by any employer or employee, even if they are not aggrieved by the commission’s decision, contrary to current law. See *Cornwell Personnel Associates, Ltd, v. DILHR*, 92 Wis. 2d 53, 284 N.W.2d 706 (Ct. App. 1979). This may just be a drafting error, but if it was intentional, it might **permit nuisance appeals to circuit court.**
- *Proposed sec. 108.09(7)(a) and (c)1. requires parties to name DWD as a defendant in all unemployment insurance appeals to court.*
  - **This could be a trap for employers and employees and result in the increased dismissal of actions brought by employers and employees who seek judicial review of commission decisions.** If an employer or employee fails to name DWD as a defendant in an action for judicial review, the court would lack competence to proceed and could be required to dismiss the employer or employee’s case. An employer or employee might

not intuitively realize it had to name DWD as a party in court cases if DWD was not a party before the administrative law judge or commission.

- In most cases, courts review commission decisions simply to determine if the commission's interpretation and application of the law is reasonable, and the employer or employee seeking judicial review attempts to prove it is not. Having DWD as a party in every case could add a third voice that would unnecessarily **complicate the court's task on judicial review.**
- *Proposed sec. 108.09(7)(c)2. eliminates the requirement that a circuit court agree to the case being brought before it if no party resides in that county.*
  - Currently, a court has authority to agree—or not agree—to hear a case being brought before it when no party resides in that county. Currently, the court's agreement is required not only in unemployment insurance and worker's compensation cases, but also in most other administrative agency review actions. See, e.g., sec. 227.53(1)(a)3. This provision would **eliminate a court's discretion to decline to hear an unemployment insurance appeal when both the employer and the employee reside somewhere else.**
- *Proposed sec. 108.09(7)(c)5. provides that, after the commission files the record, the court "shall" schedule briefing by the parties, and any party "may" request oral argument.*
  - While most judicial review actions currently involve briefing by request or court order, requiring briefing in every case could limit a court's discretion to determine how it handles cases before it. Specifically providing that any party may request oral argument is unnecessary because that is already the case in any court proceeding. As a result, the provision may be interpreted as *requiring* courts to have oral argument whenever requested, also **limiting a court's discretion in handling cases.**
  - After stating that any party may request oral argument in the last sentence of proposed sec. 108.09(7)(c)5., the proposed language incorporates a second clause from sec. 102.23(1)(d) " ; subject to the provisions of law for a change of the place of trial or the calling in of another judge." The reason for including this second clause and its effect on the first clause is unclear as it does not refer to oral argument.
- *Proposed sec. 108.09(7)(d)6. and (f) seem to limit a circuit court's remedy.*
  - This may be a drafting error, as the proposal does not include all the remedies stated in current sec. 102.24(1). Proposed sec. 108.09(7)(d) permits a court to remand a case to the commission in cases where the fact findings are unsupported and could be construed to permit further hearing. However, the proposed language does not pick up a court's authority "to enter proper judgment upon the findings of the commission" in

cases where the court affirms the commission's fact findings but reverses the commission's interpretation or application of the law.

- *Proposed sec. 108.09(7)(c)2. provides that proceedings shall be in the circuit court of the county where the plaintiff resides, except that if the plaintiff is DWD, the proceedings shall be in the circuit court of the county where a defendant – other than the commission – resides.*
  - The proposal tracks the current sec. 102.23(1)(a), but uses the term “department” rather than a “state agency.” Thus, other state agencies who are employers would be required to bring actions in Dane County, not the county where a defendant resides as provided in current law.

**Concerns that the origin and effects of the proposed changes were misrepresented to the Council:**

- The minutes from the September 17, 2015, UIAC meeting regarding DWD Proposal D15-11 are in error. Those minutes state that *“LIRC appeared before the Council in November 2013 requesting changes to address confusion of the courts and claimants on why LIRC references Wis. Stat. § 102.23, which also contains language that does not pertain to UI. At that time, Ms. Knutson suggested LIRC prepare a proposal that transferred relevant sections from Wis. Stat. 102.23 to Wis. Stat. Ch. 108 for the changes they were recommending; however, they chose not to proceed at that time.”*
  - **This is not correct.** The commission appeared at the November 18, 2013, UIAC meeting by Bill Jordahl, Commissioner, and Tracey Schwalbe, General Counsel. The purpose of the commission's appearance was to request UIAC support on proposed law changes to streamline procedures for the UI appeals process before the commission, to correct legislative drafting errors in statutory provisions, and to repeal obsolete provisions. [The relevant portion of the minutes of the November 18, 2013, meeting is attached. Interestingly, the minutes from that meeting, and only from that meeting, have been removed from the UIAC website.] Ms. Knutson at one point referenced the fact that the procedure for UI court appeals referred to the process in chapter 102 and asked if the commission had considered a law change proposal regarding that. Ms. Schwalbe responded that such a change had not been considered because it would be a huge undertaking and require the involvement of all of the commission's experienced court attorneys. The focus in November 2013 was only on improving the case review process as a result of a lean government initiative the commission had undertaken earlier that year. The brief exchange between Ms. Knutson and Ms. Schwalbe did not even warrant mention in the minutes of the meeting.
  - The commission was never contacted by DWD regarding this proposal or even indicated that it was considering such a proposal. The commission's court attorneys have handled UI court work for decades.

