Acts 1, 11, 28, 287, 288, and 292

August 2010

2009 W I S C O N S I N A C T S

1, 11, 28, 287, 288, and 292

A M E N D M E N T S

A F F E C T I N G

W I S C O N S I N

U N E M P L O Y M E N T

I N S U R A N C E

L A W

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EXECUTIVE SUMMARY

During the 2009 session of the Legislature, various amendments affecting Unemployment Insurance were made to accommodate high levels of unemployment. The changes include:

- Suspending Wisconsin Supplemental Benefits so that more generous federal benefits would be available to all Wisconsin workers
- Providing additional retraining opportunities
- Modifying provisions on relocation, family illnesses, and domestic abuse in order to capture additional federal funding for Unemployment Insurance benefits
- Defining more clearly who is covered by Unemployment Insurance
- Reducing misclassification of individuals as independent contractors when they are employees covered by the Unemployment Insurance program
- Simplifying methods for processing claims.

INTRODUCTION

This booklet describes amendments affecting unemployment law and included in 2009 Wisconsin Acts 1, 11, 28, 287, 288, and 292. The three most significant changes clarify the definition of an employee for purposes of unemployment insurance, reduce misclassification of workers as independent contractors, and expand opportunities for unemployed workers to participate in training. Modifications affecting benefits, taxes and administrative and technical matters are described in more detail after considering the background for the amendments.

For reference, Appendix A lists all of the changes by topic. Appendix B lists the changes in order of their statute number.

BACKGROUND

During the 2007–2008 session of the Legislature, several steps were taken to strengthen the Reserve Fund, which had experienced a steady decline from $1.815 billion at the end of 2000 to $554 million at the end of 2007. The wages on which employers pay taxes were increased from the $10,500 per employee to $12,000 beginning in 2009, $13,000 beginning in 2011, and $14,000 beginning in 2013. The tax table was restructured to put more tax dollars into the balancing account rather than into employer accounts. The total wage requirement enabling a claimant to qualify for unemployment benefits was increased from 30 to 35 times the weekly benefit rate. Notwithstanding these changes, unemployment in 2008 and 2009 reached levels at which the State's unemployment reserves were depleted.

During the recession of 2008-2009, regular state unemployment benefits were maintained by borrowing from the federal government. In addition, federally funded benefits were made available to most individuals who exhausted entitlement to state benefits.

To assure that claimants and employers would gain maximum advantage of federal Emergency Unemployment Compensation programs, 2009 Act 1 suspended the Wisconsin Supplemental Benefits (WSB) program. The WSB program pays additional weeks of unemployment benefits when the state unemployment rate reaches high levels. These benefits are entirely funded by Wisconsin employers. The suspension allowed Wisconsin claimants to avoid ineligibility for federal benefits and to receive more weeks of federally funded emergency unemployment benefits than they would have received from the WSB program.

Next, Wisconsin Act 11 allowed the State to take advantage of Public Law 111-5, which provided additional federal funding for regular state benefits and for state-federal extended benefits. To assist the many states that had insolvent unemployment reserve funds, P.L. 111-5 made federal funding available to states that revised or added provisions allowing claimants to receive benefits while in approved training or after separating from employment for "compelling family reasons". P.L. 111-5 also provided federal funding for the state share of state-federal extended benefits. The additional federal funding made it possible for the State to adopt an optional criterion for paying up to 13 weeks of extended benefits when the 3-month total unemployment rate is greater than 6.5% and up to 20 weeks of extended benefits when the 3-month total unemployment rate exceeds 8%.

A third law, Act 287, was enacted on May 12, 2010. It contains changes that enable the Department of Workforce Development (Department) to process claims for unemployment benefits more efficiently, especially during periods of high unemployment. Act 287 also modified some of the tests for determining whether an individual is an employee or an independent contractor.

