

# UNEMPLOYMENT INSURANCE ADVISORY COUNCIL

## Meeting Minutes

Offices of the State of Wisconsin Department of Workforce Development  
201 E. Washington Avenue, GEF-1, Room F305  
Madison, WI

April 16, 2015

The meeting was preceded by public notice as required under Wis. Stat. § 19.84.

**Members Present:** Janell Knutson, Sally Feistel, Shane Griesbach, Scott Manley, Earl Gustafson, Michael Gotzler, James LaCourt (via teleconference) and Mark Reihl (via teleconference)

**Department Staff Present:** David Anderson (Assistant Deputy Secretary), BJ Dernbach (Legislative Liaison), Pam James, Andy Rubsam, Scott Sussman, Mike Myszewski, Karen Schultz, Tyler Tichenor, Lutfi Shahrani, Tom McHugh, Mary Jan Rosenak, Lynn Norton-Demets, Emily Savard, Matthew Aslesen and Patrick Lonergan.

**Members of the Public Present:** David Crowley (Sen. Harris Dodd's Office), Mary Beth George (Rep. Sinicki's Office), Mike Duchek (Legislative Reference Bureau) Ryan Horton (Legislative Fiscal Bureau), Victor Forberger (UI Appeals Clinic), Tracey Schwalbe and David Nance (Labor and Industry Review Commission), Daniel Shaw (Daily Reporter), Chris Reader (WI Manufacturers & Commerce), Brian Dake (WI Independent Businesses, Inc.), Larry Smith (UI Management Services), Vicki Selkove (Legal Action of WI) and James Buchen.

### 1. Call to Order and Introduction

Ms. Knutson called the Unemployment Insurance Advisory Council (Council) meeting to order at 10:05 a.m. in accordance with Wisconsin's Open Meetings law. Council members and department staff at the table introduced themselves. Ms. Knutson recognized Ryan Horton from the Legislative Fiscal Bureau and Mike Duchek from the Legislative Reference Bureau and welcomed those in attendance.

### 2. Approval of Minutes of March 19, 2015

Motion by Mr. Griesbach, second by Mr. Gotzler to approve the March 19, 2015 minutes without corrections. Motion approved unanimously.

### 3. Department Update

Mr. Dernbach provided a summary of recommended budget bill amendment provisions issued by the Department of Administration (DOA), known as the Budget Errata report. DOA recommended changes in the following three areas:

- Civil Penalties – Current language increases civil penalties from 15% to 40% with all penalty collections being deposited into the UI Trust Fund. The errata corrects this language so the first 15% of the penalty is deposited into the UI Trust Fund as directed by federal law, and the remaining 25% is deposited into the UI Program Integrity Fund. The errata also adds a delayed effective date to allow time for computer programming needs.
- Suitable Work – The errata maintains that the department shall promulgate administrative rules to define what constitutes suitable for claimants *after* the canvassing period occurs (6 weeks).
- Drug Testing – The errata:
  - Clarifies that if a claimant refuses to take a preemployment screening test or fails that test, it is not necessarily from the employer where benefits are being charged.
  - Modifies language relating to a controlled substance prescription for clarity to read, "controlled substance for which the prescription has not expired" and directs the department to define "expired."
  - Improves language by replacing the term "misuse" to "unlawful" to align with federal language.

### 4. Financial Outlook

Mr. Usarek provided the Council with highlights of the 2015 Financial Outlook report on Wisconsin's UI program. The report was submitted to the Governor's Office on April 15, 2015 and focuses on the Wisconsin UI Trust Fund (Trust Fund) and financing system.

The Trust Fund ended 2014 with a positive balance of \$214 million, the first time the Trust Fund finished a year with a positive balance since 2008. Over the next three years, the Trust Fund is expected to continue to grow, with a projected balance at the end of 2017 of \$887 million. The Trust Fund is expected to grow mainly due to continued historically low benefit payments. UI tax revenue while high in 2015, is expected to fall significantly for 2016 and 2017, mostly due to the projected change from tax Schedule A to tax Schedule B, reducing annual tax revenue by \$90 to \$120 million per year under current economic conditions.

Current year-end projections for the Trust Fund are \$805 million in 2016 and \$887 million in 2017. The Trust Fund balance which triggers a change from tax Schedule B to tax Schedule C is \$900 million. With projected Trust Fund balances over \$800 million, it is possible that Wisconsin could trigger to tax Schedule C during the forecast period, resulting in further reductions of UI tax revenue of \$37 million per year.

