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WISCONSIN MANUFACTURERS & COMMERCE

Fond du Lac SHRM *Legislative & Policy Update*

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About WMC

- Founded in 1911 as the Wisconsin Manufacturers Association in response to several significant policies being debated at the Capitol.
- Merged with the Wisconsin Chamber of Commerce in 1976 to become WMC.
- We represent businesses of all sizes doing business in all economic sectors.
- Roughly 3,800 members throughout all corners of the state.
- Mission is to make Wisconsin the most competitive state in the nation to do business.
- We accomplish this mission through policy advocacy.

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Unemployment Policy

Unemployment Policy

- Unemployment law changes typically go through an advisory council process (UIAC).
- The UIAC has five members representing management, and five representing labor.
- WMC chairs the management caucus
- Management and labor have exchanged proposals and are currently negotiating an agreed bill to be introduced in the Legislature.
- DWD has also made proposals that will be considered by labor and management.

UI Management Proposals

- Require DWD's IT upgrade to include functionality to allow employers to receive a report of an alleged job search and verify. Also allow employers to report job interview no shows and refusals of offers to work.
- Clarify the definition of "employee" vs. "independent contractor" with objective standards. Make the new definitions applicable to all employment law chapters (UI, WC, ERD), and ensure that it captures the "gig" economy.
- Eliminate the "quit exception" that allows a worker to quit an "unsuitable" job during the first 30 days and still qualify for benefits.

UI Management Proposals

- Link the duration of unemployment benefits to the unemployment rate. During periods of low unemployment, the maximum duration of benefits would be 14 weeks, and during high unemployment, 22 weeks, with a sliding scale between those endpoints.
- Clarify the definition of “misconduct” with respect to absenteeism and tardiness, as well as theft, destruction of property, and violations of social media policies.
- Clarify the definition of “substantial fault” to include errors that violate written policies of employers, errors that are repeated after warning, and errors that endanger the safety of others.

UI Labor Proposals

- Change UI tax schedules to significantly increase the fund balance thresholds necessary to move to a lower tax schedule. Will result in employers paying higher tax rates.
- Require a comprehensive review of UI tax system to look at higher tax rates and a larger taxable wage base.
- Increase the max weekly benefit rate of \$370 by \$20 per week beginning in 2023, and continuing through 2026 to a max rate of \$450 per week.

UI Labor Proposals

- Eliminate the current 1-week waiting period for UI benefits.
- Increase penalties for misclassifying employees so that all employers (currently construction trade only) would face fines of \$500 per misclassified employee for first violations, and \$1,000 per misclassified employee for subsequent violations. Similarly, fines of \$1,000/\$2,000 per employee for instances of coercing someone to adopt a non-employee status.

DWD/Labor Proposals

- Repeal pre-employment and occupational drug testing.
- Repeal the “substantial fault” standard for denying UI benefits
- Repeal the statutory work search requirement and allow DWD to determine the extent of work searches required for benefits
- Increase the max weekly benefit rate to \$409 per week, then to 50% of average weekly wages in 2023, and 75% of average wages in 2024. Based on 2019 wage data, the max weekly benefit would be \$733 in 2024.

UI Policy Next Steps

- Labor and management continue to negotiate. We have agreed on several non-controversial DWD proposals.
- It is unclear whether we will reach additional agreements. Labor remains focused on eliminating the one-week waiting period and a benefit increase. Management will not support either of those unless the duration of benefits is changed to reflect the unemployment rate.
- The intent is to have an agreed bill to the Legislature before the end of the year, which will hopefully be adopted in early 2022 before final adjournment of the Legislature.

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Workers Compensation Policy

Work Comp Policy

- Similar to UI, workers compensation (WC) law changes typically go through an advisory council process (WCAC).
- The WCAC has five members representing management, and five representing labor.
- WMC chairs the management caucus
- Management and labor exchanged proposals last month, and are currently negotiating an agreed bill to be introduced in the Legislature.

