

**Memorandum RE: 27 November 2012 DWD legislative proposals to Advisory Council**

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**Introduction**

At the 27 November 2012 meeting of the Advisory Council, the Department of Workforce Development (DWD or Department) introduced a number of legislative proposals that would remake the state's unemployment law in ways not seen since 1932 when Wisconsin enacted the first unemployment compensation system in the nation.<sup>2</sup> As proposed, this legislation does to unemployment law what Act 10 did to public-sector collective bargaining. While the form of the unemployment system remains in place, the substance of providing financial assistance to those without work is gutted through new discharge standards that will make it extremely easy for employers to disqualify claimants. Changes to the quit provisions and new work search and reporting requirements will add numerous obstacles for claimants initially eligible for unemployment benefits to continue receiving those benefits. For the over-payments claimants will subsequently owe the Department, there are new tools for recover that money, including levies of claimants' bank accounts. Employers, on the other hand, will find in these proposed changes a solicitous and forgiving Department as well as plummeting unemployment taxes.

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<sup>1</sup> My apologies for the delay in preparing these comments. Soon after these proposals became public, I hurt my arm and underwent surgery for that injury. Consequently, my work pace has slowed considerably, and, moreover, basic analytic mistakes and poor writing may remain. I welcome any corrections. As always, these comments are my own and do not reflect an official statement made on behalf of the Unemployment Compensation Appeals Clinic, Inc., or any other organization to which I am connected.

<sup>2</sup> These proposals are numbered D12-01 through D12-31 with gaps in this numbering. While many were drafted in the fall of 2012, they were only publicly revealed for the first time to the Advisory Council on November 29th. Copies of the proposals are available at <http://dwd-uireform.vforberger.fastmail.fm/>.

**Quit and Discharge**

**A. Discharge**

The Department proposes in D12-01 to create a new, less stringent standard to apply in lieu of the misconduct standard when disqualifying an employee from benefits.

This new standard is called substantial fault and, as proposed, states:<sup>3</sup>

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). [the misconduct standard]

(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.

The proposal also adds new language to clarify the misconduct standard in Wis. Stat.

§ 108.04(5). This addition is:

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

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<sup>3</sup> This new standard would replace the absenteeism and tardiness disqualification language in Wis. Stat. § 108.04(5g). This absenteeism and tardiness disqualification is essentially unworkable because employers have failed to adopt its stringent notice and procedural requirements. Removal of this effectively dead provision is welcome.

## Response to DWD proposals

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 employees 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) [loss of license], 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.

The Department's rationale for these changes is based on concerns from 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."

The Department explains that:

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

## Response to DWD proposals

the concerns of the employer community and claimants who seek benefits.

This proposal does much more than just create a less stringent standard for disqualifying a discharged employee. Instead, it amends several standards already in place for determining whether misconduct exists, implies that misconduct is currently much more difficult to establish in discharge cases than it actually is, and provides a new standard for disqualifying an employee from unemployment benefits on nothing more than an infraction of a reasonable workplace requirement. Only when there is no dispute that the discharge is based solely on an employee's innate inability to perform the work in question will an employee still qualify for benefits under these proposed changes.

### New misconduct language

A few of the specified misconduct standards, such as insubordination, have always been misconduct developed through case law, and so it is likely that those standards will continue to apply in these cases. Other proposals present reformulations of current standards that make the consequences of the proposed language difficult to determine. In proposed (d), it is unclear whether the threats or acts of workplace violence whenever done will constitute misconduct or only when initiated by a claimant. For example, presently an employee escapes a finding of misconduct when a violent action is taken in self-defense. *Cf. Struble v. Wal Mart Associates Inc*, Hearing No. 10201195EC (22 July 2010) (no misconduct where employee was not merely reacting to his co-worker's taunting and physical aggression but was worried that he was in imminent danger and was acting to defend himself). Likewise, proposed (f) seems to indicate that every incidence of business record falsification done without direction of an employer qualifies as misconduct. *Cf. Handel v. Federal Express Corporation*, Hearing No. 05605972MW (15 November 2005) (employee who took break later in day when lunch break was cut short but did not record that break did not commit misconduct but rather made isolated error in judgment). Whether this new

## Response to DWD proposals

language will lead to a blanket disqualification or allow for long-standing case law to continue is unknown.

The language in several other Department proposals without a doubt alter current standards in ways that significantly ease the employer's burden in these cases. The alcohol and drug testing misconduct standard proposed in (a) eliminates the requirement that the employer have a valid business interest for its drug/alcohol policy,<sup>4</sup> especially when the prohibition applies to off-duty conduct. *See McClary v. AACer Flooring LLC*, Hearing No. 02403673AP (15 May 2003) (describing this requirement and setting forth various ways that an employer satisfies this burden); *Koss v. Menominee Indian Tribe*, Hearing No. 97400031GB (10 April 1998) ("It is not enough to establish that a work rule has been violated, as the mere violation of a work rule does not establish misconduct. The commission must determine whether the rule was reasonable . . . [and that], where the rule concerns off-duty conduct, the [proscribed] conduct must be reasonably related to the employer's interests."). *See also Gregory v. Anderson*, 14 Wis.2d 130, 137, 109 N.W.2d 675, 679 (1961) (to show that a violation of a work rule while off-duty qualifies as misconduct, an employer must show that the work rule in question is reasonably related to the employer's business interests).

Proposed (b) appears as a straightforward application of current misconduct principles. but the provision for "negligent substantial damage to an employer's property" would allow benefits in situations that currently require a showing of repeated carelessness by an employee in carrying out his job duties. *See, e.g., Crain v. Mikes Standard Services*, Hearing No. 09201542NR (7 January 2010) (mechanic's repeated failure to carefully perform his work — not checking whether lug nuts were secure or failing to realize that a transmission pan was loose — caused serious

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<sup>4</sup> While this proposal applies to both alcohol and drug use, the Department mistakenly leaves out a reference to alcohol in proposed Wis. Stat. § 108.04(5)(a)1 regarding an employee's knowledge of the employer's policy.

## Response to DWD proposals

problems for the employer); Cairns v. TTC Illinois Inc., Hearing No. 00200102EC (7 April 2000) (driver's preventable accidents — hitting guardrails, for instance — that caused substantial damage were only incidents of ordinary negligence and did not evince a pattern of negligent acts so serious as to amount to gross negligence). In other words, under the Department's proposed language *any* mistake by an employee that led to substantial property damage will qualify as misconduct.

Proposed (c) presents two possible changes to current misconduct standards. First, conviction evidence has not been determinative in finding that a claimant was responsible for the actions that led to his or her incarceration. See Albrecht v. Farm & Fleet of Monroe Inc., Hearing No. 05003647JV (28 November 2007) (criminal pleas are statutorily irrelevant pursuant to Wis. Stat. § 108.101(4) in showing misconduct in unemployment hearings, but evidence obtained on remand demonstrated that claimant committed misconduct as he was responsible for his incarceration and subsequent absences from work). The proposed language undoes the holding in Albrecht and makes convictions in and of themselves determinative of misconduct. Second, by establishing that civil forfeitures (aka citations/tickets) can constitute misconduct, this proposal will lead to a misconduct finding where employers have discharged employees because of the increased expenses those citations have on business operations. Cf. Brower v. Cal-Inland Inc., Hearing No. 89-201279EC (25 May 1990) (no misconduct where employer did not discharge the employee for the two accidents for which employee was at fault, but rather because of the insurer's refusal to continue insurance coverage on the employee).

### Substantial fault

The proposed substantial fault standard is problematic on two levels. First, in explaining this new standard, the Department presents three examples of where this new standard would apply — poor customer service that continues after warnings, sleeping on the job after warnings, and failing to complete tasks and attempting to

## Response to DWD proposals

cover-up that failure — that under current case law easily and unambiguously qualify as misconduct. The case law is replete with numerous decisions showing that an employee's failure to complete required job duties after warnings qualifies as misconduct. Bauer v. Walgreen Co Illinois, Hearing No. 07607884MW (14 March 2008) (employee's failure to do simple task to verify customers' addresses after repeated warnings and which had potentially serious consequences constitutes misconduct); Andrews v. Prime Investments Inc, Hearing No. 02200402HU (23 August 2002) (misconduct occurred when customer overheard employee's crude sexual remark, and employee previously warned); Ryba v. Palmisano & Baake Produce Co, Inc, Hearing No. 98602774MW (7 January 1999) (truck driver who received two warnings for discourteous behavior towards customers committed misconduct when he refused to help a customer unload a truck); *see also* Walter v. LIRC, Case No. 2011AP2899 (11 Sept. 2012) (LIRC finding of misconduct upheld as employee failed to perform required job duties after warning). *See also* Ivy v. Cameo Care Center Inc, Hearing No. 11603943MW (16 December 2011) (employee who fell asleep at work did not commit misconduct [and probably no substantial fault as there were no warnings] as record shows that employee was not neglecting her duties, did not conceal herself, did not create an immediate threat to the safety or welfare of residents under her care, and had no prior warnings about sleeping on the job). The only way there is no misconduct in any of the Department's examples is if something beyond the claimant's control led to the discourteous behavior to a customer, falling asleep at work, or telling an employer that a work task had been completed when in fact it had not. It is difficult even to think of possible mitigating circumstances that would satisfy these criteria. How often, for example, are employees guilty of sleeping on the job because they've been shot with tranquilizer darts by strangers?

## Response to DWD proposals

So, the examples cited for this new substantial fault standard are already situations that would lead to disqualification under the current misconduct standard.<sup>5</sup> This proposed substantial fault standard, then, is much broader than what the Department describes, and a close reading of its language shows just how broad the new standard is. First, this standard applies to all of an employer's reasonable job requirements. Given that employment is at-will in Wisconsin — in that even good faith is not required in the workplace — almost anything an employer requires of its employees is reasonable. For example, an employer can certainly require one employee to prepare a false report about a co-worker's productivity in order to support a cut in the pay of that co-worker. An employer can reasonably expect an employee to complete productivity reports as the employer directs, and an employer's interest in maximizing its profits at the expense of employee earnings is not illegal. In other words, the only way a job requirement could be unreasonable is if that job requirement was illegal, such as forcing an employee to commit criminal acts or requiring an employee to harass a co-worker because of gender, race, or ethnicity.