Finally, 2009 Act 292 enhances the Department's ability to make sure that workers receive the protections of employment law including Worker's Compensation and Unemployment Insurance. The Act allows the Department to make unannounced visits to worksites for the purpose of determining compliance and informing employers what is needed for compliance. It also provides penalties for noncompliance following notice of such and an opportunity to comply. Acts 28 and 288 provide a penalty for one specific type of noncompliance.

CHANGES IN BENEFIT POLICIES

Expand opportunities for receiving unemployment benefits while in approved training.

Under certain conditions, claimants who have been laid off without expectation of recall may enter a program of vocational training. While in training, they are not disqualified from receiving weekly benefits even though not available for work at that time. Neither are such claimants required to search for work or accept job offers while in training.

Act 287 adds to the types of training that the Department may approve. First, the Department may approve all departmentally administered programs except youth apprenticeship programs instead of limiting acceptable departmentally

administered programs only to those in effect on October 1, 2003. Second, the Department will consider as approved training all Workforce Investment Act training programs and not just those for dislocated workers as formerly.

In addition, Act 11 as amended by Act 287 allows claimants in approved training to receive up to 26 weeks of benefits after exhausting all other entitlement to state and federal unemployment benefits. The change will help claimants whose training doesn't start immediately after they are laid off or is longer than the number of weeks during which they may receive other unemployment insurance benefits. Claimants must start receiving the additional benefits within 52 weeks of the end of the most recent 52 week period during which they are otherwise eligible for regular benefits. Claimants may not be receiving similar stipends or training allowances for living expenses or other non-training costs.

Another modification that applies to all weeks of approved training simplifies program administration. This change suspends a requirement that the Department investigate whether an individual in approved training is able and available for work. The requirement is suspended until training ends or the individual's meaningful participation in it ceases.

All benefits funded by state taxes and paid while a claimant is in approved training will be charged to the Reserve Fund's balancing account. Formerly, these benefits were charged to and affected the tax rates of all employers that had laid off the claimant during the period used to determine the claimant's eligibility for unemployment insurance.

Amend allocation of lump sum pension distributions.

When an employer has a pension plan for employees and the employment relationship ends, most employees "roll over" the pension funds for which they are eligible by transferring them into another acceptable retirement plan. This action has no effect on weekly unemployment benefits because the employee does not have immediate use of the funds.

Some former employees, however, withdraw some or all of their pension funds by taking a lump sum distribution. Under prior law, the former employee who received the distribution had the employer's share of the distribution allocated as weekly wages for the week of the distribution and future weeks until the full distribution was used up. If the employee was unemployed during the allocation period, the pension amount attributed to each week could be greater than the weekly unemployment insurance benefit amount. In this case the claimant would receive no unemployment benefit for that week and many additional weeks.

Act 287 now attributes the full lump sum as deductible income only for the week in which it is received by the claimant. This method simplifies administration. It also eliminates a hardship that could occur if the claimant was required to apply the proceeds from a pension distribution to a loan that the pension funds secured.

Treat bonus payments as "earned" when paid.

The decision by an employer to pay a bonus to employees is often contingent on various matters and can cover a long period of time like a year or more. In most cases the Department finds that a bonus is earned in the week it is paid. Act 287 eliminated ambiguity and simplifies the treatment of bonus payments by explicitly stating that a bonus will be considered earned in the week it is paid. This change limits the adverse impact on the claimant to one week of benefits.

Exceptions to disqualifications for quitting when there are compelling family reasons.

As previously mentioned, P.L. 111-5 made available additional federal funds for regular benefits in states with at least three exceptions to disqualification for voluntarily leaving work for compelling family reasons. Wisconsin law already contained two of the required three exceptions, but they both required modification to comply with P.L. 111-5.

1. Wisconsin law has always provided an exception from disqualification for an employee who had no alternative to quitting because unable to perform work duties or needed to care for a family member. The law now extends the exception to disqualification to an employee who quits because of the verified illness or disability of an immediate family member when the illness or disability requires care for a period of time longer than the employer is willing to grant a leave.