- There have not been any problems with UI court cases being handled through the procedures established in ch. 102.
  - The fact that the UI court appeals are handled by reference to chapter 102 is not new or unusual. Courts have recognized that the authority conferred on the commission in WC and UI cases is similar and therefore look to the WC statutes to interpret UI law. “We look to sec. 102.19(4)(c), Stats., of the Worker’s Compensation Act because the authority conferred thereunder upon LIRC is substantially the same as that conferred by sec. 108.09(6)(c), Stats. LIRC has program responsibilities under the Worker’s Compensation Act which are substantially the same as its program responsibilities under the Unemployment Compensation Act. Sec. 15.221(2), Stats.” *La Crosse Footwear v. LIRC*, 147 Wis. 2<sup>nd</sup> 419, 424, 434 N.W.2d 392 (1988).
- DWD represented to the Council that the *“department had tried to consolidate cases in the past; however, LIRC would only agree to the consolidation if the cases were heard in Dane County.”*
  - **This, too, is not correct.** DWD filed several lawsuits against the commission in 2014 that were filed in counties where none of the parties resided, contrary to the law. DWD did not get the stipulation of the parties or the agreement of the court to do so. The commission therefore either moved to dismiss or moved for a change of venue, depending on the facts of the case. For cases involving very fact-specific issues, the commission informed DWD that the cases could be transferred to the counties where the parties resided *or* to Dane County where the commission resided. In fact, the commission stipulated to the transfer of several cases to counties around the state. For cases involving substantially similar legal issues, the commission suggested that it would conserve judicial resources if the cases were all brought in Dane County where one of the defendants – the commission – resided, rather than file the cases in several counties and have several courts have to rule on venue transfer motions and consolidation. The commission never *required* that cases be heard in Dane County – it just made economic sense for the state to have the cases combined in Dane County when the parties resided all over the state. DWD refused to file the cases in the correct counties or in Dane County where the commission resided.
- DWD represented to the Council that a *“vast majority of appeals to circuit court are filed by claimants or businesses and in the county in which they reside. Often these cases are dismissed due to technicalities discovered by LIRC.”*
  - **The first sentence is true. The second sentence is vague and incorrect.** Cases may be dismissed if the plaintiffs, including DWD, fail to follow the statutory procedures to properly commence a circuit court action. Courts dismiss cases if parties do not follow the required statutory procedures.

- DWD represented to the Council the proposal provides that *“the department is a party in all UI appeals to court, which ensures that the department has the opportunity to defend its position in judicial review cases.”*
  - **This is vague.** It is not clear what positions DWD would anticipate defending in court. It is also not clear what value would be provided to the State by including DWD as a party in every UI benefits court case. **Courts have already ruled repeatedly that the commission has final review authority over department interpretations of the UI law.** See, e.g., *DILHR v. LIRC*, 161 Wis. 2d 231, 245, 467 N.W.2d 545 (1991); *DILHR v. LIRC*, 193 Wis. 2d 391, 397, 535 N.W.2d 6 (Ct. App. 1995); *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶ 23.
- DWD represented to the Council that the *“proposal clarifies and simplifies certain procedural aspects of judicial review.”*
  - **This is not correct.** By failing to take into account several aspects of the court review process, the proposed changes will lead to greater confusion on the part of the parties and the courts.
- DWD represented to the Council that the *“administrative effect of this proposal on the Department and the Commission is expected to be minimal.”*
  - **It is highly doubtful that the administrative effect of the proposal on DWD will be minimal; the administrative effect on the commission will be substantial.** DWD proposes to be a party in all UI benefit appeals to court. For the past several years, more than 100 court cases have been filed each year, and hundreds of attorney hours have been needed to handle the litigation. DWD will obviously incur litigation expenses (attorney time, copying costs, postage, and travel) to participate in so many court appeals.
  - Cases in which DWD has participated as a party in the past have required extensive briefing and procedural delays. Adding DWD as a party in every case will **increase litigation costs** for the commission.
  - In addition, if the proposal is passed, the commission will need to revise its appeal rights form for parties, revise the frequently asked questions (FAQs) for appealing a commission decision to circuit court, revise the sample pleadings available to parties, make revisions to the commission website with relevant information, and train staff. In addition, the commission will need to update the information it provides to clerks of circuit courts across Wisconsin regarding handling of appeals of commission UI decisions. This will take a great deal of staff resources and at least six months to accomplish.

