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Proposed by: BTA

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ANALYSIS OF AMENDMENT TO UI LAW

Provide Statutory Authority to Correct Misdirected Payments and Payment Processing Errors, Treat Such Payments as Departmental Error and Authorize Action to Recover Erroneous Payments of Reserve Funds.

1. Description of Amendment

The amendment codifies the methodology the department uses for processing and correcting payments made to unintended payees or made to the correct payee in an incorrect amount. The definition of departmental error is amended to clarify what errors are not included and the amendment creates a statutory cause of action to recover erroneous payment of reserve funds.

2. Proposed Statutory Language

Amend §108.02(10e):

(10e) 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.

Amend §108.22 (8) (c) 1. a. :

(c) 1. The department shall waive recovery of benefits that were erroneously paid if:

a. The overpayment was the result of a departmental error, as defined in s. 108.02(10e); and was not the fault of any employer under s. 108.04 (13) (f);:

Create §108.16 (3) (c):

(3) The fund's treasurer shall write off:

(c) Any unrecoverable payments made without fault on the part of the intended payee under s. 108.16 (13).

Create §108.16 (6) (o):

(6) The department shall maintain within the fund a "balancing account," to which shall be credited:

(o) Any erroneous payment recovered under s. 108.16 (13).

Create §108.16 (6m) (h) & (i):

(6m) There shall be charged against the fund's balancing account:

(h) Any amount paid to correct a payment pursuant to sub. (13).

(i) Any amount written off under sub. (3)(c).

Create §108.16 (13):

When the department determines that a payment has been made erroneously, and the payment was made without fault on the part of the intended payee, the department may issue the correct payment to the intended payee if necessary, and recover the amount of any erroneous payment from the recipient as provided in ss. 108.22, 108.225, or 108.245.

Create § 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.

(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.

3. Reason for the Amendments

Misdirected Payments and Payment Errors: The department currently has few cases involving payments made erroneously as a result of computer malfunctions, data transmission errors, keying errors, computer programming errors or bookkeeping errors. In the past when these cases have arisen, the department has issued a correct payment from the balancing account if necessary and credited the balancing account when payments were received although there was not clear statutory authority for the department to do so. The amendment will provide that express statutory authority and show the accountability for the payments.

Overpayments may be waived when an erroneous payment is solely due to "departmental error." This definition of "departmental error" was adopted in 1993 to provide claimants with relief from collections of overpayments when the department has affirmatively taken an action in computing or paying benefits and made a mathematical mistake or miscalculation, applied the

law incorrectly or made a mistake of evidentiary fact, or provided incorrect information to a claimant on which the claimant relied. The law was not intended to allow claimants to be unjustly enriched by trust funds if the payments were made inadvertently, such as through computer malfunctions and data transmission errors. As more payments are made electronically, the risk of more frequent processing errors will increase. The department seeks to ensure that the law is clear in the future as to those errors that are not departmental errors for purposes of waiving overpayments.

The following are examples of the types of situations for which the department anticipates applying the law provisions:

- Example 1. Some UI payments are done manually to correct claims or issue replacement checks. Due to a keying error, a \$99 payment is keyed as \$999 and sent to the claimant. The department will seek to recover the erroneous overpayment made to the recipient.
- Example 2. In 2006 Medicare erroneously issued \$50 million in refunds to 230,000 beneficiaries due to a computer glitch. If a similar situation happened at UI, the department would seek to recover the erroneous payment made to the unintended recipients.
- Example 3. Claimant sends in money to repay an overpayment, but it is incorrectly applied to another person's overpayment creating a credit balance. The money is then refunded to the incorrect person. The department will credit the payment to the correct recipient who is still entitled to the credit, and seek to recover the erroneous payment made to the unintended recipient.

Clarify Departmental Error: 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. This change limits equitable application of the waiver requirement and reflects the correct application of the law in appeal tribunal decisions and decisions of the Labor and Industry Review Commission. The clarification also includes language to provide statutory authority to correct misdirected payments.

Statutory Cause of Action: 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 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.

4. Brief History and Background of Current Provision

The definition of department error was adopted in 1993 Wis. Act 373. The other added statutory provisions would be new, including section 108.245.

5. Effects of Proposed Change

a. Policy. The intent of the misdirected payments amendment is to codify the methodology the department uses for processing and correcting payments made to unintended payees or made to the correct payee in an incorrect amount and to clarify the various types of errors that are not "departmental errors" for purposes of waiver of overpayment recovery. This will provide governmental accountability for the processing of payments. The amendment also clarifies the definition of departmental error which should lead to more consistent interpretation of the law. The department does not anticipate that there will be a significant number of cases involving misdirected payments. However, the amendment provides an option for the department in the event such a recovery would be necessary.

b. Administrative Impact. The amendment is consistent with the current accounting process for handling misdirected checks. No significant administrative impact is anticipated.

c. Equitable. The amendment will prevent unjust enrichment to claimants for mechanical-type errors in processing payments and recovers erroneous payments for the reserve fund. The amendment result in a more uniform and consistent interpretation of departmental error. The statutory cause of action will not generally affect claimants or employers but would primarily involve recovery actions against persons not already in the UI system.

d. Fiscal. This proposal will increase the Trust Fund by approximately \$1 million per year. Currently misdirected payments average around \$100,000 per month. As we expect

this to fall off slightly as the claim loads return to more normal levels, we estimate that adopting this proposal will then save Trust Fund in the range \$1 million per year.

6. State and Federal Issues

- a. Chapter 108. No other provisions of Chapter 108 are anticipated to need to be amended as a result of this proposal.
- b. Rules. No administrative rules need to be promulgated or changed as a result of this proposal.
- c. Conformity. None.

7. Proposed Effective/Applicability Date

The provisions should be effective as of the effective date of the legislation.