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State of Wisconsin

Labor and Industry Review Commission

October 10, 2013

JANELL KNUTSON, CHAIR
UNEMPLOYMENT INSURANCE
ADVISORY COUNCIL
P.O. BOX 8942
MADISON WI 53708
VIA EMAIL: janel.knutson@dwd.wisconsin.gov

Re: LIRC Proposed Law Changes

Dear Ms. Knutson:

As you know, the Labor and Industry Review Commission recently examined its case review process to identify inefficiencies and find ways to improve the timeliness of our decision-making. In doing so, we identified some law changes that we think would help the commission save time and resources, and improve the time it takes to review unemployment insurance cases.

Enclosed please find brief summaries of the law changes we are proposing, along with proposed statutory language. We appreciate your taking these proposed changes to the Unemployment Insurance Advisory Council for their consideration. Please contact our general counsel, Tracey Schwalbe, if you have any questions or would like her to attend a council meeting and discuss the proposed changes or answer any questions the councilmembers may have. Thank you.

Sincerely,


Laurie R. McCaffum
Chairperson

Enclosures

cc: Tracey Schwalbe, LIRC General Counsel

Chapter 108 LIRC Proposed Changes

Brief Summary of Proposed Law Change: The commission proposes that the following obsolete provisions be repealed or excised from the statutes.

REPEAL OBSOLETE PROVISIONS IN WIS. STAT. s. 108.09(2)(cm) and (b)(b)(effective upon publication):

108.09 Settlement of benefit claims. (2) (cm) ~~Unless a party has filed a timely request for review of the decision of an appeal tribunal by the commission or has commenced a timely action for the judicial review of the decision of the commission, the department may set aside or amend any appeal tribunal decision adverse to a claimant that has been issued under s. 108.09, 1995 stats., within the 4-year period immediately preceding January 4, 1998, or may reverse, modify or set aside any decision of the commission adverse to a claimant that has been issued under s. 108.09, 1995 stats., within the 4-year period immediately preceding January 4, 1998, if the department finds that the benefits paid or payable to the claimant have been affected by wages earned by the claimant which have not been paid, and the department is provided with notice from the appropriate state or federal court or agency that a wage claim for these wages will not be paid in whole or in part.~~

(5) (b) ~~All testimony at any hearing under this section shall be taken down by a stenographer, or recorded by a recording machine, but need not be transcribed unless either of the parties requests a transcript prior to expiration of that party's right to further appeal under this section and pays a fee to the commission in advance, the amount of which shall be established by rule of the commission. When a transcript is thus furnished one of the parties upon request, a copy of the transcript shall be furnished the other party free of charge. The transcript fee thus collected shall be paid to the administrative account.~~

Brief Summary of Proposed Law Change: Currently, the commission reviews a written synopsis of the testimony of unemployment insurance hearings. The commission may use a transcript of a hearing if a party shows that the synopsis is not sufficiently complete or accurate to fairly reflect the testimony. Occasionally, parties offer to provide the commission with transcripts of the hearings, but the commission is not able to use them without determining that a synopsis is insufficient. The proposed change would allow the commission to use either a synopsis or a transcript of the hearing. If a synopsis is found to be defective, the commission would be able to correct the synopsis. If the transcript is submitted to the commission and the parties free of charge, the commission would be able to use the transcript provided that the commission verifies it is complete and accurate. The change would allow the commission to save time and resources, and improve the time it takes to review cases.

AMEND WIS. STAT. s. 108.09(5)(d) TO REFLECT HOW THE COMMISSION MAY USE TRANSCRIPTS IN REVIEWING CASES (effective upon publication):

108.09 Settlement of benefit claims. (5) (d) ~~In its review of the decision of an appeal tribunal, the commission shall may use a written synopsis of the testimony or a transcript of the hearing, and shall review the other evidence taken at a the hearing or a transcript of the hearing prepared, under the direction of the department or commission, by an employee of the department, an employee of the commission or a contractor. If a party shows to the commission that a synopsis is not sufficiently complete and accurate to fairly reflect the relevant and material testimony and other evidence taken, the commission may correct the synopsis or shall direct the preparation of a transcript. The commission may use a transcript offered by a party that is provided to the commission and the other parties free of charge if the commission reviews the hearing recording and verifies that the transcript is complete and accurate or makes changes to the transcript to ensure that it is complete and accurate for commission review. If a transcript is prepared, the transcript shall indicate the transcriber's name and employer whether the transcriber is an employee of the department, an employee of the commission, or a contractor.~~

Brief Summary of Proposed Law Change: Currently, appeals to the commission of unemployment insurance administrative law judge decisions may be filed either with the Department of Workforce Development's offices, the hearing offices, or the commission. The commission proposes that the law be amended to provide that appeals to the commission be filed only with the commission. This change will streamline the appeal process so that only one office is receiving appeals and so the commission has better control over its own workload from the time of the appeal. The commission also proposes to clarify the language of the standard for the commission to review late appeals. The standard remains the same; the petition must be late for a reason beyond the petitioner's control before the commission can entertain the appeal. However, the commission proposes to use clearer language to state the standard.

AMEND WIS. STAT. s. 108.09(5)(d) TO REFLECT THAT PCRs MUST BE FILED AT THE COMMISSION AND CLARIFY THE STANDARD FOR LATE APPEALS (effective for PCRs filed after 12/31/2014):

(6) COMMISSION REVIEW. (a) The department or any party may petition the commission for review of an appeal tribunal decision, pursuant to commission rules, if such petition is received by the department or commission or postmarked within 21 days after the date of the appeal tribunal decision was mailed to the party's last-known address. The commission shall dismiss any late petition if not timely filed unless the petitioner shows probable good cause that the reason for having failed to file the petition was late timely was for a reason beyond the petitioner's control of the petitioner. If the petition is not dismissed the commission may take action under par. (d).

