

**UNEMPLOYMENT INSURANCE ADVISORY COUNCIL MEETING**  
**Thursday July 26, 2011 – 9:30 A.M.**  
**Department of Workforce Development**  
**Room D203**  
**201 East Washington Avenue**  
**Madison, Wisconsin**

**Individuals Present:**

**Management:** James Buchen, Dan Petersen and Earl Gustafson

**Labor:** Sally Feistel, Phil Neuenfeldt, Terrance McGowan

**Chair:** Dan LaRocque

Department Staff: Craig Barkelar (UI Administrator), Andrea Reid, William Witter, Robert Junceau, David Lange, Mike Myszewski, Georgia Maxwell, Tom McHugh, Ramon Natera, Shashank Partha, Pam James, Troy Sterr, Ben Peirce, Lutfi Shahrani, Amy Banicki, Jason Schunk, Emily Savard, Gretchen Wendt, Angela Witt (UI Budget Analyst), Robin Gallagher

Others Present: Rob Kovach, Chief of Staff, Office of Senator Frank Lasee, Rebecca Hogan, Wisconsin Manufacturers and Commerce and Bob Andersen, Legal Action of Wisconsin

**MINUTES**

**1. Call to Order and Introductions** - Mr. LaRocque calls the meeting to order at 9:37 a.m. and introduces Terrance McGowan as a new member of the Council. Mr. McGowan introduces himself as the President and Business Manager of the Operating Engineers Local 139 a labor organization that covers the state of Wisconsin. He further explains that his members depend largely upon the unemployment insurance program to get them through the winters and there are a lot of times when the UI program is the difference between his members losing their homes and making it through the winter until the work season starts once again. He thanks the Council for the opportunity to be present as a member and to represent those members. Mr. McGowan also indicates his union is not unlike the other skilled trades including those represented by outgoing Council member Dennis Penkalski, who he has known for almost twenty years.

Mr. LaRocque introduces a second new member Michael Gotzler, and explains he will arrive later.

Mr. LaRocque acknowledges the service of Dennis Penkalski, a member of the Council for about 15 years and indicates that Mr. Penkalski served with great interest, enthusiasm and skill and worked on at least two subcommittees, helping to “shepherd through” difficult legislation. Mr. Penkalski has been a great contributor to the Council and the Council thanks him for his service.

Mr. LaRocque also thanks Susan Haine, who also has left the Council as of June 30. Mr. LaRocque indicates she served for five years and with a lot of enthusiasm and energy during her tenure and a contributed generously to our discussions and the success of the Council. Mr. Gustafson asks about recognition plaques. Mr. LaRocque has requested plaques.

**2. June 23, 2011 Minutes** – Deferred.

**3. Status of Legislation** – Mr. LaRocque reports that the extended benefits bill has not yet passed but the Senate will be in session next week and we anticipate passage.

**4. Rob Kovach, Chief of Staff, Office of Senator Frank Lasee** – Mr. Kovach introduces himself and describes letters submitted by constituents of the Senator for the Council’s consideration. Mr. Kovach explains that during town meetings the Senator received comments from employers and letters from businessmen about problems with the unemployment program. They are looking for more balance and common sense in the program. There are management costs involved with the paperwork connected with the program and with time required to respond to requests for information and to appear at hearings. For a small business these represent a sacrifice. There were cases mentioned where employees were discharged for cause, for example, theft, fraud, sleeping on the job and failure to attend work for months at a time but claimants continued to receive benefits.

