

# Memorandum

**To:** Unemployment Insurance Advisory Council

**From:** Andy Rubsam

**Cc:** Janell Knutson

**Date:** March 19, 2015

**Re:** Definitions of “responsible person” and “any other form of business association.”

---

Background: Under current law, the department may hold individuals who are officers, employees, members or managers holding at least 20% of the ownership interest of a corporation or limited liability company personally liable for the unpaid unemployment contributions of the corporation or LLC.<sup>1</sup> The department proposes to amend section 108.22(9) to also hold “partner[s] or other responsible person[s]” personally liable for the unemployment contributions of “other forms of business association[s].”

Issue: What are the definitions of the terms “responsible person” and “any other form of business association” in the proposed amendment to the unemployment insurance personal liability statute?

Answer: The terms “responsible person” and “any other form of business association” are not defined by statute. Based on case law, the terms are to be interpreted broadly but not without limit.

The department proposes to amend section 108.22(9) in order to make the Wisconsin Unemployment Insurance Law more closely track the Wisconsin Revenue Statute and the federal Internal Revenue Code (the “IRC”). The Revenue Statute provides that the Wisconsin Department of Revenue may assess personal liability for the unpaid taxes of business entities if the “responsible person” of the corporation or “other form of business association” failed to pay the taxes owed by the business entity.<sup>2</sup> The IRC broadly provides that “any person” may be held liable for the unpaid taxes of the business entity.<sup>3</sup>

---

<sup>1</sup> Wis. Stat. § 108.22(9).

<sup>2</sup> Wis. Stat. § 77.60(9) (An “officer, employee or other responsible person of a corporation or other form of business association or a member, employee or other responsible person of a partnership, limited liability company or sole proprietorship” may be held personally liable for the unpaid sales and use tax of a business entity.).

<sup>3</sup> 26 USC § 6672(a) (“Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.”)

The Wisconsin Revenue Statutes do not define the terms “responsible person” or “other form of business association.” But the Tax Appeals Commission, which reviews assessments of the Wisconsin Department of Revenue, has interpreted the term “responsible person” broadly and it “gauges responsibility by examining whether the person had the actual or *de facto* authority to withhold, account for, or pay the taxes, the duty to pay the taxes, and whether the person intentionally breached that duty.” *Sandberg v. Wisconsin Department of Revenue*, Wisconsin Tax Appeals Commission, ¶401-491, (Nov. 18, 2011).<sup>4</sup>

And the Tax Appeals Commission held that “the responsible person determination is pragmatic and based on considerations of substance, rather than form. It boils down to the fact that the crucial inquiry is whether the person had the effective power to pay the taxes—that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed.” *Id* (internal citations omitted). The Tax Appeals Commission in *Sandberg* found that the son of the business owner was *not* a “responsible person” for the purposes of the Wisconsin Revenue Statute because “evidence showed that the business, in fact, was a ‘one-man show’ where his father, Kenneth Sandberg, was ‘that man.’” *Id*.

Similarly, the Labor and Industry Review Commission interprets the current Wisconsin Unemployment Law personal liability statute (section 108.22(9)) broadly. LIRC applies federal case law regarding IRC section 6672 when it decides cases under section 108.22(9):

[T]he United States Court of Claims has held that any corporate officer with the power and authority to avoid default is a responsible party, within the meaning of section 6672. Included are persons having power to control the decision-making process by which the corporation allocates funds to other creditors, and persons with ultimate authority over the corporation’s expenditure of funds. This responsibility is a matter of status, duty, and authority, indicia of which include the holding of corporate office, control over financial affairs, authority to disperse corporate funds, stock ownership, and the ability to retain and discharge employees.

*Henry A. Warner*, Hearing No. S9100679MW (LIRC, July 16, 1993) (internal citations omitted).<sup>5</sup>

The proposed amendment to section 108.22(9) is designed to permit an assessment of personal liability for unpaid unemployment insurance contributions against individuals who, by nature of their “status, duty and authority,” are responsible for filing the contribution reports and paying the taxes. This is similar to the way that LIRC currently interprets section 108.22(9) and is consistent with the federal IRC and the Wisconsin Revenue Statute.

The term “any other form of business association” is also not defined by the Wisconsin Revenue Statutes. The purpose of amending section 108.22(9) to add that term is to ensure that the department may assess personal liability against individuals who are personally liable by nature of their “status, duty and authority” with the employer, regardless of the *form* of the business entity.

---

<sup>4</sup> Available at <http://www.wisbar.org/forPublic/INeedInformation/Tax%20Appeals%20Commission/2011/08-w-143%28p-ii%29.htm>.

<sup>5</sup> Available at <http://dwd.wisconsin.gov/lirc/ucdecns/3821.htm>. *Aff’d, Henry A. Warner v. LIRC, DILHR, and Excalibur Automobile Corporation*, Case 93 CV 3157 (Wis. Cir. Ct., Dane Co., May 18, 1994) (summary available at <http://dwd.wisconsin.gov/lirc/ucdecns/henrywarnerdgm.htm>).