   As before, the law provides that the former employee is ineligible for benefits while unable to perform work or unavailable for it. However, such employee is not subject to further disqualification for the prior act of quitting after the employee again becomes able and available for work.

2. The exception to disqualification for quitting because of domestic abuse was amended to allow the Department to accept proof of the abuse or concerns about personal safety to come from additional sources. Besides protective orders issued by the courts in prior law, the Department now accepts reports by law enforcement agencies, evidence of abuse or concerns provided by

health care professionals, or evidence from employees of domestic violence shelters.

3. A new exception to disqualification for quitting occurs when an employee terminates employment to relocate with a spouse who takes a new job. The exception applies when the location of the new work makes it impractical for the employee who quits to commute to his or her prior work location from his or her new place of residence.

<u>Describe full-time work as work consisting of thirty-two hours or more per week for certain benefit purposes.</u>

Act 287 changes three statutes that formerly used descriptions of full-time work other than 32 or more hours a week. These changes are intended to simplify administration of the program.

1. Full time work for an on-going employer.

Sometimes employers do not have the same amount of work for employees all weeks of the year. If a claimant works for an employer that paid at least 80% of his or her wages in the period that the claimant uses to establish eligibility for unemployment benefits, the claimant is disqualified from receiving unemployment benefits for any week that specified wages earned with that employer meet certain criteria and the work for that week is "full time". Act 287 replaces the words "at least 35 hours" per week with "full time", which is defined by administrative rule as 32 or more hours of work per week. The change is effective in July 2011.

2. Amend two exceptions to quit disqualifications by changing the hours of work thresholds to 32 hours in both.

Unemployment Insurance law generally disqualifies any worker who quits a job. However, the law contains several exceptions to the general disqualification. Two of these exceptions apply when a claimant works two or more jobs concurrently.

a) Section 108.04(7)(k) of prior law allowed a claimant to quit a job providing up to 30 hours of work per week without disqualification when the claimant lost another, full-time job and the loss of the full-time job made it "economically unfeasible" to continue the job that provided work of 30 hours or less.

b) Also, section 108.04(7)(o) allowed a claimant to quit a job without disqualification when the claimant quit before receiving notice of layoff or discharge from another concurrent job consisting of at least 30 hours per week.

Act 287 eliminates the former "30 hours of work" in both sections and references work defined by administrative rule as 32 hours of work.

Correct forfeiture language to reflect statutory penalties for claimant fraud.

Act 59 of 2007 initiated three levels of penalties for unemployment benefit fraud if a claimant concealed a material fact when claiming one or more weeks of unemployment benefits. These penalties are benefit forfeitures of either one, two, or three times the claimant's weekly benefit rate for each act of concealment, depending on the number of prior concealment decisions the claimant has on record. The penalty takes away the whole weekly benefit amount from each week claimed until the full forfeiture amount is "paid off".

Prior statutory language in Act 59 of 2007 went on to say "and be disqualified". When claimant concealment was discovered after 2007, some administrative law judges were uncertain whether they were to determine a forfeiture amount for the claimant and also disqualify or suspend the claimant for a period of time. The intent of the 2007 law was the forfeiture assessment, not the disqualification. 2009 Act 287 removes the words "and be disqualified".

Enable the Department to intercept federal tax refunds for unemployment insurance fraud.

The Department sometimes pays unemployment benefits as a result of fraud. The Department then uses a variety of techniques to recover overpaid benefits from the claimant. One method intercepts state tax refunds and may be used whether or not the overpayment resulted from fraud.

Act 287 takes advantage of recent federal legislation which now allows states to intercept federal tax refunds to recover overpaid benefits. However, the federal tax intercept applies only to benefits overpaid because of fraud.

CHANGES IN TAX POLICIES

Amend the definition of employee to clarify and include more relevant factors for determining worker status.