- Although the commission is able to transmit the hearing record to the circuit court within 60 days in most cases, there are instances in which the vendor does not get the transcript to the commission timely. Rushing transcripts results in higher costs. In addition, the commission's staff has been reduced through recent budget cuts, and its remaining staff has had to absorb a greater amount of the commission's workload, making it difficult to compile a court record within an artificial timeframe.
- DWD represented to the Council that it *"is anticipated that this proposal will have a negligible fiscal effect."*

The proposal will have a **substantial fiscal effect on the commission and on other stakeholders**. Adding DWD as a party in every case will increase litigation costs for the commission and will require additional staff time and resources. Cases in which DWD has participated as a party in the past have required extensive briefing and involved procedural delays. The proposal duplicates state litigation expenses in cases filed by employers and employees. **The proposal will increase costs for parties who will need to appear in order to preserve their rights, including certain small businesses which will be required to hire attorneys**, and will increase General Program Revenue (GPR) costs for the court system. Transcripts costs would also increase.

# UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

## Meeting Minutes

Offices of the State of Wisconsin Department of Workforce Development  
201 East Washington Avenue, GEF-1, Room H306  
Madison, WI

November 18, 2013

The meeting was preceded by public notice as required under s. 19.84, Stats.

**Members Present:** Janell Knutson (Chair), Scott Manley, Edward Lump, Earl Gustafson, James LaCourt, Michael Gotzler, Anthony Rainey, Mark Reihl, Shane Griesbach and Phil Neuenfeldt.

**Department Staff Present:** Bob Rodriguez (UI Administrator), Scott Sussman, Tom McHugh, Pam James, Mary Jan Rosenak, Janet Sausen, Robert Usarek, Jill Moksouphanh, Jason Schunk, Laurie Boehlke, Lutfi Shahrani, Amy Banicki, Karen Schultz and Robin Gallagher.

**State Legislators, Legislative Aides and Members of the Public Present:** Chris Reader (Wisconsin Manufacturers & Commerce), Tammi Richmond (Legislative Audit Bureau), Victor Forberger (Wisconsin UI Law Clinic), Brian Dake (Wisconsin Independent Businesses, Inc.), Bob Anderson (Legal Action of Wisconsin), Tracey Schwalbe (Labor and Industry Review Commission), Commissioner Bill Jordahl (Labor and Industry Review Commission), Jim Boullion (AGC Of Wisconsin) and Dan Shaw (Daily Reporter).

### 1. Call to Order and Introductions

Ms. Knutson called the Unemployment Insurance Advisory Council ("Council") meeting to order at approximately 9:35 a.m. in accordance with Wisconsin's open meetings law. Ms. Knutson welcomed Mr. Griesbach, new Council member who will finish the term of Terry McGowan and Commissioner Jordahl and Ms. Schwalbe from LIRC. Council members introduced themselves.

### 2. Approval of Minutes

Motion by Mr. Lump, second by Mr. Rainey, to approve the October 17, 2013, minutes without corrections. Motion carried unanimously.

### **3. Correspondence Relating to Proposed Law Changes of the Labor and Industry Review Commission from Chairperson Laurie McCallum**

Ms. Schwalbe, general counsel of the Labor and Industry Review Commission (LIRC) requested Council support on proposed changes to provisions contained in chs. 103 and 108, Stats. LIRC handles the appeals of decisions issued by administrative law judges within the Department of Workforce Development unemployment insurance, workers compensation and equal rights divisions. LIRC is comprised of three commissioners, each serving staggered six-year terms. LIRC handles 3,000 UI appeals per year. The proposed procedural changes will assist in streamlining the process. Ms. Schwalbe requested the Council consider the following changes to provisions impacting LIRC within chs. 103 and 108:

- Require unemployment insurance appeals to be filed at LIRC office discontinuing the option of filing appeals at the hearing offices.
- Clarify the "reason beyond control" standard of review for late appeals.
- Clarify that the time to appeal LIRC's decision to the circuit court starts from the date of LIRC's decision. Ms. Schwalbe confirmed that LIRC indicates on its decisions that the decisions are issued and mailed on the same date.
- Allow LIRC to use synopses and transcripts of hearings in more circumstances.
- Clarify that costs may not be taxed against LIRC in court actions.
- Correct drafting errors and repeal obsolete provisions.

Ms. Schwalbe noted that the changes were primarily procedural with respect to handling unemployment insurance appeals.

The Council tabled action on the LIRC proposal to allow time for further review and possible public comment.

### **4. Report on Unemployment Insurance Reserve Fund**

McHugh provided an update to the Council on the Unemployment Insurance Reserve Fund and provided the following information:

- The Trust Fund loan balance on November 13, 2013, was \$301.9 million, a decrease of \$443.9 million from November 13, 2012.
- Update on the FUTA credit loss due to the Trust Funds loan balance: Currently, for states with no federal loan balance, employers pay a net FUTA tax rate of 0.6%. In 2014, Wisconsin employers are projected to pay an additional \$143 million in taxes due to a 2013 FUTA rate increase of 0.9%. The 2013-15 State Budget allocated up to \$50 million in general purpose revenue (GPR) as an interest free loan to pay off the federal loan balance to allow employers to experience a lower FUTA rate. In 2015, assuming the Trust Fund is within \$50 million of solvency or solvent on November 9, 2014, the full FUTA credit will be restored. If the Trust Fund loan is greater than \$50 million on