

**D17-10
Amendments to Drug Testing Statutes**

Date: April 20, 2017 (revised)
Proposed by: DWD
Prepared by: Andy Rubsam

**ANALYSIS OF PROPOSED UI LAW CHANGE
Amendments to Drug Testing Statutes**

1. Description of Proposed Change

The 2015-2017 Budget Bill (Act 55) directs the Department to create, by rule, a program to test unemployment insurance applicants for controlled substances, to create a program for employers to submit the results of pre-employment drug tests to the Department, to provide treatment for controlled substance abuse, and to provide job skills assessments.¹

The Department has promulgated an emergency rule for the pre-employment drug testing, drug treatment, and job skills assessment provisions and the department anticipates the final draft of the permanent rule will be effective in June. The Department has begun to draft, but has not yet promulgated, the rule regarding the testing of unemployment insurance applicants for controlled substances (i.e. occupational drug testing).

During the rulemaking process, the Department has identified statutory changes that, if enacted, would ease the administration of the drug testing and treatment programs and would ensure that Wisconsin law conforms to federal requirements. The Department proposes the following statutory changes:

- Federal law provides that states may only test “applicants” for unemployment insurance for controlled substances.² “Applicant” is defined in federal law as “an individual who files an initial claim for unemployment compensation under State law. Applicant excludes an individual already found initially eligible and filing a continued claim.”³ The

¹ Wis. Stat. § 108.133.

² 42 USC § 503(1)(1)(A).

³ 20 CFR § 620.2.

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Department proposes to amend Wisconsin’s occupational drug testing statute to refer to “applicants” instead of “claimants” in order to clearly align state law with this federal definition. This will ensure conformity to federal requirements.

- Confirming that the Department shall pay the reasonable cost of drug testing applicants under the occupational drug testing program.
- Amending the privacy statute to ensure that all information related to drug testing and prescription medication is confidential. The current statute specifies that drug treatment information is confidential.⁴ Existing administrative code provisions provide general confidentiality protections⁵ but a statutory change would ensure specific protections regarding drug testing results and prescriptions.
- Limiting employers’ civil liability under state law for submission of pre-employment drug testing information to the Department. This may encourage employer participation in the program.
- The Legislature appropriated \$250,000 annually to the Department “to conduct testing for controlled substances, for the provision of substance abuse treatment, and for related expenses under s. 108.133.” The Department recommends amending the appropriation statute to confirm that the Department may use this funding to screen unemployment benefit applicants in order to determine whether there is a reasonable suspicion that a claimant has engaged in the unlawful use of controlled substances. The Department also seeks to amend the appropriation statute in order to permit the Department to transfer any unused funds from this appropriation to the unemployment program integrity fund.

⁴ Wis. Stat. § 108.133(3)(e).

⁵ Wis. Admin. Code § DWD 149.02(1).

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2. Proposed Statutory Change

Section 20.445(1)(aL) of the statutes is amended to read:

(aL) *Unemployment insurance administration; controlled substances testing and substance abuse treatment.* Biennially, the amounts in the schedule to conduct screenings of applicants, to conduct testing for controlled substances, for the provision of substance abuse treatment, and for related expenses under s. 108.133. The treasurer of the unemployment reserve fund may transfer moneys from this appropriation account to the appropriation account under par. (v).

Section 20.445(1)(v) of the statutes is amended to read:

(v) *Unemployment program integrity.* From the unemployment program integrity fund and all moneys transferred to this appropriation account from the appropriation account under par. (aL), a sum sufficient to make the payments authorized under s. 108.19 (1s).

Section 108.133(1)(am) of the statutes is created to read:

(am) “Applicant” means an individual who files a new initial claim for regular benefits under this chapter.

Section 108.133(2)(intro) of the statutes is amended to read:

(2) DRUG TESTING PROGRAM. The department shall establish a program to test ~~claimants who apply~~ applicants ~~for regular benefits under this chapter~~ for the ~~presence~~ unlawful use of controlled substances in accordance with this section and shall, under the program, do all of the following:

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Section 108.133(2)(a)1. of the statutes is amended to read:

1. Identify a process for testing ~~claimants~~ applicants for the ~~presence~~ unlawful use of controlled substances. The department shall ensure that the process adheres to any applicable federal requirements regarding drug testing. The department shall pay the reasonable costs of controlled substances testing.