Second, this new standard will apply to any action or omission over which the employee exercises reasonable control. In other words, only when events are beyond an employee's reasonable control will the substantial fault standard not apply. So, an employee cannot be at substantial fault for the blizzard that closes the workplace down, since she cannot reasonably be expected to control the weather. But, an employee can reasonably be expected to control the operation of her car. And so, an employee who misses work because of a car accident that is her fault or because her car will not start is very likely guilty of substantial fault. Because the issue is over what the employee has reasonable control over, an employee claiming that a broken car

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<sup>5</sup> The Department notes in its proposal that some adjudicators and administrative law judges *may* consider these examples as demonstrating misconduct. As the cases discussed here show, misconduct is easily found in these examples. This statement, then, raises more questions than answers about the differences being claimed between misconduct and substantial fault.



## Response to DWD proposals

prevented her timely arrival to work would have to show that the failure of her car was something beyond her control in order to counter the employer's reasonable proposition that who but the employee (or the family members who are her agents) is reasonably responsible for the car's operation.<sup>6</sup>

The Department's proposal offers three caveats that allegedly demonstrate circumstances where substantial fault would not apply: minor infractions of rules before a warning, inadvertent mistakes, or performance-based discharges. In providing these examples, the proposal allegedly seeks to show circumstances regarding how employees might still be eligible for unemployment benefits despite the broad language that defines substantial fault. These caveats are basically meaningless, however. Minor infractions of rules will still qualify as substantial fault when the employer warns an employee about any subsequent infractions. As a result, inadvertent mistakes can also easily qualify as substantial fault if the employer warns the employee to not make those mistakes anymore. Finally, performance-based discharges can easily qualify as misconduct under current law when the employer warns an employee about continued performance mistakes. Wilson v. Clasen Quality Coatings Inc, Hearing No. 07004934MD (8 May 2008) (employee's continual failure to slow down and concentrate more fully on his work, resulting in large and costly errors, went beyond ordinary negligence and evinced misconduct"); Skelton v. Silliker Inc, Hearing No. 07002089MD (18 October 2007) (employee who had previously demonstrated a satisfactory job performance committed misconduct when he repeated errors after being warned and counseled on his unsatisfactory job performance);

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<sup>6</sup> By putting the focus of the inquiry here on what is reasonably within an employee's control, the burden of proof will invariably be on employees to show that the action or omission that led to their discharge was beyond their control. As a result, the burden of proof in discharge cases will shift from employers — who traditionally have the burden of proof in these cases — to claimants. This outcome is simply the practical consequence of any discharge that is related to what employees have done. In other words, an employer will satisfy its burden that an "employee exercised reasonable control" by showing that the discharge was related to what the employee did or did not do. It will then be up to the employee to demonstrate that he or she really did not have any control over what she did or did not do.

Rayford v. Medical College of Wisconsin Inc, Hearing No. 07601072MW (20 July 2007) (employee's continuing scheduling errors after counseling demonstrated a failure to devote proper attention to her duties and so she committed misconduct). As a result, this last caveat would seemingly only apply to situations where an employee lacked the physical or mental capacity to do the job in question — a very limited exception, as it would only apply when an employer mistakenly believed that the employee had that capacity in the first place. Rather than showing how the proposed substantial fault standard is limited, these caveats reveal how all-encompassing the new standard will be if enacted.<sup>7</sup>

It is not hard to predict what will happen if these proposed changes are enacted. Under these changes to discharge law, almost any employee mistake will disqualify him or her from unemployment benefits. Indeed, employees would have better chances at winning an unemployment claims by quitting and asserting there was good cause for the quit than hoping there was no substantial fault behind their discharge. With employers so easily avoiding liability for the unemployment connected with their discharges, their unemployment taxes will plummet. This proposal, then, overturns the stated statutory purpose that unemployment benefits are intended to be a burden on employers. "Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." Wis. Stat. § 108.01(1).<sup>8</sup>

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<sup>7</sup> A large, national employer, for example, mandates that employees be discharged for their third infraction of company rules, no matter how serious or minor that third infraction is (at their second infraction, employees are warned that their third infraction will automatically lead to discharge). This company simply varies the amount of time before the employee can be rehired according to the seriousness of the third offense. Under this procedure, every discharge would most likely qualify as substantial fault.

<sup>8</sup> Sympathy for employers' unemployment burden also rests on a specious belief over how many claimants qualify for unemployment benefits. Department staffers have explained to me that claimants win roughly 60% of discharge cases decided by administrative law judges. Given that claimants who lose initial determinations account for the majority of these appeals, it appears that at present unemployment law only favors claimants to a slight degree and in no way supports the claims of

Response to DWD proposals

**B. Quit**

Proposal D12-19 makes two basis changes to Wis. Stat. § 108.04(7). First, the proposal increases the number of weeks of earnings needed to re-qualify for unemployment benefits from four to ten but eliminates entirely the requirement that four weeks must also pass before re-qualification occurs.

Second, the proposal eliminates eleven quit exceptions for allowing unemployment benefits. A chart prepared by the Department lists these changes along with the number of initial determinations based on that exception for the last four years.

Section	Issue	Change	2008	2009	2010	2011	Total
(7)(am)	Inverse Seniority (in lieu of others)	Remains	57	146	75	65	343
(7)(b)	Good cause attributable to ER	Remains	1177	1406	1318	1125	5026
(7)(c)	Quit due to health of EE or family member	Remains	171	210	223	238	842
(7)(cm)	Quit due to transfer/childcare	Repealed	34	40	22	33	129
(7)(d)	Quit to accept recall	Repealed	233	297	248	195	973
(7)(e)	Quit same good cause (10 weeks)	10 weeks reduced to 30 days	8836	10039	10976	10275	40226
(7)(g)	Temporary residence	Repealed	1	1	2	4	8
(7)(j)	Compulsory retirement	Repealed	4			2	6
(7)(k)	Quit part-time	Repealed	11	21	12	3	47
(7)(L)	Quit to take	Combined with (7)(p)	867	574	817	974	3232
(7)(m)	Quit- Labor Organization	Repealed		1			1
(7)(n)	Quit- PT elected or appointed	Repealed	1	5	2		8
(7)(o)	Quit- multiple employers	Repealed	262	351	265	201	1079
(7)(p)	Quit-to-take while claiming partials	Combined with (7)(L)	438	839	1456	1444	4177
(7)(q)	Quit due to discharge from military	Repealed	1	1		1	3

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employers to the Department that misconduct is difficult or nearly impossible to find in discharge cases or that unemployment law is too favorable to employees. The examination of the case law above demonstrates that employers can and do win many discharge cases under the current misconduct standard.

## Response to DWD proposals

Section	Issue	Change	2008	2009	2010	2011	Total
(7)(r)	Quit- family corp/involuntary cessation	Repealed	90	153	143	106	492
(7)(s)	Quit- domestic abuse	Remains	7	12	39	24	82
(7)(t)	Quit to relocate with spouse	Amended so that only relocation for military spouse allowed	n/a	236	452	436	1124
(7m)	Voluntary reduction of hours qualifies as a quit	Remains					
Totals			12190	14332	16050	15126	57798

The Department explains that it needs these changes because:

### 3. Proposer's Reason for the Change

Concerns have been raised by the employer community that the department has been too generous in providing benefits to employees who should not qualify for benefits due to our large number of quit exceptions and our low requalification threshold. Wisconsin has more quit exceptions and is more lenient in the requalification after quitting than most states in our region. In addition, many of the quit exceptions are charged to the funds balancing account; by reducing and modifying the quit exceptions and requalification requirement the solvency of the trust fund should be positively impacted.

### 4. Brief History and Background of Current Provision

Exceptions to quit disqualifications have been in place since the 1930s and have grown over the years. Reducing these exceptions have been brought forward by the employer community and the department for many years.

in 1984, the standard disqualification was the claimant had to work in 7 subsequent weeks and earn 14 times their weekly benefit rate and in addition had a 50% reduction in their maximum benefit amount. in 1989, this was changed to 7 elapsed weeks and not weeks of work.

In 1990, the quit disqualification was changed to 4 elapsed weeks and 4 times the weekly benefit rate.

There are two issues to address in these changes. First, the proposed re-qualification requirement that claimants have ten times their weekly earnings before being eligible for unemployment benefits again in place of four times their weekly earnings and a four week waiting period regardless of earnings is a significant change. Not only does it create a much higher financial hurdle for re-qualifying for unemployment benefits, but it will also lead to claimants having to work in jobs for more than ten weeks in order to re-qualify for benefits. When claimants find

subsequent work, they usually find that work in a position that pays less than their previous job.<sup>9</sup> With reduced earnings, they need to work in that new job for more weeks just to replicate the total earnings they would have received in ten weeks from their former job. The Department indicates that this change alone will lead to \$18.4 million in unemployment benefits *not* being paid to claimants — more than half of the \$33 million in claimed savings from all of these proposed changes to the quit provisions.

Second, the Department's reason for these proposed changes to the quit exceptions is primarily based on improving the finances of the unemployment trust fund.<sup>10</sup> The substantive changes proposed to the quit exceptions are for issues unrelated to the actions of an employer. As a result, the unemployment benefits paid out on these issues have no connection to or affect on an employer's unemployment insurance account and instead are paid out from the trust fund. The financial health of the unemployment trust fund is not a goal of the Department or the Advisory Council, however. While Wis. Stat. § 108.01(2) refers to a sound system of unemployment reserves, that reference is about employers' responsibility for those reserves.

A sound system of unemployment reserves, contributions and benefits should induce and reward steady operations by each employer, since the employer is in a better position than any other agency to share in and to reduce the social costs of its own irregular employment.

Wis. Stat. § 108.01(2). The statute then explicitly declares what efforts should be undertaken to address the problem of unemployment:

A more adequate system of free public employment offices should be provided, at the expense of employers, to place workers more efficiently

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<sup>9</sup> There are numerous claims from employers about claimants refusing jobs because of low pay and waiting for offers with higher pay. Available data belies these claims. Depending on which years are examined, national and state data show that wages have been either flat or declining even as, until very recently, the working population has expanded. Furthermore, individual reports from job seekers show most are taking jobs for less pay than they previously received. Only those who are giving up finding any work are dropping out of the labor market.

<sup>10</sup> This fund (also sometimes referred to as the balancing fund) provides monies for paying out claims for which no employer account is charged.

## Response to DWD proposals

and to shorten the periods between jobs. Education and retraining of workers during their unemployment should be encouraged. Governmental construction providing emergency relief through work and wages should be stimulated.