While the Trust Fund projected balance is positive throughout the forecast period, it is insufficient to ensure against future UI borrowing. If Wisconsin were to experience a recession, there is little chance that the Trust Fund balance would be large enough for Wisconsin to avoid borrowing to pay UI benefits.

The Secretary's recommendations are that the Council is expected to review Wisconsin UI law and provide specific recommendations concerning the strength of the Trust Fund and the ability to pay claims over the long-term. The Council should review all relevant factors, and provide to the Governor and Legislature, legislative solutions to further strengthen the Trust Fund. The proposal could address mechanisms to build and maintain sufficient reserve funding to meet the obligations of projected future benefit expenditures. Such mechanisms could encompass both benefits and revenue.

The department has significant information and research on the issues and alternative solutions and is prepared to support the Council as it considers options to improve Wisconsin's UI program.

## **5. Worker Misclassification**

Mr. Myszewski updated the Council on worker misclassification investigation activities for the first quarter of 2015. The website received 11 actionable complaints that included three questions, two cases currently under investigation, one case referred to benefits and five cases investigated and referred to Field Audit.

In 2013 and 2014 the Bureau of Legal Affairs (BOLA) received three federal grants that allowed the department to hire four limited term employees (LTE) to conduct worker classification investigations. These investigators have significant investigative experience and have completed training and are working in the field. Bureau of Tax and Accounting is in the process of hiring a project position field auditor. One BOLA investigator will be cross-trained as an auditor to increase productivity.

During the first quarter, the worker classification unit conducted 39 investigations (22 in the construction industry and 17 other for-profit businesses). Of those, 25 were referred to Field Audit, one was referred to Benefits for investigation, two are still under investigation and 11 were found to have no violations.

BOLA investigators will focus on the construction industry during the 2015 construction season and will refocus during the winter of 2015-2016 to non-construction sector employers that have engaged in misclassification. BOLA anticipates conducting 150 worksite investigations during 2015.

Two educational videos will be produced and distributed. The first video covers the steps an employer needs to take to properly classify a worker as an employee or an independent contractor and the second video is a mock appeal hearing that will be used in presentations to employers.

## **6. Review and Discussion of Departmental Proposals**

Ms. Knutson provided an update on the proposals the Council voted to approve at the last meeting (D15-02 Combined Wage Claims, D15-03 Treasury Offset Program and D15-05 Enabling the Department to Hold Managing Partners of LLPs Personally Liable). The department has been working with the Legislative Reference Bureau for final draft language to provide to the Council. The workshare proposal draft language has not changed since the last meeting. An update was provided to the Council on the following department proposals:

### D15-06 - Appeals Modernization

Ms. Crane provided the Council an update of the appeals modernization proposal which now includes proposed language for both the tax and benefit appeals process. This proposal allows the option for parties to be electronically notified of a notice of appeal and decisions issued. In addition, this proposal specifies that appeals must be filed in one place, and an appeal to the Labor and Industry Review Commission (LIRC) must be directly filed with LIRC. Currently, an appeal can be filed anywhere within the department. This proposal will require by statute that an attorney represent the department in all tax appeal cases. The department currently follows this practice even though it is not statutorily required.

At the last meeting, the Council requested examples of situations in which "good cause" was determined for failure to appear at a hearing. Ms. Crane provided the Council with information that identifies the legal standard of "good cause," which evolved from decisions issued by LIRC and through case law, and federal guidance used by the appeal tribunal and LIRC in determining "good cause." If there is any doubt on whether or not there is good cause for failure to appear, a hearing is held on the merits. Ms. Crane presented case information from 2015 for both employee and employer cases for failure to appear and summarized the outcome of those cases. The department is not proposing to change the standard for determining good cause under this proposal.

### D15-08 Concealment

At the previous meeting, the Council requested information from the department on the number of concealment decisions and reversals issued by LIRC. Ms. Crane identified the number of decisions issued by LIRC since 2013 on concealment and fraud, and identified how many of those decisions were reversed and how many appeal tribunal decisions were upheld by LIRC. There was a significant increase in LIRC reversals of the appeal tribunal decisions in which concealment and fraud was found between 2013 and 2014. One factor in this change stems from LIRC's interpretation of statute which differs from the department's position. The law has not changed since 2008, but the penalties that apply have increased. Federal law required that the department charge a 15% penalty to claimants who commit fraud, which became effective in October 2013. The department was also required to make changes to the question a claimant must answer on earning wages when filing a weekly claim. In order to gather the required information, the following multifactor question is asked:

During the week did you work or did you receive or will you receive sick pay, bonus pay or commission?