This law change follows up on the 2007 Act 59 requirement for a committee to study the definition of employee and make suggestions for changes to the definition. This definition is used by private sector employers, other than nonprofits and trucking and logging operators, to determine which individuals who provide services for them need to be included in the Unemployment Insurance program. In other words, it determines when an individual's risk of unemployment belongs with an employing unit rather than with an individual who bears the risk of his or her own unemployment. The latter is known as an independent contractor.

Prior law determined that individuals were independent contractors when the individual met any seven of the ten following tests.

1. The individual filed a business or self-employment tax return for the previous year.
2. The contractor had or had applied for the federal employer identification number that is used for federal tax purposes.
3. The individual maintained a separate business with an office, equipment, materials and other facilities.
4. The individual operated under contracts to perform specific services or work for specific amounts of money and under these contracts controlled the means and methods of performing the services or work.
5. The individual incurred the main expenses related to the services or work that he or she performed under contract.
6. The individual was responsible for the satisfactory completion of work or services that he or she contracted to perform and was liable for failure to complete the work or services.
7. He or she received compensation for work or services performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
8. The individual had an opportunity to realize a profit or suffer a loss under contracts to perform work or services.
9. The individual had continuing or recurring business liabilities or obligations.
10. The success or failure of the individual's business depended on the relationship between business receipts and expenditures.

The study committee reported its findings in June 2009 to the Unemployment Insurance Advisory Council (UIAC). The UIAC approved the committee's recommendations for eliminating several factors that were not working well, improving clarity by using simpler or clearer language for some factors, and using certain other factors which traditionally had been regarded as sound indicators of proper employee classification by Wisconsin courts.

Act 287 provides that the employing unit must satisfy the Department that the individual by contract and in fact performs services free from control or direction by the employing unit. In making this determination, the following nonexclusive factors may be considered:

1. Whether the individual was required to comply with instructions concerning how to perform the work;
2. Whether the individual was required personally to perform the services;
3. Whether the services of the individual were required to be performed at times or in a particular order or sequence established by the employing unit;
4. Whether the individual was required to make oral or written reports to the employing unit on a regular basis.
5. Whether the individual receives training from the employing unit.

In addition to providing services free from direction and control, the individual must meet six or more of the following conditions.

1. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual, and uses his or her own equipment or materials in performing the services.
2. The individual operates under multiple contracts with one or more employing units to perform specific services.
3. The individual incurs the main expenses related to the services that he or she performs under contract.
4. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
5. The services performed by the individual do not directly relate to the activities conducted by the employing unit retaining the services.
6. The individual may realize a profit or suffer a loss under contracts to perform such services.
7. The individual has recurring business liabilities or obligations.
8. The individual is not economically dependent on a particular employing unit with respect to the services being performed.
9. The individual advertises or otherwise holds himself or herself out as being in business.

There is no change in the treatment of loggers, truckers, and the employees of governmental and nonprofit employers. However, individuals providing personal care or companionship for an ill or disabled family member will no longer be considered employees of that family member when the family member directly employs the individual providing the services.

For purposes of the personal care exclusion, a "family member" includes a spouse, parent, natural or adopted child, grandparent, or grandchild or any individual's step-parent, step-child, or domestic partner. The family member that employs the individual is no longer subject to pay state unemployment taxes for the services performed. When the employment ends, the individual performing the care is not eligible to claim unemployment benefits based on these services, although the individual could be eligible for unemployment benefits if laid off from other covered employment.

Require the Department to take steps to help employers achieve compliance with labor laws and impose fines on employers that willfully misclassify employees.

Wisconsin Act 292 of 2009 makes explicit the duties of the Department in promoting compliance with laws that require employers to classify properly as employees or nonemployees all of the individuals performing services for them. Among these duties are educating employers, employees, nonemployees and the public about proper classification as employees or nonemployees. The duties also include investigating complaints about misclassification of employees and referring these complaints to other appropriate state or local agencies operating under laws that require proper classification. If necessary, the Department may impose penalties for noncompliance.

