D21-09
Clarification of Employee Status Statute

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Proposed by: DWD
Prepared by: Bureau of Legal Affairs

ANALYSIS OF PROPOSED UI LAW CHANGE
Clarification of Employee Status Statute

1. Description of Proposed Change

When an individual performs services for pay for an employing unit, it is presumed the individual is an employee for purposes of Wisconsin Unemployment Insurance law.¹ The employing unit must prove that the individual meets the conditions of a two-part test to overcome that presumption and be excluded from the definition of employee.²

In 1982, the Wisconsin Supreme Court decided Star Line Trucking Corp. v. Dep’t of Indus., Labor & Human Relations, 109 Wis. 2d 266, 325 N.W.2d 872 (1982). Star Line held that the mere inclusion of required Public Service Commission Administrative Code language regarding the “exclusive possession, control, and use of the motor vehicle” in a trucking lease contract was insufficient to show that the carrier has direction and control over the driver. The Public Service Commission rule required motor vehicle leases to include the possession, control, and use language.

Under current law, in deciding whether an individual meets the conditions of the two-part test the Department and appeal tribunals are prohibited from considering “documents granting operating authority or licenses, or any state or federal laws or federal regulations granting such authority or licenses” when analyzing certain factors of the test.³ This provision was included in

¹ Wis. Stat. § 108.02(12)(a).
² Wis. Stat. §§ 108.02(12)(bm) and (c).
³ Wis. Stat. §§ 108.09(2)(bm) and 108.09(4s). See also Wis. Admin. Code DWD §§ 105.02 and 107.02 (“The department believes it is unreasonable to consider mandates of law as evidence because they have not been imposed on the relationship between the parties of their own volition.”)
the unemployment law in 1995, when the Worker’s Compensation employee status test was adopted.\textsuperscript{4}

The Department proposes to amend sections 108.09(2)(bm) and 108.09(4s) to provide that all issues of unemployment insurance employee status may only be determined under Wisconsin unemployment statutes and rules. This proposal will provide consistency in determining individuals’ eligibility for unemployment benefits and employers’ unemployment insurance tax liability by limiting the employee status inquiry to the provisions of the unemployment insurance law.

Under this law change, for example, it would be clear that the Department would not rely on the fact that a salon requires its cosmetologists to have a cosmetology license when analyzing the cosmetologists’ services under the employee status test because cosmetologists are required by law to have a license to perform those services in Wisconsin.

2. Proposed Statutory Changes

\textbf{Section 108.09(2)(bm) of the statutes is renumbered 108.02 (12) (cm) and amended to read:}

(cm) In determining whether an individual meets the conditions specified in s. 108.02 (12) (bm) 2. b. or c. or (e) 1., the department shall not consider paragraphs (a), (bm), and (c), only this chapter and the rules promulgated by the department under the authority granted to the department by this chapter shall apply. Any other state or federal law, rule, regulation, or guidance shall not apply. Documents granting operating authority or licenses shall not be considered or any other state or federal laws or federal regulations granting such authority or licenses.

\textsuperscript{4} 1995 WI Act 118.
Section 108.09(4s) of the statutes is repealed:

Employee status. In determining whether an individual meets the conditions specified in s. 108.02 (12) (bm) 2. b. or c. or (c) 1., the appeal tribunal shall not take administrative notice of or admit into evidence documents granting operating authority or licenses, or any state or federal laws or federal regulations granting such authority or licenses.

3. Effects of Proposed Change

a. **Policy:** The proposed change will prevent confusion and provide consistency when determining whether an individual’s services meet the conditions for the individual to be classified as an employee under unemployment insurance law.

b. **Administrative:** This proposal will require training of Department staff.

c. **Fiscal:** A fiscal estimate is attached, based on 2017 cases.

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 for services performed on and after January 1, 2022.
Trust Fund Impact:
This law change proposal would have a positive but negligible impact on the Trust Fund.

IT Impact and Administrative Impact:
This law change proposal would have no IT impact and a negligible one-time administrative impact.

Summary of Proposal:
This proposal amends sections 108.09(2)(bm) and 108.09(4s) to provide that all issues of unemployment insurance employee status may only be determined under Wisconsin unemployment statutes and rules. This proposal will provide consistency in determining individuals’ eligibility for unemployment benefits and employers’ unemployment insurance tax liability by limiting the employee status inquiry to the provisions of the unemployment insurance law.

Trust Fund Methodology:
Cases from 2017 dealing with employee status that may be affected by this law change proposal that were appealed to the ALJ level were reviewed for this estimate. In these cases, the claimants were consistently ruled as employees on the adjudication level, but that classification may have been overturned at the ALJ level and the claimants ruled as independent contractors. This may be because employee status was not determined exclusively under Wisconsin unemployment statutes and rules. This law change proposal intends to bring consistency to the employee status ruling by limiting the employee status inquiry to the provisions of the unemployment insurance law. However, based on the quantity of cases appealed, it would not have a significant impact on the Trust Fund.

IT and Administrative Impact Methodology:
Per subject matter experts, this proposal is codifying current practice and would not have any IT or administrative impact on the adjudication level. This is expected to have a negligible one-time administrative impact on the ALJ level due to staff training.