Id. Certainly, the financial health of the state's unemployment funds should be assessed and considered by the Department and the Advisory Council in determining employers' unemployment tax rates. But, there is nothing in the unemployment law empowering the Department or the Advisory Council to change that law in order to reduce the circumstances for when unemployment benefits will be paid in order to improve the financial health of the unemployment balancing fund. For the Department to put a priority now on fund accounting when the state is still recovering from one of the worst job markets of the last hundred years is, frankly, ridiculous. Instead of looking for ways to reduce unemployment benefit payments, the Department should, pursuant to Wis. Stat. § 108.01(2), be finding ways for how it can pay out more unemployment benefits, staff placement offices for the benefit of the unemployed, develop education and training programs for the benefit of the unemployed, and spur government construction projects.

What is even more remarkable about these proposed changes to the quit exceptions is that the impact of these changes on the health of the fund balances is minimal. Only one case, for example, has been handled in four years under exception (7)(m), the quit/labor organization exception. And, exceptions (7)(r) and (7)(cm) have just under 500 cases and not even 130 cases, respectively, *after four years*. So, there is little actual financial impact from eliminating these quit exceptions.<sup>11</sup> While exception (7)(d) — quitting one job to accept a recall from a layoff involving a second employer —

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<sup>11</sup> There are substantive reasons for keeping *all* of the quit exceptions. Exception (7)(r), in particular, only arises when a small employer, who has paid into the unemployment system for its employees, is forced out of business and the former owners then seek unemployment benefits for themselves. This employer-friendly provision which makes unemployment benefits available to employers should be encouraged rather than eliminated, as the benefits here directly apply to the statutory goals expressed in Wis. Stat. § 108.01(1) about maintaining the purchasing power of workers. I have seen firsthand how these benefits are vital to employers whose business have gone under during this recession.

## Response to DWD proposals

numbers 973 cases, the actual unemployment benefits at issue in this exception is most likely very small. The benefits at issue are only for the weeks between quitting one job and waiting to return to work at the recalled job. As a result, only one or two weeks of benefits are probably being paid out here. Furthermore, with the addition of the one week waiting period, it seems likely that at present very little to no benefits are being paid out under this exception. The main goal of this exception, then, is simply to allow claimants to receive subsequent unemployment benefits without needing to re-qualify for those benefits.

So, any plausible financial savings from claims no longer being paid arises from proposed changes to exceptions (7)(e), (7)(o), and (7)(t). The Department's analysis leaves too many questions unanswered about where these savings are actually from, however. In exception (7)(e) — quitting a new job for the same reasons that would allow an applicant to have earlier refused the job offer — the Department proposes limiting employees to thirty days instead of ten weeks for making this kind of decision. Even though nearly 70% of all quit exceptions handled fall under this category, the Department provides no explanation of what impact a change from ten weeks to thirty days for this exception will have. Likewise, the change to exception (7)(t) to limit its scope to military spouses rather than all spouses who relocate is not accompanied by any analysis of what actual impact this change will have. It may well be that most of the spousal relocations handled under this provision are connected to military transfers, and so any actual reduction in the cases will be minimal.<sup>12</sup> Only with exception (7)(o) is the source of the savings obvious. Exception (7)(o) allows an employee working two jobs to leave a part-time position without good cause and still be eligible for unemployment benefits if he or she subsequently loses his or her full-time work through no fault of her own. The Department's proposed change would essentially mean that individuals working two jobs should in the future only end part-

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<sup>12</sup> Indeed, in all the cases I have seen where this exception applied, the relocation was connected to a military transfer.

## Response to DWD proposals

time work if they know definitively that their full-time position will continue for the next year or two. If they guess wrong about that full-time position and are laid off, their earlier decision to leave the part-time job effectively ends their eligibility for unemployment benefits arising from that layoff. In essence, claimants lose their eligibility for benefits from one employer based on what previously happened with another employer.<sup>13</sup>

If the actual financial impacts of these changes are difficult to determine, it is easy to see how these proposed changes will create new and increasingly difficult barriers for maintaining eligibility for unemployment benefits. In these changes to the quit exceptions, the Department is eliminating provisions which isolate changes in one employment relationships from another employer-employee relationship for which unemployment benefits are at stake. For instance, with the elimination of exception of (7)(d), an employee who quits a job when recalled to his or her main job will be disqualified for unemployment benefits and will no longer be eligible for any unemployment benefits regardless of the separation reason — even a subsequent layoff from the main employer — until he or she has ten times her weekly earnings.<sup>14</sup> The Department's proposed changes to the quit exceptions, then, will mean that claimants

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<sup>13</sup> This situation is similar to the current disqualification that applies when an individual receiving unemployments based on covered employment loses those benefits when he or she switches positions that are not covered by unemployment law, such as a real estate agent paid by commission. A part-time real estate agent receiving unemployment benefits from work unrelated to that real estate service cannot switch from one broker to another unless he or she can show a discharge without misconduct or a quit for good cause. See Piontek v. LIRC, Appeal No. 2011AP690 (29 March 2012) and Piontek v. Cooper Spransy Realty Inc., Hearing No. 09003831MD (3 March 2010). The Department's proposed merger of exceptions (7) (L) and (7)(p), while simplifying unemployment law through the combination of two very similar provisions, leaves this disqualification in place for those in excluded employment. The switch in jobs must still be to a position in covered employment, and real estate service is excluded employment. In this light, the elimination of exception (7)(o) effectively expands this disqualification to everyone working two jobs.

<sup>14</sup> This change and a proposed change discussed below to waivers of claimants' work searches will provide employers who experience seasonal unemployment several ways to game the system and eliminate most of their laid-off employees from receiving unemployment benefits.



jeopardize their unemployment benefits from any source whenever there is almost any change in any of their employment relationships. With all these disqualifications now in play, employers will find that fewer of their employees are actually receiving the unemployment benefits due them. With less money coming out of employers' accounts for the unemployment they create, the end result of these changes is actually the opposite of the mandate in Wis. Stat. § 108.01(1) that: "Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers." The Department simply should not be advocating a change in unemployment law that runs counter to the reasons unemployment law exists in the first place.

### **Claimants**

#### **A. Work search**

It is a fundamental requirement in unemployment compensation that a claimant must be seeking work. Each state administers this work search requirement in different ways, however. In Wisconsin, this requirement is currently regulated via work registration (DWD 126) and work search contacts (DWD 127).

In D12-02, the Department wants to (1) increase the number of weekly work search contacts from two to four, (2) revise regulations regarding work registration, and (3) revise regulations regarding what constitutes a work search contact. The Department explains that these proposals are about providing "an incentive for individuals who are unemployed to more actively seek out employment and thereby improve their employment prospects," as well as "strengthening the unemployment insurance safety net by helping alleviate the concern of the employer community and the general public that the unemployment insurance program is being abused by some unemployment insurance recipients."

It is doubtful that these proposals would accomplish these goals. What they seem to do instead is to expand dramatically the ability of the Department to find a

## Response to DWD proposals

claimant's work search efforts to be less than satisfactory and hence disqualify them from receiving unemployment benefits.

### Work registration

Work registration has generally been a token requirement, and confusion over this requirement has been compounded by language in DWD 126.04 regarding presumptions of work registration that, in practice, still mean a test has to be performed to determine whether a claimant does not have to meet work registration requirements that are currently not well-defined. Certainly, this lack of concern over work registration made sense when the Department was not directly involved in job search efforts. For instance, when most jobs were found through classified ads, social contacts, employer and union job-training programs, and company or school job fairs, then any kind of centralized job searching program was basically besides the point. The Department simply had no business replacing these efforts with its own programs.

In recent years, many of these job sources have declined or even disappeared, and the Department has now for several years pushed its Job Center of Wisconsin as the main source of jobs in the state. Regardless of whether this website accomplishes what is alleged, there is no dispute that significant changes in how people find work have occurred and that web-based searching is now a significant factor in finding jobs. So, an effort to make work registration more rigorous as well as understandable makes sense.

To accomplish this goal, the Department's proposed changes eliminate the confusing language about presumption of participation in DWD 126.04, puts in place specifics about waiving work registration (including a waiver of the work registration requirement when an employee works at least twenty hours for an employer (DWD 126.03(1)), and sets forth specifics about what is work registration in DWD 126.02(1) (a) and (b). These requirements are generally helpful, as they clarify to both claimants and the Department what is expected in regards to work registration.

## Response to DWD proposals

The only caveat here is that the standards and actual content of work registration is left to the Department to determine (DWD 126.02(2)). Presumably, the Job Center of Wisconsin is currently the focal point of this work registration requirement. This presumption, however, places a government-controlled program at the heart of claimants' work registration. Just as job sources have changed markedly over the last twenty years, it seems likely that significant changes in how people find jobs will continue. Accordingly, the Department's effort to make the Job Center website the central focus of its work registration requirements seems, at a minimum, short-sighted. Instead of making itself the central focus of work registration, the Department would be better served by adapting its requirements to whatever work registration efforts are being used at any one time. As discussed in more detail below, folks in job transition are signing up with numerous resources as part of their job-search efforts that are not even touched upon here by the Department..<sup>15</sup>

### Work search contacts

The Department raises the number of weekly work search contacts in Wis. Stat. § 108.04(2)(a) from two to four in its proposal.<sup>16</sup> The Department also introduces numerous requirements regarding the substance of those work search contacts. In part, these requirements are intended to provide clarity to claimants about the Department's requirements for maintaining records of work search efforts. For example, new language in DWD 127.01 specifies that the Department "may require a claimant to provide . . . job search log[s]." The Department's proposals here also

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<sup>15</sup> This concern would also allow the Department to take advantage of non-computerized-based services. Many folks do not have convenient access to the Internet from desktop or laptop computers. Furthermore, the Job Center website is overly complex or graphic-intensive, and so displays poorly on smart phones — devices many foresee as the predominant platform for Internet activity.

<sup>16</sup> In an earlier proposal to the Advisory Council, the Department sought a weekly increase to three work search contacts. In addition, this new requirement for four weekly job search contacts is only a minimum. In proposed DWD 127.06(2)(b), the Department gains the ability to increase unilaterally the number of work search contacts a claimant needs after four weeks of unemployment.

## Response to DWD proposals

appear to be an effort to simplify and consolidate work search contact requirements, such as eliminating the responding to classified ads (which can be considered the same as applying for work with employers) and combining registering at a union hiring hall with registration at a public or private placement facility.