Mr. Kovach reviewed four letters. In the Janzen letter: An employer hired a worker part time and the worker lost his full time job and the part time employer was liable for benefits; an employee no longer able to work due to an injury outside the workplace received benefits charged to the employer even though this employer was not responsible for her inability to work. The second letter, from Patrick Buckley, illustrates the burden the employer has to follow in current procedures for unemployment, specifically filing wage audits in a weekly format instead of a biweekly format. Mr. Kovach suggests the department “use its computer technology” to do calculations for the employer and change its policy to allow the employer to submit its payroll information in whatever form it is kept by the employer. Mr. Kovach explains that the letter says that any employee that requests an appeal is “granted an appeal” whether it is merited or not and suggests some appeals may not be necessary and perhaps should be “granted by merit” and multiple appeals (two or more) should include costs if the employee’s appeal is rejected. The third letter, DMH, Inc., involves employee theft. The worker was found guilty of theft but still allowed to collect benefits and there was a conviction in that case. In another case an employee was dismissed for not attending work for over a month and allowed benefits. The fourth letter is more of the same. Senator Lasee received a lot of verbal exchanges like the letters and wants to bring the issues to the attention of the UI Advisory Council.

Mr. Kovach suggests that these matters can be corrected by administrative rules. Employers contribute hard-earned dollars to the system; changes can be made to ensure that the system is working as it should. It is hoped that the Council will move forward with reforms in the upcoming months by implementing specific changes in the law to ensure that abuses are more strictly controlled, address where an employee has more than 2 appeals and ensure a more balanced and fair hearing procedure in these cases where an employee is fired for cause or where a person is discharged for a reason outside the scope of what unemployment is intended to cover. Mr. Neuenfeldt says we see people fired for theft all the time where their unemployment is denied. Mr. Kovach replies that we are still seeing cases where it is not being denied; so, if we had some administrative rules that were more specific that would help. Mr. Neuenfeldt indicates he doesn’t know what the situation was in this case but the adjudicator talks to both sides when making a determination. Mr. Kovach indicates the other thing we have been hearing is that adjudicators in different regions are reacting differently to similar cases. It does not seem to be “balanced” and we

need to create rules that highlight when benefits can be paid and when they cannot, and keep it fair and consistent so that employers can feel that this is a good system, that we have a working system. These employers do not feel we have a working system in their region.

Mr. LaRocque offers the observation that the outcomes on eligibility are very dependent on what evidence is presented in a particular case. Sometimes it takes a lot of work in each case to get it right. It is another level of analysis to see if you can reconcile the outcome with other cases that we see.

It is common in a theft case for the claim to be disqualified, provided that the facts in evidence establish the theft occurred and that the employee was responsible for it. Yet it is frustrating to employers when they are unable to prove that theft occurred and the result is benefits allowed. We would be more than happy to look at your constituent's particular cases, examine them and determine whether they hold up or not and explain that to your constituents. We do that routinely, as you probably know. We want to know about it, try to explain it. We acknowledge mistakes when they occur. That is the department's approach in general. Theft is misconduct and misconduct is an "intentional and substantial disregard of the employer's interests." The question is what evidence is presented.

Mr. Kovach says these are just examples of a much broader problem and we do not want to focus on them. We are hoping some sort of action can be taken to shore up the policies so that "adjudicators are all on the same page."

Mr. Gustafson inquires about the hearing process. Mr. LaRocque briefly explains that adjudication results in the initial determination by the department on eligibility. A hearing occurs later, but only when an appeal is filed.

Mr. Gustafson asks whether UI evidence admissible in a later legal proceeding. Mr. LaRocque indicates the unemployment statute provides that findings and determinations in the unemployment system may not be used in other legal proceedings. The employer's letter (DMH) says the judge said "there is no reason to terminate an employee for this." Mr. LaRocque indicates that in any hearing the administrative law judges understand that it is their job to apply the unemployment law to the facts presented and it is not a comment on whether an employer has a right to dismiss an employee in any particular case. Employers have very broad rights to terminate, for any reason or no reason at all; so, the question is, what did the employer prove in the hearing and does the act proven rise to the level of "misconduct." That is part of the process that sometimes employers do not fully appreciate. On the other hand it is understandable that employers get upset in situations where they believe the employee committed theft and benefits are paid.