To ensure compliance by employers, the Department may make unannounced work site visits to review employer records and interview individuals who have performed services there. For purposes of proper classification and meeting its required statutory responsibilities, each employer must at least do all of the following:

1. Maintain records identifying all persons performing work for the employer, including the name, address and social security number of each person working;
2. Provide Worker's Compensation coverage for its employees as required in Worker's Compensation law;
3. Comply with the Department's rules about providing required information on newly hired employees;
4. Maintain records of hours worked by employees, wages paid, any deductions from those wages, and any other information required in the Department's rules relating to hours and wages; and,

5. Provide Unemployment Insurance coverage for workers when required to do so.

If the Department finds an employer out of compliance with labor laws, it may serve the employer with a notice that the employer has three days in which to comply. After the three day period the Department may issue an order requiring the employer to stop work at the locations specified in the notice if the employer has not complied.

Construction employers that misclassify an employee as a nonemployee willfully and with intent to evade any requirements of the laws relating to Worker's Compensation or Unemployment Insurance are subject to a fine of $25,000 for each violation. The fine was included in Act 28, later amended by Act 288 to assure that applicability was not limited to new construction but included finishing work, remodeling, redecorating and the like.

<u>Establish November 30th as the firm and timely due date for voluntary contributions.</u>

Previously, mailed voluntary contributions were considered on time when they were postmarked by the November 30 due date and received by the Department within three days after the due date. By eliminating the grace period, Act 287 allows the Department to be administratively efficient in daily operations and encourages employers to submit documents and payments electronically which can still be done on the last day, November 30th.

<u>Modify limits on voluntary contributions.</u>

In October of each year the Department informs each employer what its unemployment tax rate will be for the next calendar year. Each employer is then allowed to make a voluntary contribution to reduce its tax rate for the following year to the next lower tax rate.

By limiting how much a tax rate can be changed, statutes therefore limit how much the voluntary contribution can be in one year. Act 287 provides an exception to the statutory limitation on voluntary contributions when an employer incurs benefit charges for layoffs due to physical damage to its business caused by a catastrophic event through no primary fault of its own. Now, employers may make a voluntary contribution to reduce the tax rate to the rate no less than the rate the employer would have had, had the physical damage to the business not caused the employer to lay off its employees.

ADMINISTRATIVE AND TECHNICAL CHANGES

Clarify that the Department is an "adverse party" in employers' circuit court actions to review tax decisions.

Act 287 clearly states that the Department is an "adverse party" when an employer seeks a circuit court review of a Labor and Industry Review Commission (LIRC) tax decision. This change provides notice that the Department must be named as an adverse party in the lawsuit in addition to LIRC.

Naming all of the correct adverse parties is critical for two reasons. First the circuit court may dismiss an employer's case when any of the preliminary review steps are done incorrectly including not naming the Department as an adverse party. Second, it gives the Department an opportunity to defend its determination of unemployment law.

Amend the special assessment for interest to allow any unused balance to revert to the Reserve Fund.

Since February 2009 the Wisconsin Unemployment Reserve Fund has borrowed from the federal government in order to pay benefits. Under certain circumstances states may be charged interest on these loans. Over the same period of time, P.L. 111-5 provided relief to borrowing states (including Wisconsin) by forgiving interest charges on federal loans through December 2010.

When interest is charged on federal loans to states, federal law prohibits states from using their Reserve Fund dollars to pay the assessed interest due. Instead, the interest payments must come from an alternative funding source. To comply with this requirement, Wisconsin statutes authorize the Department to collect a special assessment from employers.

After repaying all interest due, if there were unused amounts in the special assessment account, former law provided that those funds could be used for administration of the Unemployment Insurance program. Act 287 changes this former practice and now any unused special assessment funds will revert to the State's Reserve Fund (specifically the balancing account) to pay future benefits.

