

D12-01

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Proposed by: DWD

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ANALYSIS OF PROPOSED UI LAW CHANGE

DISCHARGE FOR EMPLOYEE'S SUBSTANTIAL FAULT

1. Description of Proposed Change

Proposed change would create a two-tier standard for disqualifying claimants from receiving unemployment insurance benefits. The change would narrow the current misconduct standard by enumerating eight employee general actions that would rise to the level of satisfying the misconduct standard. If the employee's conduct did not rise to this threshold, the employee's conduct may still make the employee ineligible for benefits. The employee's conduct would still disqualify the employee if it is found that he or she was discharged as a result of his or her substantial fault. However, the proposed amendment then further restricts what actions may disqualify a claimant by defining substantial fault to not include:

1. Minor violations of rules unless employee repeats the violation after receiving a warning,
2. Unintentional mistakes made by the employee, nor
3. Not performing work because employee lacks skill, ability, or was not supplied equipment.

The amendment additionally:

- a. Removes the current statutory language regarding disqualification for absenteeism or tardiness; and,
- b. Makes both the discharge for misconduct and discharge for substantial fault have the same seven by fourteen frame work for requalification for benefits.

2. Proposed Statutory Language

Section 108.04(1)(i) is amended to read:

(i) A claimant who does not provide information sufficient for the department to determine whether the claimant has been discharged for misconduct connected with his or her employment, discharged for a substantial fault connected with his or her employment, has voluntarily terminated his or her work, has failed without good cause to accept suitable work when offered, or has failed to return to work with a former employer that recalls the employee within 52 weeks after the employee last worked for that employer is not eligible to receive benefits for the

week in which the discharge, termination or failure occurs or any subsequent week. If a claimant later provides the information and has good cause for the initial failure to provide the information, he or she is eligible to receive benefits as of the week in which the discharge, termination or failure occurred, if otherwise qualified. If a claimant later provides the information but does not have good cause for the initial failure to provide the information, he or she is eligible to receive benefits as of the week in which the information is provided, if otherwise qualified.

Section 108.04(5) is amended to read:

108.04 (5) **DISCHARGE FOR MISCONDUCT.** ~~Unless sub. (5g) results in disqualification, an~~ An employee whose work is terminated by an employing unit for misconduct connected with the employee's work is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's weekly benefit rate shall be that rate which would have been paid had the discharge not occurred. The wages paid to an employee by an employer which terminates employment of the employee for misconduct connected with the employee's employment shall be excluded from the employee's base period wages under s. 108.06 (1) for purposes of benefit entitlement. This subsection does not preclude an employee who has employment with an employer other than the employer which terminated the employee for misconduct from establishing a benefit year using the base period wages excluded under this subsection if the employee qualifies to establish a benefit year under s. 108.06 (2) (a). The department shall charge to the fund's balancing account any benefits otherwise chargeable to the account of an employer that is subject to the contribution requirements under ss. 108.17 and 108.18 from which base period wages are excluded under this subsection. If an employee is not disqualified under this subsection, the employee may nevertheless be subject to the disqualification under sub. (5g). Misconduct is defined to mean actions or conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his or her employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer. Actions or conduct that constitutes misconduct shall solely include:

(a) A violation of the employer's written policy about the use of drugs or alcohol and the employee must have:

1. Had knowledge of the employer's drug policy; and,
2. Admitted to the use of drugs or alcohol or tested positive for the use of drugs or alcohol and the drug testing method used by the employer must be one accepted as valid by the Department;
- (b) Larceny of property or services or theft of currency of any value, or felonious conduct connected with the employee's employment with the employer or intentional or negligent substantial damage to an employer's property;
- (c) Except if covered by s. 108.04 (1) (f), the conviction of a crime or other action subject to civil forfeiture, whether while on or off duty, if the conviction makes it impossible for the employee to perform the duties for which the employee works for the employer;
- (d) Threats or acts of harassment, assault, or physical violence at the workplace committed by the employee;
- (e) Excessive absenteeism or tardiness in violation of a known company policy and the individual does not provide to the employer both notice and a valid reason or reasons for the absences or tardiness;
- (f) Unless directed by the employer, falsifying business records;
- (g) Unless directed by the employer, a willful and deliberate violation of a standard or regulation of a tribal, state or federal government by an employee of an employer licensed or certified by a government agency, which violation would cause the employer to be sanctioned or have its license or certification suspended by the government agency; or,
- (h) Insubordination.

