

# Victor Forberger, Esquire

Admitted to Massachusetts and Wisconsin bars  
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21 March 2024

Governor Tony Evers  
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Madison 53707-7863

Sent by facsimile: 608-267-8983 (2 pp.)  
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RE: Lab test subjects bill, AB398

Dear Governor Evers:

I reluctantly ask that you veto this bill, as the proposed legislative fix is incomplete and leads to only a partial solution to the problem.

The issue is whether lab test subjects qualify as employees for unemployment purposes, both as to eligibility for benefits and as to payment of unemployment taxes.

This problem arose after the Covid-19 pandemic, when the Department re-investigated claimants who had received Pandemic Unemployment Assistance (PUA) and other federally-sponsored unemployment for income that should be offset against those benefits. The Department on its own initiative has concluded that the expansive definition of employee in Wis. Stat. § 108.02(12)(a)<sup>1</sup> applies to the people participating in lab testing (through the Department also advises people who give their blood that they are not employees for those services, see "other income" at <https://dwd.wisconsin.gov/uiben/other-income.htm> (blood/plasma donation payments are NOT income that must be reported). The Department then began auditing these companies to find that unemployment taxes were owed for the compensation paid to these lab test subjects (many of whom were doing nothing more than providing samples of their blood to these companies).

The current legislative rationale for this bill is to prevent individuals from claiming unemployment benefits based on their participation in lab test experiments. Perhaps one or two people in the state have filed unemployment claims based on being lab test subjects, but almost all cases have arisen from the Department re-investigating persons in order to assess over-payments because those persons never considered their participation in lab tests as employment or themselves as employees in the first place.

The bill seeks to remove lab testing as covered employment (i.e., lab testing will be excluded employment). The bill does NOT address the Department's determination that lab test subjects are now considered employees by the Department, and so that legal determination remains unchanged. As a result, the Department will continue to investigate and find lab test compensation as income that claimants need to report on their weekly certifications (and who will be charged with unemployment fraud when they fail to report that income). Furthermore, every time a period of lab testing ends, the Department will want to investigate whether a disqualifying employment separation has occurred.

Details about these issues and their history are available at "Lab test subjects as employees" (9 Jan. 2024) (<https://wisconsinui.wordpress.com/2024/01/09/lab-test-subjects-as-employees/>). It should also be noted that this "lab test" problem is unique to Wisconsin, as no

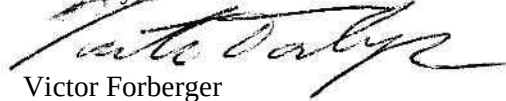
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1 Unlike other states that determine unemployment coverage first on whether there is covered employment or not, Wisconsin determines unemployment coverage by first examining whether a person qualifies as an employee per Wisconsin unemployment law.

other state has done what Wisconsin has done here. Given the radical nature of what the Department is doing, any proposed solution should address all the problems created by the Department, not just half of those problems. Perhaps a special legislative session on a complete solution on this issue could finally be an area of common ground.

If you have questions or need additional information, please contact me via the information above. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Victor Forberger", written over a light grey background.

Victor Forberger  
WI Bar: 1070634

cc Rep. Gundrum, via e-mail message to [Rep.Gundrum@legis.wisconsin.gov](mailto:Rep.Gundrum@legis.wisconsin.gov)  
Rep. Stubbs, via e-mail message at [rep.stubbs@legis.wi.gov](mailto:rep.stubbs@legis.wi.gov)  
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