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Janell Knutson
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RE: Clearinghouse Rule 13-106, Proposed changes and additions to DWD 111, 113, 114, 115, 132, and 140

Dear Ms. Knutson:

For your review, here are my comments regarding regarding the above-referenced matters.[1]

Waiver of interest for employers' unemployment taxes

The proposed regulations add new provisions to DWD 113. In DWD 113.025(1), the Department presents all of the conditions that must be met for when interest charges are waived. Two of these conditions may be problematic: sub-sections (d) and (f). In DWD 113.025(1)(d), waiver of interest will only occur when there is "a newly subject employer" or the employer "has a history" of timely filing of tax reports and payments. The regulations do not provide any criteria or definition for when employers will qualify as "newly subject" or when employers have a "history" of timely reporting and payments. It would seem, then, that this criteria would be developed via hearings and appeals to the Labor and Industry Review Commission (Commission). But, DWD 113.025(1)(f) conditions waiver of interest on there being no "hearing on the tax liability associated with [that] interest." This phrasing could indicate either: (a) that no hearings at all are possible if an employer wants a waiver of interest or (b) that employers wanting interest waivers cannot dispute the amounts owed via hearing but could contest the denial of an interest waiver via hearing. The language should be clarified to indicate what is the intended meaning. In addition, as hearings even over interest can take some time, it seems likely that an employer who disputes an interest waiver determination will more than likely no longer be either a "newly subject" employer or an employer with a "history" of timely filing and payments. Accordingly, the clarification should indicate that an employer who contests the denial of an interest waiver will receive a rebate regarding the interest owed if the appeal is successful.

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[1] These comments are my own and do not reflect an official statement made on behalf of the Unemployment Compensation Appeals Clinic, Inc., or any other organization to which I am connected.

Licensing revocation

A new DWD 114 is created regarding the new licensing provisions added to Wis. Stat. ch.108. These new statutory requirements and complex and touch on numerous other fields of business and related statutes. In light of that complexity, the proposed rules should attempt to make the Department's handling of these matters as transparent and as simple as possible. For the most part, the proposed rules succeed. But, a few problems still appear. First, the certification of delinquency set forth in DWD 114.20 only allows ten days from the date of mailing of the delinquency notice for a debtor to cure the deficiency in some way. *See* DWD 114.20(2)(d). Mail does not always arrive within a day of mailing and can at times take three to four days. Furthermore, weekends and holidays can significantly affect the ability of someone to respond to such a notice (e.g., a small employer may not have immediate access to a book-keeper or accountant in order to respond quickly and prepare funds for repayment). Accordingly, at least fourteen and preferably twenty-one days should be available to employers for responding to these notices.

If an employer fails to respond to the notice, DWD 114.20(3) provides that the Department issue a certificate of delinquency to the relevant licensing department. There is no indication here of the employer being provided notice of that event and how the employer can subsequently cure this delinquency (by, e.g., including a copy of the prior notice). Furthermore, there is no indication here of whether the Department or the employer is responsible for fees that have to be paid to the licensing department when restoring a license after the delinquency has been cured.

DWD 114.30 sets forth the criteria by which installment plans can be used. The proposed regulations indicate that the Department can issue a certificate of delinquency "without further notice" when an employer misses an installment (whatever the reason). In other words, an employer who misses a payment because of a clerical mistake by the employer (or even the Department in tracking that payment) can find itself subject to an immediate withdrawal of its license without any opportunity to address the issue. To correct this lack of notice, at least seven days notice of a late payment should be provided employers before the Department files a delinquency certificate for a late installment payment.

Financial record matching

In DWD 114.50, the Department sets forth the basic facts that it will undertake contracts with financial institutions to accomplish record matching and that financial institutions have twenty business days to agree to these contracts. No criteria is identified here for these contracts and no mechanisms are provided for regarding how disputes between financial institutions, the Department, and Wisconsin residents will be resolved.[2] Indeed, this rule presents the Department as unilaterally preparing contracts in its discretion. The only limitation set forth is that either a financial institution or the Department must give sixty days notice before changing a condition in these contracts. There simply is no information here about how this financial record-matching program will function or what safeguards and correctives exist for mistakes or identity theft.