Mr. Gustafson asks what was the timing of events in this case. Mr. Kovach answers he is not sure.

Mr. Buchen says there is no doubt that there are anomalous outcomes and some instances where things are just flat wrong, but it is like anything where you try to regulate human behavior you run up against limits about what you can do. For example, the person is mad that a person is languishing on unemployment, not getting a job, and then focuses on the job search requirements. You can't force people to hire a worker who is unemployed. A layoff is a structural issue we can not control. Related to that is that if the employer is a base period employer but not the employer that laid off the employee, that is frustrating as well. The issue of misconduct is an area where

maybe we could do something. We tried to establish a standard for attendance cases and we may be able to do that in other areas.

Mr. Kovach then says the department should “get all the ALJ’s on the same page.” Even through email, provide the ALJ’s with information that this is the legal precedent that DWD would like the ALJ to follow and these are the conditions under which the department believes the ALJ can exercise discretion. Better decisions by ALJs will cause employees to act in a more professional manner and let them know that they can not behave any way they choose.

Mr. Buchen indicates a job refusal is generally speaking grounds for denial of benefits. The existing law addresses the employer’s concern. We have the law. How should it be enforced? It is important for employers to be more aggressive. In this case, the dental office, the employer *allowed* the employee to work 26 hours per week. The basic standard is you have to be available to work full time, or 32 or more hours per week, to be eligible for benefits. It was not established that she was not able and available.

Mr. Kovach says we can not expect employers to be expert in the employment law. Mr. Buchen replies that he gets that to a point but not every employer is magnanimous and that is why we have the law. Mr. McGowan thanks Mr. Buchen saying it always takes two, and sometimes there is collusion. Mr. Petersen points out that at hearing, the most common problem is that the employers do not follow rules and the claimants do get the benefit of the doubt and that is where some of these problems come in. Employers are entitled to fire an employee but not always able to prevent them from receiving unemployment. Mr. Peterson is sympathetic with smaller employers that experience this situation.

Mr. Buchen indicates that some employers encounter the unemployment system once in a blue moon. Mr. Kovachs says there are also people on both sides that use the system quite well. Mr. Petersen says that why we try to protect people who are entitled to benefits and there are people who know are not entitled that know how to sneak around the rules. It is very difficult to try and tighten this up and take care of everyone that is involved.

Mr. Gustafson indicates we have discussed at the last two meetings about claimants turning down a job because the wage is lower and does not cover the cost of health care. Mr. Petersen asks whether the information about contacting the department when people turn down an offer of work at a particular phone number. Mr. LaRocque indicated the department’s phone number for employers to report job refusals was shared with the Council members and sent out legislators. Mr. Petersen says he is aware there is a newsletter periodically sent out to employers and that we talked about this last time. Ms. Reid explains that because of the growth in electronic filings by employers we stopped the quarterly newsletter. It is under discussion whether we should do a separate mailing to all employers and how to highlight on the department’s web site the employer’s opportunity to report job refusals. Mr. Petersen indicates employers received a separate mailing recently about training sessions. Mr. Petersen explains that employers get frustrated when a job is refused but the employer does not always report it to the department.

Mr. Kovacs points out employers are trying to fix cars or build houses, not operate the DWD system.

Mr. Buchen says the level of benefits is sometimes an issue with employers because people think

the level of benefits is so high, but the reality is that the level of benefits has dropped as a percentage of the weekly wage in this state and practically speaking it is not exactly rich. But as Mr. Gustafson pointed out, for other reasons, such as costs of going to work including child care, they are better off being on unemployment.

Mr. Gustafson points out that the pay for the new work is sometimes substantially less than the work lost. Mr. Petersen indicates it is not just the wage that is a factor but also how far the claimant has to drive to where the work is, how much gas costs a gallon, cost of daycare and other factors that appears are not directly cash explanations but other factors in the decision to take a job.