WC Management Proposals

- Implement a fee schedule on WC medical costs (as 45 other states have done) to contain costs and reverse Wisconsin's status as one of the most expensive states in the country for WC medical payments.
- Modify medical fee dispute process to base the reasonableness of fees on the average amounts paid to medical providers, as opposed to the amount charged.
- Allow employers to direct the care of injured workers to a list of at least 6 qualified medical providers. This will allow employers to realize negotiated discounts for WC services similar to health insurance

WC Management Proposals

- Base benefits on actual earnings at the time of the injury – no wage expansion.
- Require permanent disability ratings to be done by occupational health physicians, and repeal minimum PPD ratings in DWD 80 where surgical treatments provide outcomes of no permanent disability.
- Allow employers to request a re-evaluation of a PTD determination every three years to verify the permanency of the injury.
- Specify that non-traumatic injuries are only compensable if workplace exposure is the predominant cause of the condition.

WC Management Proposals

- Reduce the statute of limitations for WC claims to 2 years, with limited exceptions for toxic exposures and undisputed injuries involving prosthesis or artificial joints.
- Require notification of injuries according to employer handbook within 30 days of occurrence.
- Prohibit benefits where a worker falsely misrepresents his or her physical condition, the employer relied on that misrepresentation during hiring, and the misrepresentation was a causal factor in a workplace injury.

WC Labor Proposals

- Increase PPD max rate by \$20/week each year beginning 2017, resulting in a max benefit of \$442 per week in 2021, \$462/week in 2022, and \$482/week in 2023. Increase the benefit by \$20/week each year in perpetuity.
- Increase PTD supplemental benefit from \$669 to \$831.
- Require scholarship benefits for children of workers who either died or have permanent total disability. Benefit would include tuition, room and board, and book expenses for UW-System schools, WI Technical Colleges, or certified apprenticeship programs.

WC Labor Proposals

- Add shoulder replacement, reverse shoulder replacement, and spinal fusion surgeries as traumatic injuries with no statute of limitations for benefit claims.
- Require employers to pay the cost of group health coverage during the period of temporary disability.
- Allow scheduled injuries to potentially qualify for loss of earning capacity benefits.
- Require all employers to display a DWD-approved worker bill of rights for WC, including information on opioids and alternative treatments.

WC Policy Next Steps

- Labor and management will continue to negotiate on these proposals in the weeks ahead.
- Management will remain focused on medical cost containment, and of course labor will push for benefit increase.
- Like unemployment, the intent is to have the WCAC finalize an agreed bill before the end of the year, and hopefully have it enacted before the Legislature adjourns next year.

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Definition of Employee & Misclassification

Employee Misclassification

- Labor organizations have undertaken an aggressive effort to increase enforcement of misclassification of employees versus independent contractors.
- Governor Evers formed a task force to study the issue, with the purpose of making policy recommendations for stronger enforcement and the sharing of information across all state agencies to detect instances of misclassification
- The Governor's task force is comprised mostly of labor union representatives and government officials – there is token/minimal representation from industry.

Employee Misclassification

- The Governor's Task Force is expected to make recommendations on changes to the definition of employee versus independent contractor, and the labor representatives of the UIAC have already proposed that the UI agreed bill include the Task Force recommendations.
- WMC believes it is unfair to enforce significant penalties against employers for misclassification of employees when the definitions are subjective, and vary from chapter to chapter in the statutes.
- For this reason, WMC supports a clearly-defined and objective standard for employment classification that applies universally through all statutes.

WMC Proposed Definition

- A person is an *independent contractor* if he or she signs a written contract with the employer that states the employer's intent to retain the services of the person as an independent contractor and contains acknowledgements that the person understands that he or she is:
 - Providing services for the employer as an independent contractor;
 - Not going to be treated as an employee of the employer;
 - Not going to be provided with either worker's compensation or unemployment compensation benefits;

- **Independent contractor** (continued)
 - Is obligated to pay all applicable federal and state income taxes;
 - Is responsible for the majority of supplies and other variable expenses that he or she incurs in connection with performing the contracted services unless the expenses are for travel that is not local.
 - Provides his or her services through a business entity (e.g. LLC, partnership, sole proprietorship, etc.)