Section 108.133(2)(a)3. of the statutes is amended to read:

3. Create a screening process for determining whether there is a reasonable suspicion that an applicant ~~claimant~~ has engaged in the unlawful use of controlled substances.

Section 108.133(2)(a)5. of the statutes is amended to read:

5. Identify a period of ineligibility that must elapse or a requalification requirement that must be satisfied, or both, in order for an applicant ~~claimant~~ to again be eligible for or qualify for benefits after becoming ineligible for benefits under sub. (3) (a) or (c).

Section 108.133(2)(b) of the statutes is amended to read:

When an applicant ~~claimant~~ applies for regular benefits under this chapter, do all of the following:

Section 108.133(2)(b)1. of the statutes is amended to read:

1. Determine whether the ~~claimant~~ applicant is an individual for whom suitable work is only available in an occupation that regularly conducts drug testing.

Section 108.133(2)(b)2. of the statutes is amended to read:

2. Determine whether the ~~claimant~~ applicant is an individual for whom suitable work is only available in an occupation identified in the rules promulgated under par. (am), unless the department determined that the applicant is an individual for whom suitable work is only available in an occupation that regularly conducts drug testing under subd. 1.

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Section 108.133(2)(b)3. of the statutes is amended to read:

3. If the ~~claimant is determined by the department~~ determines, under subd. 1., that the applicant is to be an individual for whom suitable work is only available in an occupation that regularly conducts drug testing, conduct a screening on the ~~claimant~~ applicant.

Section 108.133(2)(b)4. of the statutes is amended to read:

4. If the ~~claimant is determined by the department~~ determines, under subd. 2., that the applicant is to be an individual for whom suitable work is only available in an occupation identified in the rules promulgated under par. (am), conduct a screening on the ~~claimant~~ applicant if a screening is not already required under subd. 3.

Section 108.133(2)(b)5. of the statutes is amended to read:

5. If a screening conducted as required under subd. 3. or 4. indicates a reasonable suspicion that the ~~claimant~~ applicant has engaged in the unlawful use of controlled substances, require the ~~claimant~~ applicant to submit to a test for the presence of controlled substances.

Section 108.133(3)(a) of the statutes is amended to read:

(3) DRUG TESTING; SUBSTANCE ABUSE TREATMENT. (a) If an ~~claimant~~ applicant is required under sub. (2) (b) 5. to submit to a test for the presence of controlled substances and the ~~claimant~~ applicant declines to submit to such a test, the ~~claimant~~ applicant is ineligible for benefits under this chapter until the ~~claimant~~ applicant is again eligible for benefits as provided in the rules promulgated under sub. (2) (a) 5.

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Section 108.133(3)(b) of the statutes is amended to read:

(b) If an ~~elaimant~~ applicant who is required under sub. (2) (b) 5. to submit to a test for the presence of controlled substances submits to the test and does not test positive for any controlled substance or the ~~elaimant~~ applicant presents evidence satisfactory to the department that the ~~elaimant~~ applicant possesses a valid prescription for each controlled substance for which the ~~elaimant~~ applicant tests positive, the ~~elaimant~~ applicant may receive benefits under this chapter if otherwise eligible and may not be required to submit to any further test for the presence of controlled substances until a subsequent benefit year.

Section 108.133(3)(c) of the statutes is amended to read:

(c) If an ~~elaimant~~ applicant who is required under sub. (2) (b) 5. to submit to a test for the presence of controlled substances submits to the test and tests positive for one or more controlled substances without presenting evidence satisfactory to the department that the ~~elaimant~~ applicant possesses a valid prescription for each controlled substance for which the ~~elaimant~~ applicant tested positive, the ~~elaimant~~ applicant is ineligible for benefits under this chapter until the ~~elaimant~~ applicant is again eligible for benefits as provided in the rules promulgated under sub. (2) (a) 5., except as provided in par. (d).

