

# Memorandum

**To:** UIAC Members  
**From:** Scott Sussman  
**CC:** Janell Knutson (BOLA Director)  
**Date:** 10/17/2013  
**Re:** Direct Seller Exclusion

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## PROPOSED STATUTORY LANGUAGE TO AMEND UNEMPLOYMENT INSURANCE DIRECT SELLER EXCLUSION PROVISION

Wisconsin's unemployment insurance law presumes that any individual who performs services for pay is an employee and covered by the unemployment insurance program. Nonetheless, the law grants exclusions when an individual performs certain types of services. Wisconsin statute section 108.02 (15) (k) (16) provides an exclusion for individuals who work in the direct selling industry.<sup>i</sup> The direct selling association ([www.dsa.org](http://www.dsa.org)) defines "direct selling" as "the sale of a consumer product or service, person-to-person, away from a fixed retail location, marketed through independent sales representatives who are sometimes also referred to as consultants, distributors or other titles." Well-known companies that are members of the direct selling association include Amway, Arbonne, Avon, Mary Kay, and The Pampered Chef.

Typically, if Wisconsin law excludes an employer from paying state unemployment taxes, the employer faces additional federal taxation pursuant to the Federal Unemployment Tax Act (FUTA).<sup>ii</sup> Yet, federal law also provides a similar exclusion from the federal unemployment tax at 26 U.S.C. §3508.<sup>iii</sup> As a result of the federal exclusion, when Wisconsin excludes direct seller companies from having to pay state unemployment tax, the direct seller companies are not required to pay additional federal unemployment tax.<sup>iv</sup>

Proposed legislation expands the direct seller exclusion within Wisconsin's unemployment insurance law.<sup>v</sup> The proposed legislation expands the direct seller exemption with respect to Wisconsin's unemployment taxes in a number of ways:

- First, it increases the locations in which an individual may engage in direct selling and be covered by the exclusion. Currently, to be covered by Wisconsin's direct seller exclusion the sales must occur primarily in a home. The proposed legislation enlarges this to include that to be covered by the exclusion the sales may also occur in a location other than a permanent retail establishment. This first expansion is identical to similar language contained within the federal exclusion.
- Second, the sales currently to be covered by Wisconsin's exclusion must be made to the ultimate consumer of the product. The proposed legislation provides that to be covered by the exclusion the sales may be made "for use, sale, or resale by the buyer." While not identical to the statutory wording contained in the federal exclusion, this second expansion is also consistent with the federal exclusion.
- Third, to be currently covered by Wisconsin's exclusion the remuneration derived by the seller must consist solely of commissions, overrides, bonuses or differentials directly related from in-person sales. The proposed legislation provides that the remuneration earned by the seller to be covered by the exclusion only needs to be substantially derived from the sales or other output rather than to hours worked. The use of the terminology "substantially" compared to the term "solely" will expand the exclusion by allowing some direct sellers to be covered by the exclusion who receive compensation not directly derived from the sale of products. This aspect of the third expansion is also consistent with the federal exclusion.
- The final change is that previously the statutory language provided that the sales by the seller must be done "in-person"; whereas, the draft legislation does not contain such similar restriction and would thus enable sales to be conducted over the Internet or phone. Again, this makes Wisconsin's direct seller exclusion more consistent with the similar federal exclusion.

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<sup>i</sup> The current version of the exclusion provides:

"Employment" as applied to work for a given employer other than a government unit or nonprofit organization, except as the employer elects otherwise with the department's approval, does not include service: . . . 16. By an individual whose remuneration consists solely of commissions, overrides, bonuses or differentials directly related to sales or other output derived from in-person sales to or solicitation of orders from ultimate consumers, primarily in the home;

<sup>ii</sup> Under the provisions of FUTA, a Federal tax is levied on employers covered by the Unemployment Insurance program at a current rate of 6.0 percent on wages up to \$7,000 a year paid to a worker. However, the federal law grants employers a credit against the federal tax liability of up to 5.4 percent. To

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be eligible for the credit the employer must pay state unemployment taxes timely under an approved state unemployment insurance program.

<sup>iii</sup> Federal law at 26 U.S.C. §3508 provides in relevant part:

(a) General rule

For purposes of this title, in the case of services performed ... as a direct seller -

- (1) the individual performing such services shall not be treated as an employee, and
- (2) the person for whom such services are performed shall not be treated as an employer. . . .

(2) Direct seller

The term "direct seller" means any person if -

- (A) such person -
  - (i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment,
  - (ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment, or . . .
- (B) substantially all the remuneration (whether or not paid in cash) for the performance of the services described in subparagraph (A) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and
- (C) the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes.

<sup>iv</sup> The one exception to this statement would be if Wisconsin's law were more generous in what services are included in its direct seller exclusion when compared to the federal direct seller exclusion. In this instance, if a service was covered under Wisconsin's law, but not under federal law, the company would be required to pay additional federal unemployment tax.

<sup>v</sup> The new proposal would create s. 108.02 (15) (k) 16 to read:

"Employment" as applied to work for a given employer other than a government unit or nonprofit organization, except as the employer elects otherwise with the department's approval, does not include service: . . . 16. By an individual who is engaged, in a home or otherwise than in a permanent retail establishment, in the service of selling or soliciting the sale of consumer products for use, sale, or resale by the buyer, if substantially all of the remuneration therefor is directly related to the sales or other output rather than to hours worked.