Section 108.04(5g) is repealed and recreated to read:

(5g) DISCHARGE FOR FAILURE TO NOTIFY EMPLOYER OF ABSENTEEISM OR TARDINESS. ~~(a) If an employee is discharged for failing to notify his or her employer of absenteeism or tardiness that becomes excessive, and the employer has complied with the requirements of par. (d) with respect to that employee, the employee is ineligible to receive benefits until 6 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 6 times the employee's weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's weekly benefit rate shall be the rate that would have been paid had the discharge not occurred.~~

~~(b) For purposes of this subsection, tardiness becomes excessive if an employee is late for 6 or more scheduled workdays in the 12-month period preceding the date of the discharge without providing adequate notice to his or her employer.~~

~~(c) For purposes of this subsection, absenteeism becomes excessive if an employee is absent for 5 or more scheduled workdays in the 12-month period preceding the date of the discharge without providing adequate notice to his or her employer.~~

~~(d) 1. The requalifying requirements under par. (a) apply only if the employer has a written policy on notification of tardiness or absences that:~~

- a. Defines what constitutes a single occurrence of tardiness or absenteeism;
 - b. Describes the process for providing adequate notice of tardiness or absence;
 - and
 - c. Notifies the employee that failure to provide adequate notice of an absence or tardiness may lead to discharge.
2. The employer shall provide a copy of the written policy under subd. 1. to each employee and shall have written evidence that the employee received a copy of that policy.
 3. The employer must have given the employee at least one warning concerning the employee's violation of the employer's written policy under subd. 1. within the 12-month period preceding the date of the discharge.
 4. The employer must apply the written policy under subd. 1. uniformly to all employees of the employer. (e) The department shall charge to the fund's balancing account the cost of any benefits paid to an employee that are otherwise chargeable to the account of an employer that is subject to the contribution requirements under ss. 108.17 and 108.18 if the employee is discharged by that employer and par. (a) applies. (em) If an employee is not disqualified under this subsection, the employee may nevertheless be subject to the disqualification under sub. (5).

108.04 (5g) DISCHARGE FOR SUBSTANTIAL FAULT. (a) An employee whose work is terminated by an employing unit for substantial fault on the employee's part connected with the employee's work not rising to the level of misconduct is ineligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employee earns wages after the week in which the discharge occurs equal to at least 14 times the employee's weekly benefit rate under s. 108.05 (1) in employment or other work covered by the unemployment insurance law of any state or the federal government. For purposes of requalification, the employee's weekly benefit rate shall be that rate which would have been paid had the discharge not occurred. Substantial fault is defined to include those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the job but shall not include:

1. Minor infractions of rules unless such infractions are repeated after a warning was received by the employee,
2. Inadvertent mistakes made by the employee, nor
3. Failures to perform work because of insufficient skill, ability, or equipment.

(b) If an employee is not disqualified under this subsection, the employee may nevertheless be subject to the disqualification under sub. (5).

(c) The department shall charge to the fund's balancing account the cost of any benefits paid to an employee that are otherwise chargeable to the account of an employer that is subject to the contribution requirements under ss. 108.17 and 108.18 if the employee is discharged by that employer if paragraph (a) applies.

3. Proposer's Reason for the Change

Concerns are consistently being raised by the employer community that the current misconduct standard within Wisconsin law is too generous in providing benefits to employees who should not qualify for benefits. This proposal creates a lower standard for disqualifying a claimant but then places some restrictions on the applicability of the lower standard. The proposal also provides further clarification regarding what constitutes misconduct. It is hoped that this strikes the right balance over the concerns of the employer community and claimants who seek benefits. It also eliminates the provisions of s. 108.04(5g) of the statutes that has proven unworkable.

4. Brief History and Background of Current Provision

Proposals to create a lower threshold than the misconduct standard have consistently been brought forward by the employer community. Moreover, a constant complaint is raised over the lack of clarity with respect to the misconduct standard.

5. Effects of Proposed Change

- a. Policy. Creates a lower threshold, with protections for employees, in which a claimant is disqualified from benefits.
- b. Administrative Impact. Likely to be significant administrative impact.
- c. Equitable. Law addresses concern of employer community that current system is not equitable in that it overly favors the giving of benefits to former employees.
- d. Fiscal. TBD. May have a substantial impact by lowering the number of recipients of unemployment insurance.

6. State and Federal Issues

- a. Chapter 108. Applicable provisions that need to be amended are covered above.
- b. Rules. DWD § 132.05 provides further clarification with respect to what misconduct is by an employee who is discharged by a health care facility for abuse of a patient. There may be some consideration given to whether or not this section of the administrative code should be revised if this proposal were adopted by the Legislature. It also creates a seven by 14 framework for a health care employee to qualify again for benefits.
- c. Conformity. There should be no conformity issues with this proposal. Other states have disqualifications for a claimant based on the

claimant's actions that do not rise to the level of Wisconsin's misconduct standard.

7. Proposed Effective/Applicability Date

Due to substantial administrative changes that will likely be necessary, the law change should be effective for the calendar year following enactment.