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Section 108.133(3)(d) of the statutes is amended to read:

(d) An ~~claimant~~ applicant who tests positive for one or more controlled substances without presenting evidence of a valid prescription as described in par. (c) may maintain his or her eligibility for benefits under this chapter by enrolling in the substance abuse treatment program and undergoing a job skills assessment. Such an ~~claimant~~ applicant remains eligible for benefits under this chapter, if otherwise eligible, for each week the ~~claimant applicant is in full~~ fully complies ~~compliance~~ with any requirements of the substance abuse treatment program and job skills assessment, as determined by the department in accordance with the rules promulgated under sub. (2) (a) 2. and 4.

Section 108.133(3)(e) of the statutes is amended to read:

(e) All information relating to an ~~claimant's~~ individual's declining to take a test for the presence of controlled substances, testing positive for the unlawful use of controlled substances, prescription medication, medical records, and enrollment and participation in the substance abuse treatment program under this chapter shall, subject to and in accordance with any rules promulgated by the department, be confidential and not subject to the right of inspection or copying under s. 19.35 (1).

Section 108.133(4)(c) of the statutes is created to read:

(c) Any employing unit that, in good faith, submits the results of a positive test or notifies the department that an individual declined to submit to a test under par. (a) is immune from civil liability for its acts or omissions with respect to the submission of the positive test results or the notification to the department that the individual declined to submit to the test.

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Section 108.19(1s)(a)5. of the statutes is created to read:

5. Amounts transferred from the appropriation under s. 20.445(1)(aL).

3. Effects of Proposed Change

- a. Policy. This proposal may result in increased employer participation in the pre-employment drug testing program. This proposal ensures that individuals' medical and drug testing information is kept confidential. Under this proposal, the Department will have more flexibility to use the funds appropriated to it.
- b. Administrative. Staff will need to be trained on the proposed changes.
- c. Fiscal. A fiscal estimate is attached.

4. State and Federal Issues

There are no known federal conformity issues with this proposal. The Department recommends that any changes to the unemployment insurance law be sent to the U.S. Department of Labor for conformity review. The Department believes that this proposal will ensure that Wisconsin law better aligns with federal requirements.

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:

These are technical changes and would not impact the UI Trust Fund. Any unused appropriations would transfer to the UI Program Integrity Fund.

IT and Administrative Impact:

These are technical changes and would not have an IT or Administrative impact.

Summary of Proposal:

During the rulemaking process, the Department has identified statutory changes that, if enacted, would ease the administration of the drug testing and treatment programs and would ensure that Wisconsin law conforms to federal requirements. The Department proposes the following statutory changes:

- Refer to “applicants” instead of “claimants” in order to clearly align state law with this federal definition. This will ensure conformity to federal requirements.
- Confirm that the Department shall pay the reasonable cost of drug testing applicants under the occupational drug testing program.
- Amending the privacy statute to ensure that all information related to drug testing and prescription medication is confidential. The current statute specifies that drug treatment information is confidential.⁶ Existing administrative code provisions provide general confidentiality protections⁷ but a statutory change would ensure specific protections regarding drug testing results and prescriptions.
- Limiting employers’ civil liability under state for submission of pre-employment drug testing information to the Department.
- The Legislature appropriated \$250,000 annually to the Department “to conduct testing for controlled substances, for the provision of substance abuse treatment, and for related expenses under s. 108.133.” The Department recommends amending the appropriation statute to confirm that the Department may use this funding to screen unemployment benefit applicants in order to determine whether there is a reasonable suspicion that a claimant has engaged in the unlawful use of controlled substances. The Department also seeks to amend the appropriation statute in order to permit the Department to transfer any unused funds from this appropriation to the UI Program Integrity Fund.

Trust Fund Methodology:

These are technical changes and would not impact the UI Trust Fund. Though the proposal may provide an incentive for employers to submit pre-employment drug tests to the Department, it is uncertain at this time whether there will be any significant impact on the UI Trust Fund. Any unused appropriations would transfer to the UI Program Integrity Fund.

IT and Administrative Impact Methodology:

These are technical changes and would not have an IT or Administrative impact.

⁶ Wis. Stat. § 108.133(3)(e).

⁷ Wis. Admin. Code § DWD 149.02(1).