WMC Proposed Definition

- In addition to these contractual requirements, a person must meet 4 of the following 10 criteria:
 1. The person has the right to control the manner and means by which the work is to be accomplished.
 2. The person has control over the amount of time personally spent providing services.
 3. The person has control over where the services are performed
 4. The person is not required to work exclusively for one employer
 5. The person is free to exercise independent initiative in soliciting others to purchase his or her services

WMC Proposed Definition

- Independent contractor **4 of 10** criteria (continued):
 6. The person is free to hire employees or to contract with assistants, helpers, and/or substitutes to perform all or some of the work.
 7. The person cannot be required to perform additional services without a new or modified contract.
 8. The person obtains permission from the employer to utilize any workspace of the employer in order to perform the work.
 9. The person was not reclassified as an employee after an IRS or DWD audit.
 10. The person is responsible for maintaining any required business licenses, insurance, certifications or permits required to perform the services.

WMC Proposed Definition

- All workers who do not meet both the contracted services requirements and the “4 of 10” criteria would be classified as employees.
- Our proposal would also preempt local governments from enacting their own ordinances specifying definitions for employees versus independent contractors.
- We continue to negotiate with the labor caucus at the UIAC to get our proposal placed into the UI agreed bill.

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FMLA Proposals

Governor Evers Proposal

- Would require all employers who employ 25 or more employees (currently 50) to provide state FMLA benefits.
- FMLA benefits would kick in after the first 680 hours of employment (17 weeks) as opposed to 52 weeks currently.
- In addition to leave allowances under current law, the Evers proposal would:
 - Allows 2 weeks of leave to care for a grandparent, grandchild, or sibling
 - Allows 2 weeks of leave to care for a child, spouse, domestic partner, parent, grandparent, grandchild or sibling who is in medical isolation.
 - Allows 6 weeks of leave for “family caregiving” when a chronic condition is present for a child, spouse, domestic partner, parent, grandparent, grandchild or sibling.
 - Allows 6 weeks of leave if a spouse, child, domestic partner, parent, grandparent, grandchild or sibling is on active duty in the military or has impending active duty.
 - Allows 6 weeks of leave if a child care center, child care provider or school of an employee’s child experiences as an unexpected short-term closure.
- Extends the FMLA complaint deadline for employees from 30 days to 300 days

WMC FMLA Reform Proposal

- WMC has consistently heard from our members about the complexity, cost, and time burden associated with complying with a state and federal FMLA law.
- We have proposed that any employer who is subject to the federal FMLA is not required to comply with the state FMLA.
- Given Governor Evers's positioning on FMLA issues, we are unlikely to see our reform proposal move forward until we have a new Governor.

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Recent Agency Authority Court Case

Clean Wisconsin v. DNR

- The Wisconsin Supreme Court issued a decision last month that could significantly expand state agencies' authority to regulate.
- The case involved a DNR water quality permit for a dairy farm. The question was whether a general statute giving DNR authority to regulate water quality provided explicit authority to place a limitation on how many cows can be on a farm.
- The Supreme Court said that a general statute, even one that does not mention farms or cows, is an explicit grant of authority from the Legislature to the DNR to regulate.
- We believe the ruling is absurd, and is based on the majority Justice's personal views and agendas, as opposed to the law.

Why Does It Matter?

- State agencies (like DWD) are created by the Legislature, and have no more authority than the Legislature gives them by statute.
- State agencies have also been given the power to write rules that have the same force of law as a statute.
- Unlike the Legislature, state agencies may make laws that do not consider costs, benefits, practicality, economic impacts, job impacts, etc. They are unelected, unaccountable, and protected by civil service laws.

Why Does It Matter?

- In this country, we believe in representative democracy, and government by the consent of the people. If we don't like the laws enacted by our lawmakers, we can vote them out of office.
- However, because agency rulemaking (laws) is largely unaccountable to the people, and the bureaucrats who write the regulations are insulated, protected, and remain hidden from public view, the general public has a tremendous interest in statutory limitations on agency lawmaking.
- The Supreme Court in their *Clean Wisconsin* decision last month dealt what could be a crippling blow to the public's interest in limited lawmaking authority of state agencies.

Why Does It Matter?

- If a vague law relating to water quality can empower the DNR to decide how many cows a farmer is allowed to have, what meaningful limit exists to protect the general public from agencies becoming “super regulators” with the power to regulate however they please, regardless of the law?
- Imagine the regulations that DWD could write with respect to unemployment benefits, workers compensation benefits, harassment, discrimination, wage and hour regulations, etc. if there are no meaningful statutory limitations on their authority.
- WMC is already working with lawmakers to draft legislation to overturn this court decision.