But, the new requirements in DWD 127.01(2) regarding work search contacts also eliminate a few still very viable work search avenues and ignore several others that are increasingly important to job seekers. In place of registering with placement services connected to professional organizations, the Department now has visiting a Wisconsin Job Service Center or other state-equivalent. Participation in employment workshops are also eliminated. For many professionals, however, connections through a professional organization are vital parts of any job search because of the services and contacts that become available. For the Department to exclude one-time registration here and prioritize visits to a state job center seems to prioritize what the Department can most easily administer over what is more effective (unless the Department has somehow encapsulated the efforts of numerous professional organizations within its Job Center operations). Furthermore, rather than eliminating participation in employment workshops, the Department should be expanding this opportunity to include not just the skill-based workshops currently included in DWD 127.01(2) but also the numerous job support groups that currently are not listed here. Numerous studies indicate individuals who regularly attend these groups markedly increase their chances for finding new jobs. For example, a group I work with, Madison Area Job Transition,<sup>17</sup> offers a holistic approach to job search efforts that has proven effective to many looking for work. Rather than limiting job search contacts to Department sponsored activities at its Job Centers and the Job Center website, the

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<sup>17</sup> The group's website is at <http://madisonareajobtransi.wix.com/majt>. *See also* [http://host.madison.com/business/mission-continues-for-madison-area-job-transition-program-even-as/article\\_807ea648-ed64-11e1-bcaa-0019bb2963f4.html](http://host.madison.com/business/mission-continues-for-madison-area-job-transition-program-even-as/article_807ea648-ed64-11e1-bcaa-0019bb2963f4.html).

regulations should be expanded to include the kinds of activities actually being used by successful job searchers.

To begin, individuals need to pursue several kinds of contacts before they attempt an actual application for a specific position. While the Department's proposals correctly deprecate classified ads as a job search contact, the employment model still being used by the Department here the model of an individual responding to an ad of some kind with an employment application. Today, individuals who simply complete employment applications in response to a position description are rarely successful. Rather, the successful job application usually occurs after several job search contacts have been made to ascertain: (a) the specific needs of the company, (b) the resources and skills that the applicant has which are best-suited for the position, and (c) the circumstances that make for a good fit between applicant and company.

These contacts begin with applicants making themselves available on various networks. LinkedIn has become a major resource for those in transition, and a profile there is almost as essential today as having a well-prepared resume was ten years ago. Furthermore, numerous employers now post jobs only through LinkedIn.<sup>18</sup> So, without a LinkedIn account, an individual simply has limited to no access whatsoever to the job postings and employer information there. There are also numerous e-lists available for finding jobs that claimants must first subscribe to if they are to have access to the positions offered through these e-lists.<sup>19</sup> If the Department wants to encourage claimants to take actions that will lead to actual jobs rather than simply responding to employer job-postings, then the Department should credit claimants for job search contacts when they subscribe to relevant e-lists or create profiles on LinkedIn.

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<sup>18</sup> As an indication of how much has changed in job search efforts, please note that there is no mention here of careerbuilder.com and monster.com. While these websites are certainly still useful in some cases, they appear to be going the way of classified ads.

<sup>19</sup> A Madison-based e-list for these postings, for example, is available at: [http://finance.groups.yahoo.com/group/madison\\_lds\\_employment/](http://finance.groups.yahoo.com/group/madison_lds_employment/). E-lists like these are only accessible to their members.

## Response to DWD proposals

Claimants should also be credited for joining LinkedIn groups, such as the Madison-based Hi-Tech Happy Hour, that provide key networking opportunities for those looking for jobs both within LinkedIn and through sponsored events.

Informational interviews — when individuals meet with employer representatives to discuss an employer, its operational concerns and goals, and the individual's skills but which involve no actual employment application — are vital tools for many in learning about how to present themselves when later completing work applications for that employer. Accordingly, claimants should also be credited for a job search contact for any informational interviews they have.

Individuals in transition also attempt to develop new skills in order to expand their job opportunities by attending training of various kinds. In many cases, this training means enrolling in classes at local colleges and universities. Unfortunately, unless the training is Department-approved (which eliminates the need for any work search), individuals enrolled in classes receive no credit from the Department for these efforts and may even jeopardize their unemployment benefits because school enrollment is considered anathema to being able and available for work.<sup>20</sup> The Department could reduce the tension between educational efforts and receipt of unemployment benefits by, for example, providing a mechanism to claimants for finding out which training programs are actually approved and by expanding that approval to reach a broader set of educational programs.<sup>21</sup> When education

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<sup>20</sup> Many claimants enroll in classes knowing that they will drop out of those classes immediately when a job offer arrives. The Department, however, follows the traditional understanding in unemployment law that class enrollment evinces an intention to complete that class, and so can lead to a claimant no longer being able and available for work.

<sup>21</sup> Indeed, over the past several years I have heard from many claimants who think they are enrolled in Department approved training (or are even told by Department agents that the training is approved) only to find out later from another Department agent that their classes are not approved and that the claimant must subsequently repay unemployment benefits. The Department could accomplish much and end a great deal of confusion on this front by simply making and maintaining a list of publicly-available (i.e., on-line) approved training programs that claimants could check when exploring educational and training options that would not conflict with

## Response to DWD proposals

attainments are increasingly important in the labor market, it is imperative that unemployment law in Wisconsin adapt to this new reality and at least reduce the obstacles the unemployment system puts in place for those looking to improve their job prospects through enrollment in education and training programs.

At present, claimants receive no credit for any of these actions, and the Department's proposed regulations do not correct this mistake, even eliminate a few actions that are still quite useful in looking for work, and put a rather hollow priority on completing work applications when conducting a work search. The likely outcome of the Department's proposal is simply to increase the number of job applications that claimants need to complete each week. Employers will subsequently be burdened with even more applications to sift through without any actual improvement in the quality of the individuals filling out the applications. Essentially, the proposed regulations do little more than create busy work for claimants and employers.

For the Department, on the other hand, this busy work for claimants creates higher hurdles they must jump over to maintain their eligibility. The Department indicates that this proposal has no foreseen effects on the unemployment trust fund and that only 350 cases relating to work search issues are identified in any given year. Yet, even the slightest enforcement of these various changes regarding work search contacts will make it much more likely that claimants will have their unemployment benefits put in jeopardy while at the same time reducing the amount of unemployment benefits charged to employer accounts.

The proposed documentation requirements claimants will have to follow for their work searches and new restrictions on work search waivers reveal just how high these hurdles can reach. In proposed DWD 127.04(1), the Department adds a requirement that claimants are to keep job search records for each week they look for work for 52 weeks rather than the eight weeks currently required. This change creates

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unemployment benefits.

## Response to DWD proposals

an enormous burden on claimants and for employers who will be asked to verify job applications that could be almost a year old. If employers are slow to respond to a Department request to search job application archives, the Department is likely then to invalidate a claimant's work search records and order repayment of unemployment benefits previously paid.<sup>22</sup>

Waiver of work search efforts can be had under provisions in DWD 127.02. Many of these waiver provisions relate to employees working in seasonal employment. The Department's proposals will lead to a reduction and perhaps even the elimination of work search waivers for these claimants. In the proposed change to DWD 127.02(1), a waiver will only be granted when an individual works twenty or more hours with any employer (currently, waivers are available when a claimant works any hours with his or her customary employer). A waiver for temporary unemployment in proposed DWD 127.02(2) will only be possible when an employer verifies that the claimant has a reasonable expectation of returning to work within 8 or 12 weeks. This employer-based verification replaces criteria in the current regulation where the Department looks to the employer's history of layoffs, information furnished to the employee about reemployment dates, and recall rights available under a collective bargaining agreement. In other words, in place of this objective criteria, a work search waiver will in the future turn on an employer's subjective determination that it has a reasonable expectation of having work for a particular claimant at some future date. The employer's decision is determinative here. Given that kind of control over this issue, an employer who declines to certify that an employee has a reasonable expectation of

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<sup>22</sup> The Department's proposal sets forth the specific information needed for a work search contact and mysteriously adds that these records are required to be kept in the form and manner prescribed by the Department. This proposed change, then, allows the Department at its discretion to require claimants to submit work search records as part of their weekly claim filing. As a result, any mistake in that information would lead to disqualification or delays in unemployment benefits to claimants (for example, a mistaken employer address or misspelling by the claimant may not match Departmental records and could mean disqualification until the claimant can remedy this issue through a hearing before an appeal tribunal).



recall will subsequently subject its employees to having to look for work and accepting reasonable job offers while on layoff. That employer will thereby reduce the amount of unemployment benefits charged to its account.<sup>23</sup>

**B. Suitable work offers**

In D12-30, the Department wants to amend the disqualification for refusing a suitable offer of employment in Wis. Stat. § 108.04(8)(a) by replacing the current four weeks elapse and four weeks of earnings requirements with a requirement that claimants have ten weeks of earnings before re-qualifying for unemployment benefits. This provision would then have the same re-qualification requirements as proposed by the Department in Wis. Stat. § 108.04(7)(a) for quits that do not meet one of the exceptions.

The Department explains that this change is so this provision and the quit provision have similar re-qualification requirements, and the Department adds that the fiscal impact of this change on the trust fund is minimal. In 2011, there were 677 claimants who were disqualified under this provision, and the Department explains that this number of cases is too few to have any impact on benefit amounts being paid out to claimants.

This explanation is unexpected. As described above, the Department draws the opposite conclusion from the number of cases at issue in the proposed changes to the quit exceptions, even though for most of those exceptions the number of cases is much less than what is at stake with this proposed change. So, this basic incongruity adds to the reasons already described for doubting the Department's analysis for the quit exceptions and indicates as well that something is amiss with the Department's

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<sup>23</sup> The Department proposes in DWD 127.02(3) a similar change for the waiver of work search requirements for new hires. In this situation, the employer here who is being asked to verify future employment is not on the hook for any unemployment benefit charges relating back to the new hire. As a result, this employer is likely to have no qualms about verifying its intent to hire the applicant within the next four weeks. This proposed change simply eliminates the need for someone recently hired but who cannot yet start work immediately from having to continue to apply for jobs during this waiting period.

conclusion here. At the very least, it appears that the Department is significantly underplaying the impact a change from four weeks of earnings to ten weeks of earnings will have on claimants' eligibility for unemployment benefits that are otherwise available to them.

**C. Ineligible because of wages received**

In D12-18, the Department proposes a technical change to Wis. Stat. § 108.05(3) (dm) to allow that wages a claimant might have received because of work missed without a valid reason should be included in determining whether \$500 or more was earned that week. The proposed changes are:

A claimant is ineligible to receive any benefits for a week if the claimant receives or will receive from one or more employers:

1. Wages earned for work performed and/or has wages ascribed under s. 108.04(1)(bm) in that week of more than \$500; or
2. Sick pay, holiday pay, vacation pay, bonus pay, back pay, wages ascribed under 108.04(12)(e) or termination pay which, by itself or in combination with wages earned for work performed in that week, is equivalent to more than \$500.

