

D21-08
Fiscal Agent Election of Employer Status

Date: March 18, 2021
Proposed by: DWD
Prepared by: Bureau of Legal Affairs

ANALYSIS OF PROPOSED UI LAW CHANGE
Fiscal Agent Election of Employer Status

1. Description of Proposed Change

Individuals who receive long-term support services in their home through government-funded care programs are employers under Wisconsin's unemployment insurance law. These employers receive financial services from fiscal agents, who directly receive and disperse government program funds. The fiscal agent is responsible for reporting employees who provide services for the employers to the Department, and for paying unemployment tax liability on behalf of the employer.¹ Currently, approximately 16,000 employers in Wisconsin receive government-funded care and use a fiscal agent.

During the previous legislative session, the Legislature enacted the Department's proposal to permit the Department to assess fiscal agents with joint and several liability for the unemployment tax of employers who use fiscal agents.²

2011 WI Act 198 created a provision that permits home health care providers to elect to be the employer of workers who provide home health care services under chapter 49.³ A home health care provider electing coverage as the employer must notify the recipient of the election and must be treated as the employer for federal unemployment tax purposes.

The Department proposes another law change related to fiscal agents that would permit private fiscal agents (not government units) to elect to be the employer of workers who provide care services under chapters 46, 47, and 51. The fiscal agents would be required to inform the

¹ Wis. Stat. § 46.27(5)(i).

² Wis. Stat. § 108.22(10).

³ Wis. Stat. § 108.065(3).

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recipient of care of the election and would need to be treated as the employer for federal unemployment tax purposes. This proposal is expected to simplify unemployment insurance reporting requirements for fiscal agents.

If the worker is one of a certain class of family members of the person receiving care, the worker is currently ineligible for unemployment benefits when the employment relationship ends.⁴ Under this proposal, a worker who is a family member of the person receiving care would be an employee of the fiscal agent and would be eligible for unemployment benefits. Benefits would be charged to the fiscal agent's account, which would affect its experience rating.

2. Proposed Statutory Changes

Section 108.02 (13) (k) of the statutes is amended to read:

~~“Employer”~~ Except as provided in s. 108.065 (3m), “employer” does not include a county department, an aging unit, or, under s. 46.2785, a private agency that serves as a fiscal agent or contracts with a fiscal intermediary to serve as a fiscal agent under s. ~~46.27 (5) (i)~~, 46.272 (7) (e); or 47.035 as to any individual performing services for a person receiving long-term support services under s. 46.272 (7) (b), 46.275, 46.277, 46.278, 46.2785, 46.286, 46.495, 51.42, or 51.437 or personal assistance services under s. 47.02 (6) (c).

Section 108.065 (1e) (intro.) of the statutes is amended to read: 1

Except as provided in subs. (2) ~~and (3)~~ to (3m), if there is more than one employing unit that has a relationship to an employee, the department shall determine which of the employing units is the employer of the employee by doing the following:

⁴ Wis. Stat. § 108.02(15)(km) (“‘Employment,’ as applied to work for a given employer other than a government unit or a nonprofit organization, except as the employer elects otherwise with the department’s approval, does not include service provided by an individual to an ill or disabled family member who is the employing unit for such service, if the service is personal care or companionship. For purposes of this paragraph, ‘family member’ means a spouse, parent, child, grandparent, or grandchild of an individual, by blood or adoption, or an individual’s step parent, step child, or domestic partner. In this paragraph, ‘domestic partner’ has the meaning given in s. 770.01 (1).”)

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Section 108.065 (3m) of the statutes is created to read:

A private agency that serves as a fiscal agent or contracts with a fiscal intermediary to serve as a fiscal agent to recipients of services under ch. 46, 47, or 51 may elect to be the employer of one or more employees providing those services. As a condition of eligibility for election to be the employer of one or more employees providing those services, the private agency shall notify in writing the recipient of any such services of its election, for purposes of the unemployment insurance law, to be the employer of any worker providing such services to the recipient, and must be treated as the employer under 26 USC 3301 to 3311 for purposes of federal unemployment taxes on the worker's services.