The department is exploring ways to separate this question into multiple questions for user ease; however, programming costs to make this change are estimated at \$1 million.

In June 2013, the department replaced the claimant handbook with a flier that instructs how the claimant can access the handbook online or request a hard copy by calling the department. The flyer is translated into Spanish and Hmong. The handbook explains how to file a claim and the different questions that will be asked when filing a claim. The appeals tribunal routinely asks all claimants during a hearing if they had read the claimant handbook.

#### D15-01 Social Security Information

The labor members of the Council had requested additional information on the social security proposal prior to approving it. Mr. Sussman provided information on the hypothetical effect of a dollar for dollar reduction in UI benefits for a claimant receiving SSDI benefits.

The average recipient collecting SSDI benefits receives \$1,165.39 a month (equal to \$268.97 per week). Under a dollar for dollar reduction scenario, and based on the average amount a SSDI recipient receives, a claimant receiving the average SSDI monthly payment may qualify for a \$5 UI benefit payment. The department reviewed about a dozen claims involving receipt of SSDI benefits. If a dollar for dollar reduction were applied, in 10 of those cases the claimant would receive no UI benefit payment. Only one would qualify for benefits because the claimant had a higher paying job for a period of time; however, the wages from that job had resulted in the claimant being disqualified from SSDI benefits for a number of months.

#### D15-04 – Reimbursable Employer Fraud Charging

Mr. Rubsam provided the Council a summary of the reimbursable employer fraud charging proposal and summarized three options for Council consideration. The options relate to UI benefit charges to reimbursable employers due to identify theft and are as follows:

- Revised Option 1 (Revised from the proposal submitted to the Council in March 2015) - Directs the department to set aside \$2 million, plus interest, to pay UI benefit charges that reimbursable employers incur due to identity theft fraud. If, as a result of paying identity theft fraud charges, the balance of the funds set aside becomes less than \$100,000, the department proposes to assess all reimbursable employers. The assessment would be at a rate that, when applied to the payrolls of all reimbursable employers for the preceding year, will generate an amount not to exceed \$200,000 per year to pay for identity theft fraud charges incurred in the future for reimbursable employers. The minimum total assessment would be \$20,000, with no assessment to an employer if the assessment to that employer would be less than \$10.

- Option 2- Directs the department to set aside \$2 million, put interest, to pay UI benefit charges that reimbursable employers incur due to identity theft fraud. If, as a result of paying identity theft fraud charges, the balance of the funds set aside becomes less than \$1 million, the department proposes that the Secretary will consult with the Council regarding an assessment. If, after consultation, the Secretary determines an assessment is needed, all reimbursable employers will be charged a rate not to exceed \$200,000 per year in order to restore the balance of the funds set aside to \$2 million. The minimum total assessment would be \$20,000, with no assessment to an employer if the assessment to that employer would be less than \$10.
- Option 3 – Directs the department to pay, from the UI Trust Fund, the first \$1 million of UI benefit charges that reimbursable employers incur due to identity theft fraud. The treasurer of the UI Trust Fund will inform the Secretary after reimbursable employers are credited the first \$1 million. The Secretary will consult with the Council regarding an assessment for repayment of future identity theft charges. If, after consultation, the Secretary determines an assessment is needed, all reimbursable employers will be charged a rate not to exceed \$200,000 per year to pay for future identity theft fraud charges for reimbursable employers. The minimum total assessment would be \$20,000, with no assessment to an employer if the assessment to that employer would be less than \$10.

#### D15-09 Able and Available

Mr. Rubsam provided a summary to a department proposal relating to revisions of the able and available law. Wisconsin law requires, as a benefit eligibility condition, that a claimant must be able to work and available for work. The proposed changes will streamline the adjudication process.

The department proposal will repeal or amend provisions where the department issues a multi-part determination in order to address two issues: first, the claimant's separation from employment, failure to accept suitable work, or where the claimant's quitting resulted from a medical necessity of the claimant to care for an immediate family member; and second, the claimant's ability to work and availability for work. The proposed changes would result in the issuance of two determinations: one regarding the separation, failure to accept suitable work issue or the quit issue, and the second to determine the claimant's ability to work and availability for work. This approach was recommended by the U.S. Department of Labor (USDOL). The USDOL tracks and keeps statistics on employee separations and quits, and determines from those, how many are able to work and available for work. Currently, USDOL is not able to track the department's determinations as they are grouped together. The department is paid by USDOL for all determinations issued. By separating the two issues, the department may receive increased funding, and USDOL will be able to track Wisconsin statistics.