The Department explains that this change will make the use of wages across numerous other wage-type decisions consistent. As an employee who misses a work shift in a given week without justification is considered to not be able and available for that day and will have his weekly benefit amount subsequently reduced by the amount he or she would have earned from that missed work shift, the change here is largely academic. Still, through the added reference to wages that will be received, the proposed change should clarify for employees that all wages should be reported when earned, regardless of when the employer actually pays those wages. For example, even though they are in excluded employment, real estate agents and others paid on commission must still report their earnings from that excluded employment when receiving unemployment benefits. There is at present a great deal of confusion among these claimants and also Department representatives about when commissions should be

reported, however. This change should at least reinforce the requirement that commissions be reported when earned, not when actually paid.

**D. Claimant PIN**

In proposal D12-03, the Department creates a new statutory provision, Wis. Stat. § 108.04(2)(g):

1. Each applicant must create security credentials in order to engage in transactions with the department including but not limited to filing an initial or continued claim for unemployment insurance benefits. The security credentials may consist of a personal identification number (PIN), username and password or any other means prescribed by the department.
2. If an applicant's security credentials are used in the filing of an initial or continued request for unemployment benefits or any other type of transaction, the applicant is presumed to have been the individual using the security credentials. This presumption may be rebutted by a preponderance of the evidence showing that the applicant assigned the security credentials is not the individual who used the credentials in the transaction. If, however, the owner of the security credentials divulges the security credentials to another person, or fails to take adequate measures to protect them from being divulged to another person, the owner shall be strictly liable for any benefits erroneously paid as a result of such actions.

The Department explains that this proposed language codifies current Department practices regarding use and disclosure of claimants' PIN numbers. While less than fifty cases a year concern the fraudulent use of PIN numbers, this proposal is needed, the Department explains, to address recent decisions of administrative law judges who waive recovery of an overpayment because "the claimant was not at fault as he did not file the [fraudulent] claim."

This explanation is incomplete and possibly even misleading. The waiver standard in Wis. Stat. § 108.22(8)(c) for recovery of an overpayment requires both a lack of fault by the claimant and departmental error of some kind. In these PIN cases, then, unless the Department itself was responsible for disclosure of a PIN number, it does not seem possible for the waiver standard to be met simply on a finding that the claimant was not responsible for the fraudulent use of a PIN. Furthermore, even if an administrative law judge did incorrectly apply the waiver standard, the Department is

free to appeal that incorrect decision to LIRC for review. The Commission had previously held that disclosure of a PIN number to another who then files a fraudulent claim is disqualified from receiving unemployment repayments and must repay the amounts at issue. Christopher A Saygo, Hearing No. 10605416MW (12 November 2010) (claimant failed to follow directions in handbook when he disclosed his PIN to his spouse and she filed his weekly claims when he was in jail and not actually able and available for work). This decision appears to address all of the Department's concerns, and administrative law judges should be following Saygo as controlling precedent. The mere fact that a third-party and not the claimant used the PIN is inconsequential when the claimant's circumstances meant he or she was not eligible for the unemployment benefits to begin with.<sup>24</sup>

The Department's proposed change does add something not currently being applied to claimants who disclose their PIN numbers, however, namely strict liability when there is any disclosure of a PIN by a claimant. As a result, whenever the issue of erroneous payments are at stake, the Department can win those cases whenever it shows that the claimant has disclosed his or her PIN to another. This strict liability language will simply trump any other legal analysis.

#### **E. Weekly filing via telephone**

The Department proposes in D12-20 to delete DWD 129.01(4)(e) which forgives a claimant for not filing his or her weekly claim when the Department's phone system has been inoperable or unavailable for 40% or more of its schedule. The Department

<sup>24</sup> In this proposal, the Department is silent regarding its ability pursuant to Wis. Stat. § 108.095 to pursue impostors responsible for an over-payment and, under Wis. Stat. § 108.04(11)(cm) to recover from those impostors both the over-payment amount and an additional administrative penalty of 100% of the amount owed. See Jenkins v. KFC Restaurant, Hearing No. 06000196MD (23 April 2006). An example of where the Commission remanded an impostor case for further investigation is Jeffrey W Casperson, Hearing No. 11605986MW (16 November 2011). The remand here was for new investigations over an overpayment for eligibility and concealment issues because there were additional weeks at issue than acknowledged by the Department and because issues of identity theft, claim-filing and payment processing procedures, PIN disclosure and security, and the claimant's physical or mental abilities had not adequately been examined by the Department.

## Response to DWD proposals

wants this change because since 2009 its phone systems no longer calculate available lines in a way that correlate with this administrative code language and because the availability of computer filing means that claimants can still file weekly claims via computer even when the phone lines are down or constantly busy.

Given the growing use of computers for all facets of daily living, this change certainly makes sense. But, I am also aware of numerous claimants who find phone lines clogged and the computer interface too daunting or confusing to complete. As discussed elsewhere, the on-line interface is problematic too often, and many claimants perceive the Department as a black box for which they cannot discern any rhyme or reason for the information the Department demands from them. Accordingly, whatever happens with this proposal, there needs to be an additional effort by the Department to provide training to claimants on how to use the computer system for reporting weekly claims, to revamp its systems so that claimants can have improved and expanded access to their claim information, and to modify its weekly reporting procedures and forms to allow claimants to add explanatory notes or information that currently cannot be reported. Finally, as the Department's phone lines remain the primary and basically only method by which claimants can discuss issues relating to their claims with the Department, an immediate push for improving staffing and access of the Department's phone systems should be instituted immediately. Certainly, there has been some improvement in 2012 from what existed with the phone lines in 2010. But, busy signals and even messages that phone lines are closed for the rest of day are still much too common. A focus on an administrative code provision about telephone access when the phone system is still so difficult to access seems to be little more than sweeping the floor of a burning house.

### **F. Claimant's obligation to provide information**

In D12-08, the Department posits that there is a conflict between Wis. Stat. §§ 108.04(1)(i) (claimants who fail to provide the Department with timely information

## Response to DWD proposals

about their discharge are ineligible for benefits until they provide that information or, if they have good cause for the delay, the week when the discharge occurred), (2)(e) (claimants who fail to provide the Department with their social security number are ineligible for benefits until they provide that information or, if they have good cause for the delay, when they first filed their unemployment claim), and (1)(hm). The Department seeks to correct this discrepancy with the following changes to Wis. Stat. § 108.04(1)(hm):

The department may require any claimant to appear before it and to answer truthfully, orally or in writing, any questions relating to the claimant's eligibility for benefits and/or to provide such demographic information as may be necessary to permit the department to conduct a statistically valid sample audit of compliance with this chapter. A claimant is not eligible to receive benefits for any week in which the claimant fails to comply with a request by the department to provide the information required under this paragraph, or any subsequent week, until the claimant complies or satisfies the department that he or she had good cause for failure to comply with a request of the department under this paragraph. If a claimant later complies with a request by the department ~~or~~ and satisfies the department that he or she had good cause for failure to comply with a request, the claimant is eligible to receive benefits as of the week in which the failure occurred, if otherwise qualified. If the claimant later complies but does not have good cause for the initial failure to provide the information, he or she is only eligible as of the week in which the information is provided, if otherwise qualified.

This proposal does much more than make one statutory provision equivalent to others. It instead creates a mechanism for broadly disqualifying claimants whenever the Department finds that claimants have not been responsive enough to Department requests for information.<sup>25</sup>

The proposed change adds a requirement that claimants who do not provide the requested information in a timely fashion will only have those benefits restored for the week when they provide the requested information unless they have good cause for their delay. In that case, benefits will be restored back to the week when the

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<sup>25</sup> In comparison, the minimal consequences to employers for failing to heed the Department's requests for information about claimant eligibility remain. In other states, for instance, employers who do not respond in a timely manner about a claimant's separation forfeit their ability to participate in subsequent hearings as a party and are limited to witness testimony only — that is, non-party employers have

information was first requested.<sup>26</sup> The Department offers three examples for why this statutory change is needed. The first example concerns a claimant and employer who fail to provide any information about the claimant's discharge for a work rule violation after the initial claim. Currently, the Department makes a decision based on the available evidence. This situation is directly addressed under Wis. Stat. § 108.04(1)(i). The proposed changes to Wis. Stat. § 108.04(1)(hm) here are simply inapplicable. Under the Department's proposal, the claimant will be penalized for alleged inaction even though the employer still has the burden of showing misconduct in the first place. By pushing for application of this proposed new requirement, the Department is essentially burdening the claimant rather than the employer with the responsibility for showing that no misconduct occurred.

The second example concerns a claimant missing scheduled work with a part-time employer. At present, the Department does not pay benefits for that week if a claimant never responds to the Department's inquiries. Through this statutory change, the Department wants to continue a freeze on benefit payments until the claimant responds. The Department asserts that this change is in the interest of claimants so that they avoid future over-payments. In so doing, the Department turns a question over job scheduling into an issue of whether the claimant is able and available for work on a continuing basis. This logical leap from a claimant who fails to respond about

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no right to cross-examine witnesses or to object to the admission of exhibits.

<sup>26</sup> This proposed change may also create an additional penalty, as restoration of unemployment benefits even with good cause will only be for the week when the information was first requested and not when unemployment benefits were stopped. For example, the Department may stop payments for the week it learns that the claimant declined a job offer. A Department representative may not contact the claimant about that job offer until the following week or perhaps two or more weeks later. As a result, even if the claimant had a legitimate reason for declining the job offer and good cause for the delay in providing the Department with that legitimate reason, the claimant will still *not* receive benefits for the weeks from when he or she declined the job offer to the week when the Department representative contacted the claimant about his or her reasons for declining the job offer. In contrast, the other statutory provisions cited by the Department as comparable restore benefits to the first week of eligibility when there is good cause for the delay.

## Response to DWD proposals

missing one work shift to a claimant being no longer able and available for any work ignores basic unemployment claim handling. If an employer reports to the Department when a claimant misses one scheduled work shift, that employer is likely to report when the claimant is no longer able and available for work on a continuous basis. In other words, the proposed change has no practical impact in this situation. Instead, all it accomplishes is to halt all subsequent weekly benefits for claimants who do not contact the Department in the time allotted.

