

**D17-06 (updated with fiscal estimate)**  
**Standard of Proof in Unemployment Insurance Law Cases**

Date: February 16, 2017  
Proposed by: DWD  
Prepared by: Andy Rubsam

**ANALYSIS OF PROPOSED UI LAW CHANGE**  
**Standard of Proof in Unemployment Insurance Law Cases**

**1. Description of Proposed Change**

The standard of proof is “a rule about the quality of the evidence that a party must bring forward to prevail.”<sup>1</sup> The standard of proof used in a legal proceeding depends on the nature of the proceeding. The preponderance of the evidence is the burden of proof used “in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.”<sup>2</sup> A more stringent burden of proof is clear and convincing evidence, which is “evidence indicating that the thing to be proved is highly probable or reasonably certain.”<sup>3</sup> The highest level of proof is beyond a reasonable doubt, which is used in criminal proceedings.

Currently, Wisconsin’s unemployment insurance law does not contain a uniform standard of proof. The Commission applies the clear and convincing standard to concealment cases and cases involving misconduct for theft by the employee. Minnesota unemployment law provides that all issues of fact are determined by a preponderance of the evidence.<sup>4</sup> The Department proposes that all issues of fact in Wisconsin unemployment insurance cases (other than criminal penalties) shall be determined by a preponderance of the evidence. Criminal cases based on violations of the unemployment insurance law would continue to be determined by the higher “beyond a reasonable doubt” standard.

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<sup>1</sup> Standard of Proof, Black’s Law Dictionary (10th ed. 2014).

<sup>2</sup> Preponderance of the Evidence, Black’s Law Dictionary (10th ed. 2014).

<sup>3</sup> Evidence, Black’s Law Dictionary (10th ed. 2014).

<sup>4</sup> MN Stat. § 268.031(1).

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**2. Proposed Statutory Changes**

**Section 108.09 (3m) of the statutes is created to read:**

(3m) STANDARD OF PROOF. All issues of fact in cases decided under this section are determined by a preponderance of the evidence.

**Section 108.095 (5) of the statutes is amended to read:**

(5) ~~Any~~ A hearing on an appeal under this section shall be held before an appeal tribunal ~~appointed~~ established under s. 108.09 (3). Section 108.09 (3m), (4), and (5) applies to the proceeding before the appeal tribunal.

**Section 108.10 (2) of the statutes is amended to read:**

(2) ~~Any~~ A hearing on an appeal under this section ~~duly requested~~ shall be held before an appeal tribunal established as ~~provided by~~ under s. 108.09 (3), ~~and s.~~ Section 108.09 (3m), (4), and (5) ~~shall be applicable~~ applies to the proceedings before ~~such~~ the appeal tribunal. The department may be a party in any proceedings before an appeal tribunal. The employing unit or the department may petition the commission for review of the appeal tribunal's decision under s. 108.09 (6).

**3. Effects of Proposed Change**

- a. Policy. The proposed change regarding the standard of proof will require parties to all non-criminal unemployment insurance cases to show the same level of evidence as in other civil cases. This will align the burden of proof in unemployment insurance cases with the burden of proof in other civil cases.
- b. Administrative. This proposal will require training of adjudication staff and administrative law judges.
- c. Fiscal. A fiscal estimate is attached.

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**4. State and Federal Issues**

There are no known federal conformity issues with this proposal. All changes to the unemployment insurance law should be sent to the U.S. Department of Labor for conformity review.

**5. Proposed Effective/Applicability Date**

This proposal would be effective with other changes made as part of the agreed bill cycle.

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Prepared by: Technical Services Section

**FISCAL ANALYSIS OF PROPOSED LAW CHANGE**

**UI Trust Fund Impact:**

This law change proposal would save the UI Trust Fund approximately \$86,667 annually.

**IT and Administrative Impact:**

This law change proposal would not have an IT impact. The administrative one time impact is estimated at 258 hours or \$10,262.

**Summary of Proposal:**

The standard of proof is the quality of evidence that a party must bring forward in order to prevail. The standard of proof in criminal proceedings is beyond a reasonable doubt. The standard of proof in most civil proceedings is a preponderance of the evidence, which is interpreted to be more likely than not. Currently, Wisconsin's unemployment insurance law does not provide a statutory standard of proof. The department recommends that, like Minnesota, the standard of proof in all unemployment cases be a preponderance of the evidence.

**Trust Fund Methodology:**

For 2016, there were 446 concealment determinations that were overturned upon appeal with attached Benefit Amount Reductions (BARs) of \$1.3 million dollars. These determinations were chosen, as concealment investigations would be most affected by the proposed change in the standard of proof. Based on 50 random samples and case review by Senior Administrative Law Judges, the proposed change in the standard of proof is expected to reduce the number of cases reversed by approximately 20%. This would reinstate \$260,000 worth of BARs annually. Approximately 50% of individuals with a BAR would be expected to return to collect UI within the 6 year period that BAR is in effect. This would lead to an annual reduction of benefits of \$130,000. This reduction in benefits would lead to an approximate reduction of UI taxes by \$43,333 per year. This proposal then is expected to save the UI Trust Fund approximately \$86,667 per year.

This law change proposal is expected to bring conformity and clarity when determining benefit eligibility issues.

**IT and Administrative Impact Methodology:**

This law change proposal would not have an IT impact. The one-time administrative cost to prepare and conduct adjudication and administrative law judge staff training is estimated at 258 hours or \$10,262.