ANALYSIS OF PROPOSED UI LAW CHANGE
Repeal Pre-employment & Occupational Drug Testing

1. Description of Proposed Change

Pre-Employment Drug Testing and Drug Treatment

The 2015 Budget, 2015 Wis. Act 55, created Wis. Stat. §§ 108.04(8)(b) and 108.133, requiring the Department, by administrative rule, to create a voluntary program for employers to report the results of a failed or refused pre-employment drug test to DWD. If a reported person is receiving UI benefits, the person is presumed to have failed, without good cause, to accept suitable work and is ineligible for benefits. If the person failed the drug test, they may maintain UI benefit eligibility if they enroll in and comply with a substance abuse treatment program, complete a job skills assessment and otherwise meet all program requirements. Under this law, DWD will pay the reasonable costs for drug treatment.

The emergency rule for the Pre-Employment Drug Testing Program became effective on May 6, 2016 and became effective as a permanent rule on May 1, 2017. As of March 31, 2021, DWD has received about 171 reports from employing units regarding individuals’ failures of pre-employment drug tests or refusals to take pre-employment drug tests. No claimants have been determined to be ineligible for UI benefits under the pre-employment drug testing statutes and rules and denied benefits because of the employers’ reports of a failed or refused drug test as a condition of an offer of employment. Because no claimants have been determined to be ineligible for UI benefits under the pre-employment drug testing statutes and rules, no claimants have maintained benefit eligibility by enrolling in and complying with a substance abuse treatment program and completing a job skills

1 The provisions in the Budget Bill for pre-employment and occupational drug testing were not presented to the UIAC for approval and were not included in the agreed bill.

2 However, the provisions of Wis. Stat. § 108.04(9) still apply.
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2017 Wis. Act 157 (the UIAC agreed bill) amended the pre-employment drug testing law effective April 1, 2018 to limit employers’ civil liability under state law for submission of pre-employment drug testing information to the Department. Even with the amendment, there has been very limited use of the Pre-Employment Drug Testing Program by employers.

Occupational Drug Testing and Drug Treatment

The Middle Class Tax Relief and Job Creation Act of 2012\(^3\) permits states to test a UI applicant for unlawful use of controlled substances as an eligibility condition if the applicant is an individual for whom suitable work (as defined under state law) is only available in an occupation that regularly conducts drug testing (as determined under regulations issued by the Secretary of US-DOL). DWD is aware of only two other states, Texas and Mississippi, that have enacted statutes that permit drug testing of UI claimants. However, it appears that neither state has begun to test UI claimants for drugs as a condition for UI eligibility.

Under 2015 Wis. Act 55, the Department must, by administrative rule, create a program for drug testing certain UI applicants. The Department will determine whether an applicant’s only suitable work is in an occupation that regularly conducts drug testing. If an applicant’s only suitable work is in an occupation that regularly conducts drug testing, the Department will screen the applicant to determine whether there is a reasonable suspicion the applicant engaged in the unlawful use of controlled substances. An applicant with a positive screening result must submit to a drug test to remain eligible for UI benefits. An applicant who fails a drug test under Wis. Stat. § 108.133 without evidence of a valid prescription may remain eligible for UI benefits if the applicant enrolls in and complies with a drug treatment program, completes a job skills assessment, and otherwise meets all program requirements. The UIAC approved a scope statement for DWD to promulgate an

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\(^3\) Section 303(l)(l)(A)(ii), SSA.
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administrative rule in early 2020, but DWD has not yet promulgated rules to implement occupational drug testing.

The Legislature appropriates $250,000 of GPR annually ($500,000 per biennium) to DWD to fund and administer UI drug testing and treatment programs for both pre-employment and occupational drug testing programs. No GPR funds have been expended for substance abuse treatment programs as a result of pre-employment drug testing reports filed by employers. Unused appropriated GPR funds are transferred to the Program Integrity Fund at the end of the biennium.4

The Governor’s Budget Bill (AB 68 / SB 111) proposes to repeal the UI pre-employment and UI occupational drug testing statutes and to provide that the GPR funding for drug testing and treatment be used for DWD’s administration of the UI program instead of drug testing and treatment.5

2. Proposed Statutory Change

Section 108.04(8)(b) of the statutes, as affected by 2017 Wisconsin Act 157, is repealed.

Section 108.133 of the statutes, as affected by 2017 Wisconsin Act 157, sections 26 to 37, is repealed.

Wis. Admin. Code Chapter DWD 131, “Pre-Employment Drug Testing, Substance Abuse Treatment Program and Job Skills Assessment,” is repealed.

(Additional cross-references may also need to be amended.)

3. Effects of Proposed Change

a. Policy: This proposal would reduce the likelihood that a person would be denied UI benefits for failing a pre-employment drug test.

b. Administrative: This proposal would provide state funds for administration of the UI program.

4 2017 Wis. Act 157, effective April 1, 2018.
5 The Budget Bill also proposes to legalize recreational marijuana.
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c. **Fiscal:** A fiscal estimate is not yet available.

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.

5. **Proposed Effective/Applicability Date**

   This proposal would be effective with other changes made as part of the agreed bill cycle.
Drug Testing Program and Pre-Employment Drug Testing

Date: 05/05/21
Prepared by: Technical Services Section

FISCAL ANALYSIS OF PROPOSED LAW CHANGE

Summary of Proposal:
Current state law requires DWD to establish a program to test certain claimants who apply for unemployment insurance (UI) benefits for the presence of controlled substances that is consistent with federal law. A claimant who tests positive for a controlled substance for which the claimant does not have a prescription is ineligible for UI benefits until certain requalification criteria are satisfied or unless he or she enrolls in a substance abuse treatment program and undergoes a job skills assessment, and a claimant who declines to submit to a test is simply ineligible for benefits until he or she requalifies. The proposal repeals the requirement to establish the drug testing program.

Also under current law, an employer may voluntarily submit to DWD the results of a preemployment test for the presence of controlled substances that was conducted on an individual as a condition of an offer of employment or notify DWD that an individual declined to submit to such a test. If DWD then verifies that submission, the employee may be ineligible for benefits until he or she requalifies. However, a claimant who tested positive may maintain eligibility by enrolling in a substance abuse treatment program and undergoing a job skills assessment. The proposal repeals these preemployment drug testing provisions.

UI Trust Fund Impact:
UI drug testing of claimants has not been implemented. Therefore, this portion of the proposal will have no Trust Fund impact.

UI has received information from employers on individuals who have positive pre-employment drug tests results and refused pre-employment drug tests; however, no claimant has been denied benefits due to failing a test, nor has any claimant enrolled in a substance abuse treatment program. There is no expected impact to benefit payments as a result of this proposal.

IT and Administrative Impact:
IT impact to the Unemployment Insurance program is estimated at $7,120.
One-time administrative impact to the UI program is estimated at $2,136.
There is no ongoing administrative impact to the UI program.