The third example concerns a claimant who also works for a family business and the Department needs additional information to know whether he can avoid subtracting his family business earnings from his weekly benefits. The claimant's failure to provide the requested information could lead him or her to receive reduced unemployment benefits by mistakenly deducting family income. It certainly would be better for the claimant in this rare circumstance to receive the proper amount due him or her through prompt responses to Department inquiries. But, a penalty that eliminates all unemployment benefits for everyone who is not prompt in replying to Department inquiries in order to encourage claimants who receive family income to clarify their ownership stake in the family business (a very rare issue) seems to be a massive overreach.

An additional problem with this proposal is that the Department itself is not responsible for its own mishandling of claimants' information. Since I began working in unemployment matters here in Wisconsin, I have always heard complaints about the Department's handling of claims. Given the massive increase in unemployment in this last recession, it is understandable that the Department would have difficulty keeping up with the ensuing spike in claims.<sup>27</sup> But, in the spring of 2012, the number of

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<sup>27</sup> In addition, the fact that Wisconsin has structured its unemployment payment formula to encourage claimants to participate in part-time work (other states use a formula that essentially eliminates a claimant's unemployment benefit after only a few hours of part-time work, and thus few claimants in those states seek out part-time positions) leads to significant more issues relating to that part-time work that have to be investigated and determined. In states where the payment formula



## Response to DWD proposals

complaints I heard about the Department's handling of claims sky-rocketed. Claimants repeatedly told me of instances in which the Department was asking again and again for the same information they had previously provided. Few claimants kept documentation regarding their contact with Department representatives, however. So, the only viable response claimants had in these circumstances was to again and again provide the same information. Under the Department's proposal, however, when the Department has mishandled information already provided by claimants, claimants will lose unemployment benefits until they again provide the same information. Only if claimants have documented their interactions with the Department showing that the Department instead of them is responsible for the mistake can they avoid the penalty proposed in this statutory change. In short, claimants will have to approach every interaction with Department personnel in the same way an attorney deals with a hostile, opposing party.

The Department's proposal here also ignores a major obstacle claimants must deal with when communicating with the Department, namely how difficult it is to contact the Department.<sup>28</sup> Phone lines have been overwhelmed for years now, and the Department's computer systems limit claimants to filing basic information and will reject any information that does not conform to what is expected.<sup>29</sup> Any issues that

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discourages part-time work, issues related to part-time work simply do not appear. Wisconsin further adds to its case load by allowing claimants to not include their wages from part-time independent contractor work in their weekly claims. Other states mandate that all wages from all sources, including work as an independent contractor, must be offset against weekly benefits being received. As a result, Wisconsin has to investigate numerous cases where claimants have questions about whether to report wages they receive from employers who have labeled those claimants as independent contractors. These determinations are distinct from the investigations into whether the employer has properly classified these individuals.

<sup>28</sup> The proposal also makes no allowance for the fact that claimants have no control over third parties who have the information being requested by the Department. A claimant, for example, no matter how much he or she pleads cannot force a medical provider to complete a 474 form by the Department's response deadline.

<sup>29</sup> A claimant recently informed me, for instance, that she could not report via computer vacation pay of \$2200 a former employer suddenly and surprisingly paid her a month after her discharge. The on-line weekly claim form apparently did not

arise must be dealt with outside of the computerized filing system. E-mail messages from claimants to Department personnel are impossible, and even facsimile numbers for Department investigators have limited public availability. In short, the only viable mechanism a claimant has for reporting or asking questions about any ambiguous unemployment issue remains a phone call to a Department representative.<sup>30</sup>

The Department to some extent has acknowledged this problem through certain workarounds to these jammed phone lines. For instance, to give claimants access to Department agents via phone, the Department often sends out notices to claimants to answer a phone call at a certain date and time from a Department representative. Unfortunately, these scheduled phone calls sometimes conflict with activities the claimant has already scheduled, and the only way for the claimant to inform the Department of that scheduling conflict is to call the Department's general phone lines. The usual result is a busy signal for the claimant and then a Department representative's phone call on the scheduled date and time going unanswered.

#### **G. Social security disability**

The Department proposes in D12-05 to create a new Wis. Stat. § 108.05(7g) where a claimant's receipt of or filing for social security disability benefits would create a rebuttable presumption that he or she is no longer available for suitable employment. Under this proposed statute, even if the claimant rebuts this presumption, the claimant is still unavailable for suitable work unless the claimant has

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allow reporting of a wage amount that was greater than three digits. So, she reported \$999 and then tried to contact a Department representative to report the rest. After several days of phone call attempts, she finally spoke to a Department agent, who advised her to report the vacation pay in four weekly installments. Having some doubts about the validity of that advice, she decided it would be better to not file any weekly claims for a while until she actually needed her unemployment benefits to pay her rent.

<sup>30</sup> While employers have access to some of their Department records via a web interface, claimants have no on-line access to their Department records other than their weekly claim filing. As a result, even basic questions such as why a weekly benefit amount changed or when unemployment benefits will run out can only be answered through a phone call to a Department representative.

## Response to DWD proposals

received enough base period wages to qualify for unemployment at the same time he or she also received or filed for social security disability benefits. This last mechanism for allowing unemployment benefits and disability benefits to co-exist can only occur in theory. To be eligible for unemployment benefits while also receiving disability benefits, an individual must have been gainfully employed when receiving those disability benefits. As almost no one applies for disability benefits while still employed, it seems that these circumstances will hardly ever actually exist. In other words, the proposal makes social security disability and unemployment benefits inherently mutually exclusive.

At present, there is no inherent conflict between these two benefit programs, as the tests for showing disability for social security purposes and for showing being able and available for work in unemployment law are not incompatible with each other. As a result, there are circumstances where a claimant can receive benefits from both programs. See Kouimelis v. Dennys Restaurant 6318, Hearing No. 12201489EC (4 December 2012), Tunisha A Perkins, Hearing No. 11605816MW (11 January 2012). The Department's proposal would effectively replace the standard test in DWD 128.01(3)(a) for being able and available for those who claim social security disability with a test that a health care professional certify the claimant as available for suitable employment.

The Department explains that this change is needed because almost all of the individuals who receive both social security disability payments and unemployment benefits are committing fraud and that individuals receiving benefits from both programs are using a loophole in the law to game these benefit programs.<sup>31</sup> This explanation is remarkably callous about the circumstances in which individuals who

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<sup>31</sup> The fraud allegation in the proposal is essentially a value judgment that individuals should not receive both disability benefits and unemployment benefits. The only actual example of fraud in the proposal is of an individual who collected both disability benefits and unemployment benefits from several states for weeks he also concealed work activity. As such, current law seems quite capable of ferreting out actual fraud.

## Response to DWD proposals

file for benefits from both programs find themselves and disregards the long delays that occur between an application and an eventual award, if granted, of disability benefits.

One of the first unemployment cases I handled here in Wisconsin involved an individual who was laid off at the same time his health suddenly declined. As he continued to look for a new job, his condition worsened. Approximately a year later and still unemployed, he was diagnosed with a now inoperable brain tumor, and he subsequently applied for social security disability. After about four months — a comparably short amount of time relative to most disability applications (which usually take 8 to 16 months in Wisconsin) — the Social Security Administration approved his application. While waiting for that decision and not knowing what would happen, he continued to look for work and to file his weekly unemployment claims. When the disability application was approved and back-dated to his original application date, he immediately notified the Department. In its subsequent investigation, however, the Department did not just find that benefits he received for the last year and a half (not just from when he applied for disability) had to be repaid but also assessed a penalty against him for concealment by alleging that he had intentionally and falsely claimed to be able and available for work despite the brain tumor that he only recently learned about.

At the hearing, the administrative law judge found there was no concealment since the available evidence showed that the claimant thought he could work and continued to look for work, that he did not know he had an inoperable brain tumor until a year later, that no one else knew about the true nature of his declining health until relatively recently, and that he did not know about being approved for disability benefits until the Social Security Administration actually granted his application. He did have to repay prior unemployment benefits he received, however, as his medical provider in a 474 form indicated that he was incapable of work for approximately the

last ten months that he had received unemployment benefits. Again, that information had only come to light a few weeks prior to the hearing, and the claimant himself had fervently been looking for work while he was receiving unemployment benefits.

As this case demonstrates, claimants confronted with disability issues often do not know about the extent of their disability for some time. Even when an individual finally concludes that an application for disability benefits is in order, the Social Security Administration does not act quickly on those applications. Furthermore, not all applications for disability are approved, and individuals often have to resubmit applications several times before finally being approved or giving up. On the other hand, unemployment benefits must be filed for on a weekly basis, and so claimants cannot delay that weekly filing while waiting for their potential disability to be resolved.

The Department's proposal here ignores all of this ambiguity and lack of information available to claimants about their potential disability. While the impact of a missing limb may be obvious, health problems arising from long-term illnesses or unknown conditions can be difficult to understand and diagnose. For the Department, however, a disability is always known, and the only question is the claimant's desire to continue working with that health condition.<sup>32</sup> Under the Department's proposal, then, at the same time an individual files an application for disability benefits he or she also needs to stop filing for unemployment benefits even though he or she does not know when or how the Social Security Administration will act on that disability application. By forcing individuals receiving unemployment benefits who may also have a disability into this stark choice, the Department is basically setting them up for failure.

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<sup>32</sup> In making this distinction between disability benefits and unemployment benefits, the Department asserts that individuals who are severely disabled will not meet the unemployment requirement of being able and available for work and immediately apply for disability benefits. Individuals with marginal disabilities, on the other hand, will chose to exhaust their unemployment benefits before applying for disability benefits.

## **H. Benefit rate change**

In D12-31, the Department proposes to increase the maximum weekly benefit rate from \$363 to \$370. This increase will also raise the minimum amount of income in a quarter needed to qualify for unemployment benefits from \$1350 to \$1375.<sup>33</sup> With this increase, the amount of unemployment benefits paid in a year to claimants will rise by approximately \$12 million. The Department explains that weekly benefit rates have historically been increased every two years or so, even during economic downturns, and there is no reason not to take similar action now. In 2011, more than a third of claimants qualified for the maximum weekly benefit rate of \$363.