Protect claimants and witnesses in unemployment insurance cases.

Over the years the Department has received complaints from employees and witnesses who claim to have been discharged from their employment for either claiming benefits, testifying at a departmental hearing, or participating in departmental audits and investigations. Prior law had limited protection for claimants. It sometimes penalized employers for various actions including

attempting "to induce an employee to refrain from claiming unemployment benefits" or to "waive any other right" under unemployment law. It also penalized employers who refused to rehire employees who did claim unemployment benefits. However, an employer was not prohibited from discharging or otherwise retaliating against an employee for claiming benefits. Moreover, witnesses, some of whom are employees and may be subpoenaed by the Department to testify at a hearing, had no protection at all under former unemployment law.

Act 287 expands unemployment law to provide protection for employees and witnesses. Instead of prior law, which fined employers not less than $100 or more than $500 or provided for imprisonment up to 90 days, or both, an employer shall now be fined between $100 and $2,000, imprisoned up to 90 days, or both for any of the following:

- Deducting from an employee's wages the funds to pay the employer's contributions to the Reserve Fund;
- Failing to provide workplace posters and information for employees about the Unemployment Insurance program as required in unemployment statutes;
- Directly or indirectly threatening to terminate or not reemploy any employee who claims or accepts unemployment benefits, participates in a departmental audit of employer payroll records or other investigation, testifies at an unemployment hearing, or refuses to sign a waiver of any rights under Chapter 108;
- Discriminating or retaliating against any individual because the individual claimed benefits, participated in an unemployment audit or investigation by the Department, testified in an unemployment hearing, or exercised any rights under Chapter 108.

Each act is a separate offense.

<u>Clarify exclusions from employment by Indian tribes.</u>

Act 287 amends Wisconsin statutes to clarify that tribal legislative bodies and judiciaries are not political subdivisions of the State and that the option for Indian tribes to exclude certain tribal elected officials, policymakers and advisors from employment coverage is made under tribal law - not state law. Also clarified is that individuals who participate in work relief or work training programs conducted by tribes and assisted or financed in whole or in part by any federal agency, any agency of a State or political subdivision thereof, or Indian tribe are excluded from covered employment unless a tribe elects otherwise.

In 2001 the federal government required state unemployment laws to cover most employment by Indian tribes. Initially, when Wisconsin put this change into the unemployment law, only the introductory paragraph to this section was amended to reference Indian tribes. The individual subdivisions of the statute were not amended. Act 287 amendments clarify all the statute sections and prevent future misinterpretation.

Repeal statutory provisions requiring Indian tribes to provide financial assurance.

Indian tribes that elect to reimburse the Unemployment Reserve Fund for benefits rather than pay taxes are no longer required to file a surety bond. The bond was available to fund benefits that the Department paid to the tribe's employees in the event that the tribe failed to reimburse the State for these benefits. Now, the penalty for a tribe's failure to reimburse the State will be termination of the Unemployment Insurance program for the tribe's employees.

Require professional employer organizations to register with the Wisconsin Department of Regulation and Licensing.

Chapter 461 was added to Wisconsin law in 2007 Act 189. It was created to regulate businesses known as professional employer organizations (PEOs). These organizations typically lease an entire work force to each of one or more clients who desire a workforce but do not have the expertise or inclination to hire staff, keep payroll and wage records, etc. Chapter 461 required PEOs to register with the Department of Regulation and Licensing. 2009 Act 287 inserts the same registration requirement in unemployment law.

In order to be licensed, a PEO has to provide the Department of Regulation and Licensing with an audited financial statement. The PEO has to show it maintains a working capital of at least $100,000, and has a surety bond or other commitment in the same amount. These requirements are intended to secure the payment of wages and other amounts including unemployment taxes.

APPENDIX A

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