

Memorandum

To: Unemployment Insurance Advisory Council

From: Andy Rubsam

Cc: Janell Knutson

Date: March 19, 2015

Re: 2015 Senate Bill 21/Assembly Bill 21 (the "Budget Bill") –
UI Drug Testing Program

Testing Claimants for Use of Controlled Substances

Federal law permits states to require an unemployment insurance (UI) claimant to submit to a test for the unlawful use of controlled substances as a condition of receiving UI under two circumstances.¹

First, states may test claimants who were terminated from employment with their most recent employer because of the use of controlled substances. Currently, under Wisconsin law, a claimant who is terminated for the use of controlled substances may be disqualified for UI benefits if the use of controlled substances is found to be misconduct.²

Second, a state may test an UI benefit claimant for whom suitable work is only available in an occupation that regularly conducts drug testing. The U.S. Department of Labor (USDOL) will determine, by regulations that are not yet final, which occupations regularly conduct drug testing.

The Budget Bill requires the department to establish, by administrative rules, a program to require certain claimants to submit to tests for the unlawful use of controlled substances. A copy of the relevant portions of the Budget Bill is attached. When a claimant applies for UI benefits, the department will determine whether the claimant is an individual for whom suitable work is only available in an occupation that regularly conducts drug testing.

If the claimant's only suitable work is in an occupation that regularly conducts drug testing, the department must screen the claimant in order to determine whether the claimant should

¹ 42 USC § 503(l).

² Wis. Stat. § 108.04(5).

be required to submit to a test for controlled substances. The department will “create a screening process” by administrative rule. If the screening shows that the claimant should be required to submit to the controlled substances test, the claimant must submit to the test. The test for controlled substances must comply with the federal Substance Abuse and Mental Health Services Administration (“SAMHSA”) testing guidelines. Under the Budget Bill, the term “controlled substance” is defined as it is under federal law, which “does not include distilled spirits, wine, malt beverages, or tobacco.”³

If the test is negative for controlled substances, the claimant may be entitled to UI benefits if the claimant is otherwise eligible, without further testing. If the test is positive for a controlled substance but the claimant has a valid prescription for the controlled substance, the claimant may be entitled to UI benefits if the claimant is otherwise eligible.

If the claimant refuses to submit to the test for controlled substances, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim for UI benefits in a subsequent year.

If the test is positive for a controlled substance for which the claimant does not have a valid prescription, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim for UI benefits in a subsequent year. But, a claimant who tests positive for a controlled substance (for which the claimant does not have a valid prescription) may maintain eligibility for UI benefits for each week in which the claimant participates in a state-sponsored substance abuse treatment program *and* undergoes a state-sponsored job skills assessment. The Budget Bill requires the department, by administrative rule, to “identify the parameters for a substance abuse treatment program” and to “identify the parameters for a job skills assessment for claimants who misuse controlled substances.”

The attached chart provides a representation of the process that will be used in the drug testing program.

The Budget Bill directs the department, by administrative rule, to identify occupations for which drug testing is regularly conducted in Wisconsin. The Budget Bill also defines “occupation that regularly conducts drug testing” as that term is defined by USDOL regulations. The USDOL has issued a *proposed* list of occupations that regularly conduct drug testing, which are:⁴

- a. An occupation that requires the employee to carry a firearm;

³ 21 USC § 802(6).

⁴ Proposed 20 C.F.R. § 620.3. This list of occupations in the proposed federal regulations is *not* yet final.

- b. An occupation identified in 14 C.F.R. § 120.105 (as in effect on October 9, 2014) by the Federal Aviation Administration, in which the employee must be tested (Aviation flight crew members and air traffic controllers);
- c. An occupation identified in 49 C.F.R. § 382.103 (as in effect on October 9, 2014) by the Federal Motor Carrier Safety Administration, in which the employee must be tested (Commercial drivers);
- d. An occupation identified in 49 C.F.R. § 219.3 (as in effect on October 9, 2014) by the Federal Railroad Administration, in which the employee must be tested (Railroad operating crew members);
- e. An occupation identified in 49 C.F.R. § 655.3 (as in effect on October 9, 2014) by the Federal Transit Administration, in which the employee must be tested (Public transportation operators);
- f. An occupation identified in 49 C.F.R. § 199.2 (as in effect on October 9, 2014) by the Pipeline and Hazardous Materials Safety Administration, in which the employee must be tested (Pipeline operation and maintenance crew members);
- g. An occupation identified in 46 C.F.R. § 16.201 (as in effect on October 9, 2014) by the United States Coast Guard, in which the employee must be tested (Crewmembers and maritime credential holders on a commercial vessel);
- h. An occupation specifically identified as requiring an employee to be tested for controlled substances in a state law that took effect no later than October 9, 2014, and still remains in effect.

Pre-Employment Drug Testing

The Budget Bill permits employers to *voluntarily* submit to the department the results of a test for controlled substances that was conducted as a pre-employment screening. The Budget Bill also permits employers to inform the department that an individual refused to take a pre-employment test for controlled substances.

If the individual tests positive for controlled substances (and lacks a valid prescription for the drug) or if the individual refuses to take the test, there is a rebuttable presumption that the claimant refused to accept suitable work. The department will promulgate administrative rules specifying how a claimant may overcome the presumption.

If an employer reports that an individual refused to submit to a test for controlled substances as part of a pre-employment screening, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim for UI benefits in a subsequent year.

If an employer reports that an individual tested positive for a controlled substance for which the claimant does not have a valid prescription as part of a pre-employment screening, the claimant is ineligible for UI benefits for the latter of 52 weeks or when the claimant files a new claim for benefits in a subsequent year.

Like claimants whose only suitable work is in an occupation that regularly conducts drug testing, a claimant who tests positive for a controlled substance as part of a pre-employment screening (without a valid prescription) may maintain eligibility for UI benefits for each week in which the claimant enrolls in a state-sponsored substance abuse treatment program *and* undergoes a state-sponsored job skills assessment.

Severability/Savings Clause: The department's Secretary may waive compliance with any Budget Bill provision related to UI testing for controlled substances if a waiver is necessary in order for the department to receive federal grant funding to fund the UI division or for employers to receive the maximum credit allowances under the Federal Unemployment Tax Act.

Fiscal Effect

Consistent with federal law, the Budget Bill *does not* require claimants to pay for the cost of the testing for controlled substances. The Budget Bill does not provide any General Purpose Revenue (GPR) funds during the 2015-2017 biennium for the cost of testing for controlled substances.

The Budget Bill provides \$500,000 of GPR for the 2016-2017 fiscal year for the cost of substance abuse treatment.

Effective Date

The Budget Bill provides that the provisions related to controlled substances testing, including the voluntary reporting of pre-employment testing by employers, are not effective until the administrative rules related to those provisions take effect. The department must present a statement of scope for the administrative rules to the Governor within 180 days after the Budget Bill becomes effective.

Conformity

A state's UI law must conform with, and the administration of its law must substantially comply with, applicable federal requirements. There are no known federal conformity issues with the controlled substances testing and voluntary reporting of pre-employment drug testing results by employers as provided in the Budget Bill. The department recommends that the provisions of the Budget Bill regarding drug testing and pre-employment testing be sent to the USDOL for conformity review.

2015 Senate Bill 21 (2015 Assembly Bill 21) Process for Department to Drug Test UI Claimants