The Department provides the minimum and maximum weekly benefit rates in other midwestern states for comparison. These numbers offer only an incomplete comparison, however, as there is no information about the actual schedule used for calculating these numbers. Michigan has a minimum of \$117 and a maximum of \$362, while Minnesota has a minimum of \$38 and a maximum of \$561. There is no way to know what level of income qualifies an individual for the minimum weekly benefit rate in these states, nor can it be determined how the weekly benefit rate rises relative to an increase in the wages the claimant received. It could be, for example, that in Michigan a claimant can qualify for the \$117 weekly benefit rate with only \$1000 of income in a quarter. Or, it could be in Minnesota that an individual only qualifies for the maximum weekly benefit rate of \$561 when he or she has nearly \$90,000 in annual income, and there must be at least \$10,000 in annual earnings to even qualify for the minimum weekly benefit rate of \$38. As each state has its own schedule and scheme for determining weekly benefit rates, the minimum and maximum numbers presented here mean little as a tool of comparison.<sup>34</sup>

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<sup>33</sup> The proposed weekly benefit rate schedule is set forth in a newly created Wis. Stat. § 108.05(1)(r) and is slated to take effect on 5 January 2014. Wis. Stat. § 108.05(1)(q), the current weekly benefit rate schedule, will be amended so that the new schedule will be in effect on this date.

<sup>34</sup> A basis comparison would at least show the minimum, median, and maximum incomes that coincide with minimum, median, and maximum weekly benefit rates in

## Response to DWD proposals

Still, the proposed increase in the weekly benefit rate here in Wisconsin is welcome. Given the other proposed changes, however, it is unlikely that claimants will receive this higher level of unemployment benefits. There will simply be too many ways for claimants to be disqualified from receiving any employment benefits, and so this increase will have little practical impact.

### **I. Inclusion of cafeteria plans in determining base period wages**

At present, the definition of base period wages in Wis. Stat. § 108.02(4m)(a) does not exclude the benefits employees receive through cafeteria plans. Employers do not report these benefits to the Department as wages subject to unemployment taxes, and, in practice, the Department does not reach out to include these amounts when calculating base period wages, except when claimants ask that these amounts be included. In D12-16, the Department proposes that Wis. Stat. § 108.02(4m)(a) be amended to exclude cafeteria plan payments from the definition of base period wages and that Wis. Stat. § 108.02(4m)(g) (cafeteria plan payments included as base period wages) be deleted.

The Department explains that this change is needed so that the wages that are taxed for unemployment purposes are the same as the wages used to calculate a claimant's benefit year and that employees from the same company be treated in the same way and not have their weekly benefit rate based on whether one claimant and not another wanted cafeteria plan payments included in calculating base period wages. The latter reason has little validity, as the Department is basically saying it wants to change the law because the Department is itself not being consistent and is letting claimants decide how to apply the law themselves. The Department is obligated to follow unemployment law as written, and it should not excuse that responsibility because it may be difficult, complex, or inconvenient.

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each state.

## Response to DWD proposals

Still, the proposed change makes sense for the sake of consistency in what wages are taxed and what wages make up a benefit year.<sup>35</sup> In addition, the fiscal impact is likely to be minuscule rather than just minimal, as the Department claims. This tiny impact is because the employees participating in cafeteria plans are most likely receiving a higher wage comparable to others in the state.<sup>36</sup> As a result, they probably qualify for the maximum weekly benefit rate without inclusion of cafeteria plan payments in calculating their base period wages. Only in a very few cases is it likely that cafeteria plan payments will actually affect these calculations.<sup>37</sup> As a result, this proposed consistency in how wages are handled in unemployment law for claimants generally outweighs the change in weekly benefit rates for just a few claimants.

### **Department operations**

#### **A. Repayment waivers and recovery**

In D12-06, the Department proposes a new exception for the definition of departmental error, several accounting changes in the statutes,<sup>38</sup> and a new cause of action for recovery of erroneously-made payments.

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<sup>35</sup> The Department indicates that other mid-western states either exclude or include cafeteria plan payments for both employers' unemployment taxes and claimants' benefit year calculations. Wisconsin is the only state in this region which is not consistent.

<sup>36</sup> As noted elsewhere, over a third of claimants currently qualify for the maximum weekly benefit rate.

<sup>37</sup> I am speculating here. And, I have a nagging doubt about this speculation since the Department should be able to identify the cases where cafeteria plan payments have been included in determining a claimant's base period wages and thus show how many cases would be affected by this proposed change. The Department notes that it receives five to twenty requests a week (ten on average) from claimants to include cafeteria plan payments in calculating base period wages, but the Department does not indicate the actual impact the addition of cafeteria plan payments has on calculating base period wages.

<sup>38</sup> This part of the proposal is for a few additional statutory provisions and a few changes to current provisions regarding how to account for recovery of the over-payments at issue here.



## Response to DWD proposals

The proposed changes to the definition of departmental error Wis. Stat.

§ 108.02(10e) are:

DEPARTMENTAL ERROR. (a) "Departmental error" means an error made by the department in computing or paying benefits which results exclusively from:

- (a) 1. A mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, whether by commission or omission; or
- (b) 2. Misinformation provided to a claimant by the department, on which the claimant relied.

(b) "Departmental error" does not include an error made by the department in computing, paying or crediting benefits to any individual, whether or not a benefit claimant, or in crediting contributions to one or more employers which results from:

- 1. Computer malfunctions;
- 2. Data transmission errors with financial institutions;
- 3. Typographical or keying errors;
- 4. Computer programming errors;
- 5. Bookkeeping or other payment processing errors;
- 6. A false statement or misrepresentation by any individual, including but not limited to identity of the person; or
- 7. Unauthorized manipulation of electronic systems from within or outside the department.

The new cause of action for recovering erroneously made payments is from a newly created Wis. Stat. § 108.245:

Statutory Cause of Action.

(1) The department may commence action in circuit court to preserve and recover the proceeds of any payment of funds from the unemployment reserve fund including but not limited to any payments to which an individual or an entity is not entitled including any transferee or other individual or entity that receives, possesses or retains such payments and any fund or account, including but not limited to an account of a bank or any other financial institution, resulting from such transfer, use or disbursement.

(2) Upon motion of the department establishing that an individual, entity or transferee received a payment to which that individual, entity or transferee was not entitled, the circuit court shall enjoin the payee, transferee or any individual, entity or depository institution in possession of the funds at the time of commencement of this action to preserve the funds and prevent their transfer and/or use prior to the final order disposing of the action; and, upon final order, all such payments shall be repaid and or remitted to the department.

## Response to DWD proposals

(3) The absence of an administrative or other legal remedy for recovery of such funds or failure of the department to exhaust such remedies shall not be a defense to such an action. A judgment for damages entered by a court pursuant to this section may be recovered and satisfied pursuant to s. 108.225.

The Department explains that the changes to the definition of departmental error are needed to allow for recovery for inadvertent computer malfunctions or data transmission errors. As electronic fund transfers are increasingly used by the Department for its payments and with debit cards on the horizon, the consequences of a computer-related mistake such as wrongly keying in a decimal point — turning \$99.00 into \$999.0 — can be significant. On this basis, the proposed clarification is certainly useful.<sup>39</sup>

The new statutory cause of action proposed here is intended for third-parties who mistakenly receive payments through inadvertent computer errors. The Department explains:

The department has statutory authority, §108.22(8), to recover reserve fund monies erroneously paid to benefit claimants. If a person who is a UI claimant receives monies to which they were not entitled, the department may employ the administrative mechanisms of §108.09 to issue an initial determination establishing an overpayment. For approximately 25 years, overpayments have been waived if the erroneous payment was caused by department error and there was no employer fault or claimant fault as a result of a false statement or misrepresentation. §108.22(8)(c) If the overpayment was not caused by department error, the department may use warrants as provided in §108.22 and a levy for delinquent

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<sup>39</sup> The sixth exception — a false statement or misrepresentation by any individual — appears unnecessary and confusing, as Wis. Stat. § 108.22(8)(c) allows for waiver of recovery, in part, only when there is no false statement or misrepresentation by a claimant and departmental error. The Department's explanation for this change does not clarify this proposed language. The Department explains: "The amendment clarifies that departmental error does not include situations where false statements, misrepresentations or employee or employer fault result in computing, payment or crediting of benefits or in crediting contributions to one or more employers" (p.3). All of these situations are examples under current law where there would be no waiver of a repayment obligation. A departmental mistake in these circumstances arises from its reliance on another and does not involve its own internal administration and processing. The examples cited by the Department in other parts of the proposal, for example, all involve inadvertent mistakes by Department personnel in the computerized processing of claim information that have nothing to do with information provided by non-Department personnel. If this language is intended to address the impersonation of a claimant or an employer by a third-party, it should actually reflect that concern rather than just imply this issue.

## Response to DWD proposals

contributions or benefit overpayments as provided in §108.225 to enforce collection of overpayment determinations.

The department has the authority to debit the accounts of employers registered with the Unemployment insurance Division where necessary to recover overpaid amounts such as refunds of contributions erroneously made.

The administrative process in chapter 108 for recovery of such amounts from claimants and employers is not suited to the department's potential need for recovery from persons with whom the department has no unemployment insurance account relationship. Nor is the administrative process necessarily adequate, even for an employer with a UI account, in the event the department erroneously pays a particularly large sum to the employer (beyond the amount of the ordinary refund).

Currently, recovery from persons who are not claimants or employers in the Wisconsin UI system receiving reserve fund payments erroneously made to them generally would depend on common law principles and remedies for unjust enrichment. The department could bring a cause of action to recover funds paid erroneously to any person under the common law theory of unjust enrichment. However, there are common law elements and defenses to this cause of action that the department would seek to neutralize by creating a statutory cause of action. For instance, under the common law unjust enrichment claim, the plaintiff must prove that the defendant had knowledge or appreciation of the benefit and accepted the benefit under such circumstances that it would be inequitable for the individual to keep it. A defendant may raise a defense that it would be equitable for them to keep the money. The statutory cause of action would allow the department to bring the cause of action against a defendant if an erroneous payment was made, and collect restitution of the erroneously paid monies without needing to prove that the defendant had knowledge of the payment or prove that it would be inequitable for the individual to retain the funds. In addition, the department proposal would provide that banks or other transferees that have received the funds would be required to preserve the funds and prevent transfer of the funds until the action is resolved and the funds turned over to the department.

In essence, this new cause of action makes it easier for the Department to recover funds by filing complaints in circuit court against the parties who receive the inadvertent over-payment. The proposed language in this new cause of action, however, is not limited to inadvertent computer mistakes. Rather, the Department could use this new cause of action in any overpayment recovery action, and the Department would have new tools in recouping those over-payments through attachments to bank accounts and possibly even garnishment of wages.