Brief Summary of Proposed Law Change: The commission proposes language to clarify that the time to appeal a commission decision runs from the date of the commission's decision. This does not change the amount of time in which the commission has authority to set aside its decisions because the commission's decisions are dated and mailed on the same date. Rather, this change clarifies the language and leaves open the option to send commission decisions to the parties other than by mail in the future.

AMEND WIS. STAT. ss. 108.09(7)(a), 108.095(7), and 108.10(4) TO STATE THAT THE APPEAL TIME PERIOD RUNS FROM THE DATE OF THE COMMISSION DECISION/DATE IS THE SAME BUT DECISIONS MAY NOT BE MAILED IN THE FUTURE (effective upon publication):

108.09 (7) JUDICIAL REVIEW. (a) The department or either any party may commence action for the judicial review of a decision of the commission under this chapter after exhausting the remedies provided under this section if the party or the department has commenced such action in accordance with s. 102.23 within 30 days after a the date of the commission's decision of the commission is mailed to a party's last-known address.

108.095 (7) Any party may commence an action for judicial review of a decision of the commission under this section, after exhausting the remedies provided under this section, by commencing the action within 30 days after the date of the commission's decision of the commission is mailed to the department and the last-known address of each other party. The scope and manner of judicial review is the same as that provided in s. 108.09 (7).

108.10 Settlement of issues other than benefit claims.

(4) The department or the employing unit may commence action for the judicial review of a commission decision under this section, provided the department, or the employing unit, after exhausting the remedies provided under this section, has commenced such action within 30 days after such the date of the commission's decision was mailed to the employing unit's last-known address. The scope of judicial review, and the manner thereof insofar as applicable, shall be the same as that provided in s. 108.09 (7).

In an action commenced by an employing unit under this section, the department shall be an adverse party under s. 102.23 (1) (a) and shall be named as a party in the complaint commencing the action.

Brief Summary of Proposed Law Change: Currently, the commission refers to Wis. Stat. s. 102.26 to argue to the courts that costs may not be taxed against the commission. This requires the commission give a lengthy explanation of how appeals of unemployment insurance decisions to circuit court are handled through the worker's compensation statute. This simple clarification in chapter 108 would make that clear for the courts.

AMEND WIS. STAT. s. 108.09(7)(d) TO CLARIFY THAT COURT COSTS MAY NOT BE TAXED AGAINST THE COMMISSION (effective upon publication):

(7) JUDICIAL REVIEW.

(d) Notwithstanding ss. 102.26 (1) and 814.245, upon review of a decision of the commission under this chapter, costs as between the parties shall be in the discretion of the court, but no costs may be taxed against the department or the commission.

Brief Summary of Proposed Law Change: Currently, Wis. Stat. s. 108.22(8)(a) states that the commission has this authority to waive recovery of erroneously paid benefits. Subsection (c) states when the recovery of benefit overpayments can be waived. The commission follows this language, although a likely drafting error omitted its obligation to do so. This change would correct that omission.

AMEND WIS. STAT. s. 108.22(8)(c)2. TO CLARIFY HOW THE COMMISSION WAIVES RECOVERY OF BENEFITS ERRONEOUSLY PAID (effective upon publication):

108.22 Timely reports, notices and payments. (8) (c) 1. The department or the commission shall waive recovery of benefits that were erroneously paid if:

- a. The overpayment was the result of a departmental error; and
 - b. The overpayment did not result from the fault of an employee as provided in s. 108.04 (13) (f), or because of a claimant's false statement or misrepresentation.
2. If a determination or decision issued under s. 108.09 is amended, modified or reversed by an appeal tribunal, the commission or any court, that action shall not be treated as establishing a departmental error for purposes of subd. 1. a.

Chapter 103 LIRC Proposed Changes

Brief Summary of Proposed Law Change: The commission proposes to amend Wis. Stat. s. 103.04(1) to include its responsibility to issue decisions under Wis. Stat. s. 103.06(6)(c), regarding appeals of worker classification compliance enforcement actions. This omission was an oversight when that law was created in 2009 Wis. Act 292. The commission also proposes to clarify that the time to appeal the commission decision to court runs from the date of the commission's decision. This does not change the amount of time in which to appeal the commission's decisions because the commission's decisions are dated and mailed on the same date. Rather, this change clarifies the language and leaves open the option to send commission decisions to the parties other than by mail in the future.

AMEND WIS. STAT. s. 103.04(1) TO CLARIFY THE COMMISSION HAS AUTHORITY TO ISSUE DECISIONS UNDER CH. 103 (s. 103.06)(effective upon publication):

103.04 Labor and industry review commission.

(1) The commission shall issue its decision in any case where a petition for review is filed under ch. 102 or 108 or s. 66.191, 1981 stats., or s. 40.65 (2), 103.06(6)(c), 106.52 (4), 106.56 (4), 111.39, 303.07 (7) or 303.21.

AMEND WIS. STAT. s. 103.06(6)(d) TO STATE THAT TIME PERIODS RUN FROM THE DATE OF THE COMMISSION DECISION/DATE IS THE SAME BUT DECISIONS MAY NOT BE MAILED IN THE FUTURE (effective upon publication):

103.06 Worker classification compliance. (6) (d) The employer or the department may commence an action for the judicial review of a decision of the commission under par. (c) within 30 days after the date of the commission's decision ~~was mailed to the employer's last-known address~~. The scope of judicial review under this paragraph, and the manner of that review insofar as is applicable, shall be the same as that provided in s. 108.09 (7). An order to stop work that is in effect under par. (b) 3. shall remain in effect as provided in par. (b) 3. during the pendency of a review under this paragraph.