Section 108.22 (10) of the statutes is amended to read:

A private agency that serves as a fiscal agent under s. 46.2785 or contracts with a fiscal intermediary to serve as a fiscal agent under s. 46.272 (7) (e) or 47.035 as to any individual performing services for a person receiving long-term support services under s. 46.272 (7) (b), 46.275, 46.277, 46.278, 46.2785, 46.286, 46.495, 51.42, or 51.437 or personal assistance services under s. 47.02 (6) (c) may be found jointly and severally liable for the amounts owed by the person under this chapter, if, at the time the person's quarterly report is due under this chapter, the private agency served as a fiscal agent for the person. The liability of the agency as provided in this subsection survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the person and shall be set forth in a determination or decision issued under s. 108.10. An appeal or review of a determination under this subsection shall not include an appeal or review of determinations of amounts owed by the person. This subsection does not apply with respect to a private agency that has made an election under s. 108.065 (3m).

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3. Effects of Proposed Change

- a. **Policy:** This proposal will simplify reporting requirements for fiscal agents.
- b. **Administrative:** This proposal will require training of Department staff.
- c. **Fiscal:** A fiscal estimate is attached.

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 **January 1, 2023**.

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FISCAL ANALYSIS OF PROPOSED LAW CHANGE

Prepared by: Technical Services Section

Trust Fund Impact:

The immediate Trust Fund impact of this law change proposal cannot be determined. It may result in additional tax revenue as well as additional benefit payments. The assumption is that over time this proposal would have a net-zero impact on the Trust Fund.

IT and Administrative Impact:

This law change proposal is not expected to have an IT impact.

The one-time administrative *cost* is estimated at 80 hours or \$3,830. The ongoing administrative *savings* is estimated at 3 FTE positions or a savings of \$300,000 annually; however, these staff savings would be absorbed through other higher value-added work.

Summary of Proposal:

This law change proposal would permit private fiscal agents (not government units) to elect to be the employer of workers who provide care services to individuals who receive long-term support services in their home through government-funded care programs. The fiscal agents would be required to inform the recipient of care of the election and would need to be treated as the employer for federal unemployment tax purposes.

Trust Fund Methodology:

Though this law change proposal would result in the employer accounts of individuals who receive long-term care to be converted and condensed into the employer accounts of fiscal agents, it is assumed that the overall amount of tax revenue and benefits paid would remain neutral. However, this does not take into account the 108.02(15)(km) exclusion (*the exclusion of personal care services performed by an individual to an ill or disabled family member who directly employs individual*). The fiscal agent, now the employer in lieu of the family member receiving care, would be required to report such caregivers' wages and pay unemployment taxes on these employees, which could potentially affect the fiscal agents experience rating.

Excluded wages are not reported to the Unemployment Insurance Division, thus the amount of employee wages currently excluded that would now become reportable cannot be determined.

In 2018, there were approximately 93 determinations excluding wages from benefit claims under 108.02(15)(km). Assuming the individual had no other base period wages this would result in approximately \$354,330 in additional benefits paid annually (assuming an average weekly benefit amount of \$300 and average weeks paid of 12.7). Adjusting for taxes, this would result in an approximately \$233,857 cost to the Trust Fund. However, this does not take into account the additional tax revenue on employee whose wages would no longer be excluded from UI coverage.

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In summary, this proposal could result in:

- More tax revenue received and more benefits paid based on previously excluded wages under 108.02(15)(km); however, this amount cannot be established.
- Fewer benefit overpayments based on the 108.02(15)(km) exclusion estimated at \$100,000 annually. This is because under this proposal these benefits would now be payable. However, most overpayments are collected (at least 80%) thus this would not have a significant impact on the Trust Fund.

The Trust Fund impact of this law change proposal cannot be determined. It may result in additional tax revenue as well as additional benefit payments as more workers now become covered employees. The assumption is that over time taxes will balance to offset benefit payments so that the net effect to the Trust Fund will be approximately zero.

IT and Administrative Impact Methodology:

Per subject matter experts, this law change proposal is not expected to have an IT impact. There would be minimal changes needed within SUITES.

Per subject matter experts, this law change proposal is estimated to have a one-time administrative cost of approximately 80 hours or about \$3,830 to collapse 14,400 employer accounts into approximately 18 fiscal agent accounts, assuming the majority (per subject matter expert) would take the election.

This proposal would significantly reduce the ongoing administrative burden and decrease confusion about employer identities. Subject matter experts estimate the ongoing administrative staff savings of approximately 3 FTE positions or about \$300,000 annually. However, these staff savings would be absorbed through other higher value-added work.