## Response to DWD proposals

Along with this dramatic expansion in what the Department can do to recover over-payments, the Department indicates that the fiscal impact of this change will lead to \$100,000 a month being returned to the Trust Fund. This amount is shocking, as it indicates that Department personnel are currently making inadvertent computer mistakes that amount to \$100,000 each month in mistaken payments. Surely, a much more important proposal here by the Department would be to develop new internal procedures to eliminate or at least reduce these inadvertent computer mistakes. The fact that approximately a million dollars a year is lost through inadvertent computer mistakes should lead to significant and fundamental changes in how the Department handles payment processing. Instead, the Department is silent on that issue.

### **B. Collection efforts from bank accounts**

In D12-10, the Department wants to be added to Wis. Stat. § 71.91(8) so that it would have the same authority currently available to the Department of Revenue and the Department of Children and Families to locate the bank accounts of delinquent debtors. Those accounts would then be potential levy targets through which the Department could recover delinquent unemployment accounts. The Department expects that this change will allow it to recover approximately \$8 million a year in unpaid unemployment taxes and overpayments to claimants. While the Department does not break down the likely percentage of employers or claimants that will be subject to this matching program, it is likely that the majority of these recovered funds will be claimants', if for no other reason, then, that the unemployment benefits paid out are almost always much larger per capita than the unemployment taxes paid by employers.

That \$8 million figure indicates that this change will have a staggering impact, both on the savings of claimants who will find their accounts drained through Department levies and on the financial institutions who, given the tens of thousands of unemployment claims at issue here, will have to respond to these Department requests

for financial records. Certainly, this change will make the Department's collection efforts easier. But, the impact on consumer purchasing and on the staffing resources of financial institutions has not been examined at all. If the goal stated in Wis. Stat. 108.01(1) for unemployment insurance to alleviate the "decreased and irregular purchasing power of wage earners" still applies to the Department, certainly it should examine what impact the withdrawal of approximately \$8 million from wage earners will have on their purchasing power before implementing such a program.

**C. Collection efforts from licensing**

In D12-17, the Department wants to amend Wis. Stat. § 73.0301(2) so that any license needed to do business in the state can be denied, non-renewed, discontinued, suspended, or revoked because of a tax delinquency. By making these licenses subject to curing delinquent unemployment accounts, the Department gains a good amount of leverage to force parties to cure their unemployment debts. The fiscal impact of this change, the Department believes, will be minimal. Still, the Department wants this authority, which the Department of Revenue and the Department of Children and Families already have.

The Department frames this proposal as a device for recovering delinquent unemployment taxes from employers. The statutory language, however, would apply to any debt and any license-holder, and so apparently this provision could also be applied to claimants with overpayments who need a license to continue in their profession.

**D. Access to DMV records**

In D12-23, the Department seeks to amend Wis. Stat. § 341.51(4g)(b) so that the Department would have access to Department of Transportation drivers' records via social security number. A change in computer systems at the Department of Transportation eliminated the ability of the Department to search drivers' records by name in order to find claimants' addresses. With this statutory change, the Department

could, like the Department of Revenue and the Department of Children and Families, use social security numbers to search drivers' records.

**E. Corrections of prior drafting errors**

In D12-09, the Department proposes technical word changes and corrections for the 15% concealment penalty in Wis. Stat. § 108.04(11)(bh) that will be deposited into a newly created program integrity fund.

**Employers**

**A. Employer successorship**

In D12-04, the Department wants to amend Wis. Stat. § 108.16(8)(b)4 to allow the Department to excuse a late successorship application when the delay was beyond the control of the transferee. For many employers who transfer, merge, or expand their operations, successorship with the Department offers them an opportunity to continue with the low unemployment tax rate that the original entity had earned over time. To return to that favorable tax rate, employers' successorship applications are due the first full quarter after the business transfer has occurred. Many employers, however, make clerical mistakes in completing this successorship paperwork and cannot retain a favorable unemployment tax rate. This change in the statute, the Department explains, creates an opportunity for employers to show that the reason for the late successorship application was something beyond their control. As a result, they will have a second chance at maintaining their original unemployment tax rate.

The example provided by the Department features a clerical error by an employer who failed to check a box indicating successorship on a UCT-115 form. So, it appears that a "clerical error" will satisfy the requirement that the reason for the late successorship application was beyond the control of the transferee. Under this criteria, almost all employers who want a successorship can have one, since all they have to show is that their application was delayed or incomplete because of a clerical error on their part. The Department explains that this change is needed and equitable because

employers are hurt by Department deadlines currently being applied in a rigid manner. In light of how easily employers can meet this proposed test, the change is much more than equitable. It is transferring the responsibility for enforcing successorship application deadlines from the Department to employers.

**B. Department handling of LLCs**

The Department proposes in D12-28 to discontinue treating LLCs with the same members as a single employer.<sup>40</sup> This change would bring the Department into compliance with Federal Unemployment Tax Act reporting requirements, which treat each LLC as a separate entity for federal unemployment taxes regardless of whether the members of the LLC are the same or not. In short, this provision removes a potential conflict with federal law.

**C. Interest on late payments**

In proposal D12-15, the Department wants to amend Wis. Stat. §§ 108.22(1)(a) and (d) regarding an employer's reporting requirements to create an incentive for employers to cooperate and voluntarily accept their responsibility for payment of unemployment taxes. The change would allow the Department in limited circumstances and in its sole discretion to waive or decrease the interest charged as a penalty for a late filing with the Department. As an example, the Department cites an employer who owed four years of unemployment taxes amounting to nearly \$21,000 because it was unaware that unemployment law applied to it. Presently, the only penalties that can be waived in these circumstances are rather small, \$800. The Department would like an incentive to encourage an employer voluntarily to accept its responsibility to pay unemployment taxes in the future, and this change in the law would allow it to waive approximately \$3300 in interest penalties in order to encourage employers to maintain its unemployment obligations in the future.

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<sup>40</sup> To accomplish this change, Wis. Stat. § 108.02(13)(kL) would be repealed and Wis. Stat. §§ 108.02(13)(a), 108.16(2)(g), and 108.16(2)(h) would be amended by removing certain references to limited liability companies that have the same members.

## Response to DWD proposals

Anyone who does labor and employment today is aware that employers are increasingly classifying their personnel as independent contractors rather than employees. For unemployment purposes in Wisconsin, the standards in Wis. Stat. §§ 108.02(12)(bm) or (c) for showing that an individual is not an employee are high, and it is likely that many, many individuals treated as independent contractors by employers are actually employees, at least for purposes of the state's unemployment law. When employers are confronted with this misclassification, an incentive to encourage employers to accept their mistake and commit to paying unemployment taxes in the future would certainly make the Department's efforts more efficient and ensure to employers that the Department is attempting to make unemployment taxes less burdensome. In this regard, the Department's proposal represents a useful push against the independent contractor trend that seems to be increasing of late. While others may assert that rigorous and expanded enforcement against employers for misclassification of employees is needed rather than a change that "rewards" employers who are not following the law, this proposal should be tried. It at least provides a way for tipping the scales toward employers viewing unemployment taxes with less hostility, and so could lead to a softening of attitudes in the employer community that encourage the misclassification of employees.

The proposed change, however, should include some statutory criteria about how the Department will, in its sole discretion, make these decisions. Without any criteria, it could well be that the waiver of penalties could be applied in an *ad hoc* fashion. While individual employers given a waiver will likely be grateful, the arbitrary application of this rule would effectively undermine any good will in the general employer community about fair and even-handed treatment from the Department and additionally make review of its effectiveness by the Advisory Council problematic and politically loaded.<sup>41</sup>

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<sup>41</sup> As these waivers will not be reviewable, the Advisory Council should at least assume responsibility for reviewing this program in order to make sure that, at a minimum,



#### **D. Quarterly wage reporting**

In D12-27, the Department wants to amend Wis. Stat. § 108.22(1) to state:

**Timely reports, notices and payments.** (1) (a) If an employer, other than an employer that has ceased business and has not paid or incurred a liability to pay wages in any quarter following the cessation of business, is delinquent in making by the assigned due date any payment to the department required of it under this chapter, the employer shall pay interest on the delinquent payment at that monthly rate that annualized is equal to 9 percent or to 2 percent more than the prime rate as published in the Walt Street Journal as of September 30 of the preceding year, whichever is greater, for each month or fraction thereof that the employer is delinquent from the date such payment became due. If any such employer is delinquent in making any quarterly report under s. 108.205 (1) by the assigned due date, the employer shall pay a tardy filing fee of ~~\$50 for each delinquent quarterly report.~~ \$20 per employee as reported on the employer's most recently filed quarterly wage report or \$100, whichever is greater, except that if an employer files the report prior to 30 days after the date the department assesses the tardy filing fee, the tardy filing fee shall be \$50 for each delinquent quarterly report. If the employer fails to report after 30 days, and the department determines the employer count reported on the most recent tax report is inaccurate, the department may estimate the employee count and base the penalty on an estimated employee count.

The Department explains that it needs this change for the following reasons:

Under current law, the tardy filing fee is \$50. Once an employer is late with filing the report, there is no incentive to file. This proposed law change would encourage filing by creating a non-filing fee assessment that is greater than the tardy filing fee, with the stipulation that if the employer files the report, the non-filing fee will be waived and will be reduced to the tardy filing fee level. Currently, if a claimant files a claim and the employer has not filed the wage report, this causes a delay in getting the initial payment to the claimant. By encouraging prompt wage filing, this will improve benefit processing. The department still may waive the tardy filing fee if the employer demonstrates that it was tardy due to circumstances beyond the employer's control.

The amounts at issue are sizable in the aggregate but relatively small on average for each employer. In 2011, over 21,000 employers were assessed just over \$2.1 million non-filing penalties for one or more quarters, and nearly 5,000 employers were assessed late-filing penalties of just over \$421,000. The average penalty assessed against employers in 2011 for non-filing was approximately \$98, and the average late-filing penalty assessed was approximately \$85.

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cronyism or some other illegitimate basis is not behind the majority of waivers.

## Response to DWD proposals

Here, the Department is offering a flexible approach to encourage employers to meet their unemployment obligations rather than just increasing the penalties for continued failure. It should be tried.

### **Conclusion**

As is obvious from all these proposals, the Department is of two minds. For employers, the Department proposes changes that lead to greater flexibility in how the Department can respond and that replace rigid penalties with incentives or excuses for non-compliance. For claimants, on the other hand, the Department is increasing penalties, making reporting requirements unforgiving, and raising new hurdles for qualifying for unemployment benefits. It could even be said that, whereas the Department is offering an arm of support for employers, for claimants the Department is offering little more than the back of its hand.