Specific language is not included in the proposal. The Council is asked to approve the concept of the proposal and if approval is granted, the department will draft language to present at an upcoming meeting.

## **7. Response to Questions from Council**

### *Fraud and Non-Fraud Overpayments*

At the last meeting, the Council requested information on the amount of fraud versus non-fraud benefit overpayments and of those how much was collected, specifically in 2014. Mr. McHugh provided the Council with information on overpayment collections.

In 2004, the total amount of fraud overpayment payments equaled \$6,089,969 and of that amount over the last 10 years, \$4,793,155 (78.7%) was collected. In 2008, the total amount of fraud overpayment decisions issued equaled \$3,106,971 and of that amount over the past 6 years, \$2,256,765 (82.5%) was collected.

In 2014, the department collected \$40.8 million in both non-fraud (\$18.9 million) and fraud (\$21.9 million) overpayments. The department utilizes collection tools such as the Treasury Offset Program (TOP) in which federal tax refunds are intercepted to maximize collection efforts.

### *Drug Testing Occupations*

At the last meeting, the Council requested information on the number of Wisconsin workers employed in occupations identified by the USDOL as requiring drug testing. Mr. Usarek provided an estimate of the number of Wisconsin workers who work in occupations that may require drug testing based upon the proposed USDOL regulations.

Data collected from the May 2014 Occupational Employment Statistics survey for Wisconsin was matched by O\*Net occupational codes to the occupations listed in the proposed guidelines provided by USDOL. The total number of workers identified in these occupations is 126,630. It is not possible to provide a percentage of how many of those workers will be subject to drug testing as the screening process has not been developed that will determine if one person has only suitable work in these occupations. In addition, it is not possible to determine how many workers will be filing for UI benefits.

## **8. Assembly Bill 140 – Annual Statements Showing Total Public Assistance and Unemployment Insurance Benefits Received**

Mr. Sussman provided a summary of 2015 Assembly Bill 140 (AB 140) which directs the Department of Administration (DOA) to partner with the departments of Health Services (DHS), Children and Families (DCF) and Workforce Development to generate a detailed written financial statement of yearly public assistance benefits and UI benefits received by an individual or family. The financial statement would detail each type of benefit received, the monetary value of each type of benefit and the total monetary value of all benefits received by an individual or family.

AB 140 raises potential federal conformity issues on disclosing specific confidential UI information to a family member other than the individual filing for benefits. Federal regulations would allow an exception for the department to transmit confidential UI information to another

state agency for the use in performance of the other state agency's official duties. In order for the department to release information to DOA, the department is required to enter into an agreement with DOA and include a number of provisions to safeguard the information of UI claimants. The cost associated with providing DOA with this information would not be covered by the USDOL UI administrative grant.

Federal regulations require the department to mail form 1099-G to any claimant who has received benefits. The department currently mails all claimants tax form 1099-G directly, but does not disclose any UI benefit information to the claimant's family.

To date, a Senate companion bill has not been introduced. The department would recommend that AB 140 be sent to the USDOL for review.

## **9. Management and Labor Proposals**

Ms. Knutson asked if the Council was bringing forward any management or labor proposals. Ms. Knutson requested the Council continue to consider the department proposals, review those with suggested language and if possible, take action on those proposals today. If the Council does not have any specific management or labor proposals at this time, Ms. Knutson suggested the Council consider sending any approved department proposals to the Legislature. At this time, no labor or management proposals were brought forth by the Council.

## **10. Correspondence**

Ms. Knutson commented on the letter the department and Council members received from LIRC dated April 9, 2015 relating to "red flags" noted with proposed UI law changes. Ms. Knutson provided information on the following issues addressed in the letter:

- **SSDI**– Currently, there are several SSDI cases on appeal to the circuit court. One case has been fully briefed and the department is awaiting a decision. As indicated by the litigation, the department has a difference of opinion with LIRC. LIRC has only recently raised concerns regarding the American with Disabilities Act (ADA) and other issues relating to benefit ineligibility. The current statute was approved by USDOL and federal law allows a total reduction of benefits for disqualifying income. LIRC is referencing policy considerations. Policies are decided by the Council, Legislature and Governor.
- **Concealment** – The department disagrees with LIRC's statement that they have not changed their approach on the evidentiary standard and concealment cases. LIRC has essentially engaged in a policy debate on how much weight should be placed on an incorrect answer. This policy decision should be determined by the Council and Legislature. In addition, LIRC expresses concern that a criminal conviction may result from an administrative decision. Criminal prosecutions require proof beyond a reasonable doubt that the claimant misled the department by falsely answering a question. The department is committed to solving interpretation issues regarding the concealment



statute, this is the main reason the concealment proposal was drafted. The department will review incorrectly answered questions carefully to determine if a claimant made an honest mistake. If a claimant is having difficulty understanding instructions or answering questions, the department's position is the claimant should contact the department immediately to resolve the issue. There have been cases in which the issue of a claimant's learning disability is first raised at the LIRC appeal or in circuit court.