Business transfers

Here, DWD 115.07(2)(a) is amended to allow the Department to process a late successship application if the delay was "the result of excusable neglect." When this change regarding business transfers was first proposed to the Advisory Council, the Department described excusable neglect as a clerical error (such as when someone forgot to check the appropriate box on a form). No actual definition of excusable neglect was provided for, and this proposed language still offers no specific definition about what constitutes excusable neglect. But, in DWD 113.025(2)(a), the Department refers to excusable neglect as a reason for waiving interest charges and offers an explanatory note of what conduct qualifies as excusable neglect:

> **Note**: An erroneous contention regarding the unemployment law or misunderstanding of the obligations under the law shall not constitute excusable neglect. The following are examples of excusable neglect if the interest resulted from:
>
> - Embezzlement by an accountant or an employee who is not related to the employer such that the embezzlement caused the interest to be due.
> - Inaccurate written communication by the Wisconsin Division of Unemployment Insurance to the employer that affirmatively misled the employer as to its duties and obligations such that the inaccurate written communication caused the interest to be due.

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[2] For example, if Michael Smith in Milwaukee is mistakenly matched by a financial institution to Michael Smith in South Milwaukee, there is no indication here how the wrong Michael Smith or the financial institution can correct this issue.

DWD 113.025(2)(a). Neither one of these examples of excusable neglect is anything akin to a clerical mistake. Accordingly, the Department should define what it means by excusable neglect in regards to business transfers or at least attach a note here to explain how excusable neglect is similar to or different from the excusable neglect that allows waiver of interest charges.

Voluntary termination of part-time work

There is typographical error in the announcement regarding these rules changes, as the announcement refers to DWD 132.02 being eliminated when the actual rule being eliminated (and as actually stated here in the proposed changes) is DWD 132.03.

Standard affidavit form

In the newly created DWD 140.22, the Department presents how the new affidavit form is to be completed and what information it needs to have. Given the evidentiary limits of affidavits in hearings, any set of rules regarding their use will be problematic. These rules should at least provide clear guidance regarding these limitations and use at hearings. The only guidance offered, however, is that an administrative law judge may accept an affidavit into evidence as provided in DWD 140.16.[3] *See* DWD 140.22(3)(b). Evidence is difficult enough a topic for attorneys, let alone lay persons who do not read about rules of evidence during their free time. Accordingly, the proposed rules should include some kind of notice on the affidavit form itself about the evidentiary issues at stake with an affidavit. For example:

> By its nature, an affidavit is hearsay evidence, and so no issue or fact in dispute can be decided solely by what is stated in the affidavit. Furthermore, the probative or evidentiary value of an affidavit may most likely be reduced if the affiant is not at the hearing to provide testimony about the contents of the affidavit.

Even with this qualification, the proposed rules create additional problems for those who think affidavits can provide reliable evidence at unemployment hearings. DWD 140.22(3)(a) sets forth the requirement

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[3] DWD 140.16(1) states in regards to the admissibility of evidence:

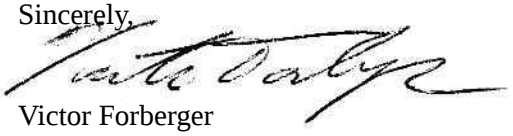
> Statutory and common law rules of evidence and rules of procedure applicable to courts of record are not con- trolling with respect to hearings. The administrative law judge shall secure the facts in as direct and simple a manner as possible. Evidence having reasonable probative value is admissible, but ir- relevant, immaterial and repetitious evidence is not admissible. Hearsay evidence is admissible if it has reasonable probative value but no issue may be decided solely on hearsay evidence unless the hearsay evidence is admissible under ch. 908, Stats.

that affidavits may be rejected at a hearing unless sent to "the hearing office or the other party at least three days prior to the hearing."[4] As hearing notices can by regulation be sent within six days of the hearing date, and the post office takes at least one day to deliver mail (if not two or more days), the proposed rule essentially only provides one day to prepare and mail an affidavit that can be received within three days of the scheduled hearing. Even with the more typical seven to ten days of notice for hearing dates, most parties will find this three-day requirement difficult to meet. Either the Department should amend its hearing notice rules to require ten to fourteen days notice for unemployment hearings or this time-line requirement for affidavits should be eliminated.[5]

Conclusion

Thank you for the opportunity to respond to these proposed regulatory changes. If you have any questions or need additional information, please contact me at your convenience.

Sincerely,



Victor Forberger

[4] The use of "or" here appears to be a mistake, as the affidavit should be available to all relevant entities. Rather, the rule should read "the hearing office and, if applicable, all other parties . . . "

[5] Hearings by telephone do require that all documents to be used at the hearing be provided to the hearing office and the parties three-days prior to the hearing. These telephone procedures should apply equally to affidavits without any change to these procedures. In addition, hearing offices usually provide two weeks notice for telephone hearings because of this requirement to submit documents beforehand.