Mr. Kovach says that such factors may not be able to be addressed but that consistent application of the law can be addressed. Getting communication to department staff, the adjudicators and the judges, is what we think is needed.

Mr. LaRocque says it is a point well taken and he takes it personally because he is in charge of the appeals operation and the concerns expressed about the quality of judges' decisions is frankly something I am genuinely concerned about. I have talked to the Division Administrator and Assistant Division Administrator about firming up the training of administrative law judges with the turnover we have had and the need for training and the need to be sure we consistently apply the law in a correct manner and assure the legal soundness of the decisions.

Mr. Kovach offers to support the department if there is any legislation required or if there is a change required in an administrative rule.

Mr. Barkelar asks whether when an administrative law judge gets reversed by the Labor, Industry and Review Commission the administrative law judge gets a copy of the decision. Mr. LaRocque indicates that is correct. Mr. Barkelar points out that there is a built in corrective action where it should be getting them to the center of how you apply the law.

Mr. Barkelar also mentions effective communication with employers, who are not experts on the law, that the unemployment law is complicated and we have to do a better job of educating employers on these issues because they can be helping themselves but do not find out until after the fact.

Mr. Kovach indicates he can't imagine a business owner out there that would look at the law without a case before them, when there is a problem. Information can help them operate more efficiently.

Mr. LaRocque said we will take the time to look at the issues raised in the letters presented, including the names of the parties to the cases involved in the letters you presented, if you will share those names, so that we can review the complaints in light of what the employers actually experienced. Let us know after the meeting what we can do to meet your concerns.

In regard to Mr. Buckley's complaint about process, when times are good and business is coming along, there are fewer claims. The division is working toward implementation of a system for electronic exchange of employer's information on separation of employees who have made claims. That system, when it comes online, will speed the process and reduce or relieve employers of the kinds of paperwork Mr. Buckley's letter highlights as a problem for employers.

Mr. Buchen says we are always trying to improve the program and the way it's operating, but I do want to make the observation that we have spent a lot of time wrestling with these same issues and some are not susceptible to resolution and the human nature aspect compounds it most of the time. But, we would love to work with you on any solutions you can find.

Mr. Kovach indicates the focus is on what the Senator is hearing from constituents.

Mr. Gustafson thanks Senator Lasee and Mr. Kovach for taking the time to gather this information and indicates that it is helpful to all of the Council members. He also says the Council understands the issue and will focus on it and the Council believes that any unjustified payment of benefits is money taken from the pockets of employers and qualified claimants and the trick is to identify unwarranted outcomes and ensure consistent treatment.

## **5. Amend Treasury Offset to Allow Recovery from IRS of Non-Fraud**

Ms. James states that this proposal as explained at an earlier meeting expands the law to allow offset for recovery of non fraud overpayments resulting from failure to report earnings using the Treasury Offset Program (TOP). Back in October 2010, the IRS expanded that law to allow for recovery of nonfraud overpayments resulting from failure to report earnings. Since February of this year, under the current Treasury offset program the department has collected \$2.9 million to date in fraudulent claims by offset of federal tax returns.

Mr. Buchen says that sounds like fraud, overstating your wages. Mr. Shahrani explains the circumstances in which failure to report or underreport wages is determined to be intentional. The department believes that where a claimant reports the employer and the wages as an estimate that the claimant did not conceal. There are times when claimants are not sure what wages will be received for work in a particular week. But, if a claimant consistently underreports the amount of wages earned in each week, it may be determined to be an intentional misstatement, or fraud.

Mr. McHugh says overpayments less than \$1000 and there is no prior determinations of fraud by a particular claimant, those cases are considered nonfraud.

Mr. Buchen asks about the estimate for non fraud. Ms. James indicates the estimate is \$5.9 million of non fraud overpayments resulting from failure to report earnings could be certified with the IRS offset. Mr. Petersen asks if there will still be some overpayments that could not attach to their tax refunds. Non fraud overpayments not related to wage discrepancies would not be reached by the TOP set off. The only ones you can certify for offset as non fraud, are wage discrepancies. Mr. LaRocque points out that this requires a state legislative change.