- Department website – LIRC had provided suggestions to the department on the worker misclassification website when it was first created. These changes have been implemented; however, it took additional time due to the GEF-1 fire and other priorities. The department does not believe anyone was misled by the content of the website. The department will continue to improve and update the website and appreciates all suggestions.

Mr. Manley thanked Ms. Knutson for the explanations. Mr. Manley stated he was puzzled with the numerous issues raised in the letter as legal "red flags," which he considers are policy issues and not legal. LIRC is not a policy making body. The Legislature and the Council set unemployment policy, which is important for LIRC to remember.

## **11. Motion to Caucus**

Motion by Mr. Manley, second by Mr. Griesbach to recess and go into closed caucus session pursuant to Wis. Stat. § 19.85 (1) (ee), to discuss department proposals and the Financial Outlook recommendations at approximately 11:40 a.m. The motion carried unanimously.

### **Report out of Caucus**

The Council reconvened from caucus at 1:03 p.m. Motion by Mr. Griesbah, second by Mr. Manley to approve the following department proposals:

D15-01 – Social Security Disability Insurance  
D15-07 – Work Share  
D15-09 – Able and Available

The Motion carried unanimously. The Council is not ready to approve the appeals modernization proposal and would like to discuss the concealment proposal at the next meeting, specifically addressing questions about intent.

## **12. Other Business**

Ms. Feistel asked the management members if they discussed increasing the triggers on the tax schedules to avoid future Trust Fund Solvency issues. She indicated if the Council was in agreement on adjusting the triggers and keeping employers in Schedule A a little bit longer, the Council should meet soon in order to get the proposal to the Legislature by June.

Mr. Manley responded that the management members did not discuss the tax schedule triggers in detail and they were not prepared to recommend any kind of a tax schedule or tax change.

Ms. Feistel responded that it would not be a tax increase if employers are already in schedule A. Now is the time to consider a change while Schedule A is still in effect.

Mr. Manley responded that management had not discussed the triggers.

Mr. Reihl asked if management was interested in meeting in a week or two to strictly discuss that subject and then labor and management can go into caucus to discuss it. Employers have already received a tax reduction because of other things that have occurred. If Schedule B goes into effect, the \$100 million per year short fall is going to cause a problem down the road. If tax Schedule A remains in effect, employers are going to continue to pay the same taxes, it is not a tax increase. If other changes are made down the road, that will be perceived as an increase. If something could be done in the short term, it would give the Council a little time to look at what needs to be done long-term. Mr. Reihl asked if management is willing to have another meeting of the Council within two weeks to consider this issue.

Mr. Manley responded that if the Council is going to change the tax tables at all, whether it be the triggers, the number of schedules, etc., he would prefer not do it on a piece meal approach. If the Council is going to recommend that the legislature take some action toward the long-term stabilization of revenue for the Trust Fund, in his opinion it is not in the Council's interest to try and address it one piece at a time. He would rather look for a broader solution where all options are on the table.

Mr. Reihl responded that adjusting the triggers would take care of an immediate issue that will cause revenue to go down in the Trust Fund. This would give the Council time to consider longer term solutions.

Mr. Gustafson agreed with waiting to consider a broader solution indicating there was very little time to discuss a proposal with their various constituents.

Mr. Reihl responded that he is concerned that the finance subcommittee considered possible solutions but no steps were taken by the Council to address the issue. Changing the triggers would address an immediate issue and employers would still see a decrease in taxes.

Mr. Manley indicated that this is something the Council can discuss at the next meeting. He did not think that it makes sense for the Council to try and put together a proposal in two weeks.

### **13. Future Meeting and Agenda Items**

The next meeting of the Council is scheduled for May 21, the week before Memorial Day. A survey for availability of the Council members will be conducted to determine an alternate meeting date.

Ms. Knutson encouraged the Council to contact her for agenda items or research requests for the next meeting.

**14. Adjourn**

Motion by Ms. Feistal, second by Mr. Manley to adjourn. By unanimous consent, the Council adjourned at 1:15 p.m.