## **6. Amend Employer Assessment for Interest Payment to Establish Account**

Mr. McHugh explains that under current law we are required to send out an assessment to employers for payment of interest on federal loans. Under current law special assessment receipts are deposited into the "interest and penalty" account. Interest and penalty monies can be used for a variety of purposes including administration and may be lapsed to the state's general fund. To segregate this money for the specific purpose of paying interest or principal on Title XII loans or

municipal bonds, DOA suggested that we set up a separate fund. Mr.LaRocque indicates that also would be a legislative item.

## **7. Provide Authority for Short or Long Term Borrowing**

Ms. James explains that our Reserve Fund loan balance is about \$1.4 billion. The impact of this loan is that the department must pay interest and employers will have a reduction in their FUTA tax credits in 2011. The department has been discussing options that can be used to pay back the loan and to avoid FUTA tax reductions. One option is to use private borrowing.

Currently state law does not affirmatively provide authority for borrowing for the unemployment program other than the federal loans. The proposal would allow borrowing for short term as longer term needs.

An example of when we would use this borrowing is if we have the opportunity to obtain “cash flow” loans from the federal government. Federal cash flow loans are interest free advances from January through September if we do not borrow any additional money during the following fourth quarter (i.e., we have money available to pay benefits in the fourth quarter without federal advances).

Mr. LaRocque says this is a heads up that we may bring you a legislative proposal to enable borrowing.

Mr. Barkelar explains the proposal gives the department cash management tools if it will save money for the fund. Today there might not be a need for it but in nine months or fifteen months there may be and it would be nice to not have to go through the legislature at that point. Whatever borrowing was recommended would probably go before the Council but would have to be approved by the legislature. It is important to make sure we have the tools ready for good cash management.

Mr. Gustafson asks what is the downside or risk to this proposal. Mr. McHugh says with bonds issued in the private market, you borrow a specific amount of money, perhaps more principal than we need. There is also an interest risk. In the late 1980's, Louisiana utilized private borrowing. Subsequent analysis concluded that it did not result in savings and cost \$47 million more than Title XII loans [federal loans to state unemployment programs]. But, in Illinois and Texas, it did result in interest saved.

Mr. Barkelar says there is a risk, for example, if you lock in a bond before the federal government decides to waive interest you can not take advantage of the waiver. That is why with longer term large amounts you would use financial advisers and with their best advice makes a decision and then live with it. There are enough opportunities with limited risk that we should be able to take advantage of opportunities to better manage funds so employer's taxes need not be increased or claimant's benefits reduced.

Mr. Buchen mentions that the difference in interest rates for public and private borrowing is not as large as it was several years ago. Another benefit is that there is more control with private borrowing versus the way we borrow with the federal government. Ms. James points out that borrowing gives the department flexibility to take advantage of potential interest rate savings and

to avoid FUTA tax reductions. Mr. LaRocque says, this requires a legislative change and a proposal may be ready for consideration as early as next month.

## **8. Correspondence**

Correspondence offered by Senator Lasee has been discussed with Mr. Kovach.

## **9. Future Meetings and Legislative Calendar**

The Council agrees tentatively [agreed subsequently] to meet on Wednesday, August 24, 2011 and Thursday, September 22, 2011. The remaining legislative floor periods in 2011 are in September and October and not after that [a copy of the legislative calendar for 2011 is provided to Council members, showing the last floor period ends November 3, 2011]. Council members should bring their proposals to the August 24 meeting so that there is adequate time to agree to them, draft the bill and introduce it in the legislature.

## **10. Other Business**

Motion (McGowan) to adjourn, second (Petersen), approved by voice vote, ayes 6 no 0.