



## Legislative Fiscal Bureau

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TO: Members  
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Senate Bill 672: Workforce Development -- Worker Classification Compliance

Senate Bill 672, which would require the Department of Workforce Development (DWD) to establish a system to ensure the proper classification of workers under the state unemployment insurance (UI), worker's compensation (WC), and labor standards laws, was introduced on April 7, 2010, and referred to the Senate Committee on Labor, Elections, and Urban Affairs. The bill was recommended for passage by that Committee on April 15, 2010, by a vote of 5 to 0, and was referred to the Joint Committee on Finance.

SB 672 was developed from the recommendations of the Worker Misclassification Task Force. The task force was established by the Secretary of DWD in October, 2008, and consisted of representatives of labor unions, private sector construction businesses, labor attorneys, and representatives from the state Departments of Commerce, Workforce Development, and Revenue. The task force was charged with examining the problems relating to misclassifying workers and recommending administrative and legislative steps to address those problems. The task force issued a final report in June, 2009.

### **CURRENT LAW**

Under provisions enacted in 2009 Wisconsin Act 28 (the 2009-11 biennial budget act), an employer engaged in the construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing or similar construction projects that, willfully and with intent to evade, misclassifies or attempts to misclassify an individual who is an employee of the employer is subject to fine of \$25,000 for each violation. Similarly, such employers who, willfully and with intent to evade, provide false information to DWD for the purpose of misclassifying, or who willfully misclassifies or attempts to misclassify an employee as a nonemployee under the state UI and WC laws is also subject to a fine of \$25,000 for each violation.

## **SUMMARY OF BILL**

### **Duties of DWD**

SB 672 would require DWD, for purposes of promoting and achieving compliance by employers engaged in construction activities with the specified employment laws through the proper classification of persons performing services for an employer as employees and nonemployees, to do all of the following:

- a. Educate employers, employees, nonemployees, and the public about the proper classification of persons performing services for an employer as employees and nonemployees.
- b. Receive and investigate complaints alleging violations of the requirements for proper classification of employees, or investigate any such alleged violations on its own initiative, and, if the Department found that an employer was in violation of a requirement, order the employer to stop work and pay a forfeiture.
- c. Refer complaints of misclassification of employees as nonemployees to other state or local agencies that administer laws whose enforcement depended on the proper classification of employees.
- d. Cooperate with other state or local agencies in the investigation and enforcement of laws whose enforcement depended on the proper classification of employees.
- e. Appoint attorneys licensed to practice in this state as appeal tribunals to conduct hearings and issue decisions.

### **Compliance Requirements**

For purposes of ensuring that an employer is properly classifying the persons performing services for the employer as employees and nonemployees, DWD would be authorized to require an employer to prove all of the following: (a) that the employer was maintaining records identifying all persons performing work for the employer, including the name, address, and social security number of each of those persons; (b) that the employer was maintaining worker's compensation coverage required for its employees; (c) that the employer had provided to the Department the information required for the state hiring reporting system, directory of new hires, with respect to each newly hired employee of the employer; (d) that the employer was maintaining records of the hours worked by its employees, the wages paid to those employees, any deductions from those wages, and any other information that the employer was required to keep under rules promulgated under state hours of work and minimum wage laws, and was listing deductions from wages as required under state law; and (e) that the employer was in compliance with state UI law provisions. Any agreement between an employer and employee purporting to waive or modify any of these requirements would be void.

## **Compliance Investigations**

DWD would be authorized to conduct investigations to ensure compliance with these requirements. In conducting an investigation, the Department could do any of the following:

a. Enter and inspect any place of business or place of employment and examine and copy: (1) any records that the employer was required to keep under rules promulgated under state minimum wage and hours of work laws; (2) any books, registers, payroll records, records of wage withholdings, records of work activity and hours of work, and records or indicia of the employment status of persons performing work for the employer; and (3) any other records relating to compliance with the worker classification requirements.

b. Determine the identity and activities of any person performing work at any location where the work was being performed.

c. Interview and obtain statements in writing from any employer or person performing work or present at any location where the work was being performed with respect to the names and addresses of persons performing work for the employer, the payment of wages to and hours worked by those persons, and any other information relating to the remuneration of those persons, and the nature and extent of services performed by those persons.

DWD would be authorized to conduct these activities at any location where the work was performed by or for an employer. In addition, the Department could conduct the activities specified under "a" above at any other location where the records were maintained by an employer or an agent of an employer. If, in the course of an investigation of an employer, DWD determined that there was reason to believe that the employer was not the prime contractor of the work being performed by or for the employer, the Department would be required to seek to determine the identity of the prime contractor. If DWD identified any person other than the employer that it believed to be the prime contractor of the work being performed, the Department, for informational purposes, would be required to serve on that person, copies of any stop work and civil penalty notices or orders (described below) served on the employer with respect to the work. Failure of DWD to serve a copy of a notice or order on a person believed to be a prime contractor would not relieve the employer from any liability arising out of the notice or order, or impair the Department from pursuing any remedy relating to the notice or order.

## **Stop Work Orders and Civil Penalties**

If, after an investigation, DWD determined that an employer failed to demonstrate compliance with any of the worker classification requirements, the Department could serve on the employer a notice of the Department's intent to issue an order requiring the employer to stop work at the locations specified in the notice. The notice would be required to advise the employer that the order would be issued within three business days after the date of the notice unless, within those three business days, the employer provided information satisfactory to the Department that indicated that the employer was in compliance with worker classification requirements at each

location specified in the notice.

If within three business days after service of a stop work notice, an employer did not demonstrate compliance with the worker classification requirements with respect to a location specified in the notice, DWD would be authorized to serve an order on the employer requiring the employer to stop work at the locations specified in the order. The order would have to advise the employer that the employer could request a hearing on the order, describe how the employer could request a hearing, and be accompanied by a form for requesting a hearing. The order would take effect as provided in the order, and would remain in effect until the employer provided evidence satisfactory to the Department that it was in compliance with the worker classification requirements and the employer paid the required forfeiture.

An employer that did not stop work as required under an order could be required to forfeit \$250 for each day, beginning on the day on which the order was served and ending on the day on which the employer provided evidence satisfactory to DWD that it had stopped work as required under the order, or was in compliance with worker classification requirements, whichever occurred first. An order would be final unless appealed, and would be subject to review only as provided under the provisions of the bill, and not under state administrative law provisions.

### **Appeals of Stop Work Orders and Civil Penalties**

Any employer that was aggrieved by an order to stop work could appeal the order by filing with DWD a written request for a hearing to review the order within 10 days after service of the order. If a request for a hearing was filed within those 10 days, the Department would be required to hold the hearing within 14 days after receipt of the request. The order to stop work would be automatically stayed from the filing of the request for a hearing until the date on which a decision on the appeal was issued. During the stay of the order to stop work the forfeiture would continue to accrue.

The hearing would be required to be held before an appeal tribunal and conducted in the manner provided under the state UI law. Within seven days after the hearing, the appeal tribunal would have to issue a decision in writing affirming, reversing, or modifying the order to stop work and the forfeiture. If the appeal tribunal found that the employer had, at all times, been in compliance with the worker classification requirements, the appeal tribunal would be required to reverse the order to stop work and the forfeiture. However, if the appeal tribunal found that the employer had not complied with the worker classification requirements, the automatic stay would be lifted, and the order to stop work would remain in effect until the employer provided evidence satisfactory to DWD that the employer was in compliance with the worker classification requirements, and the employer paid the forfeiture. A decision of an appeal tribunal would be final, unless a review of the decision was requested. A decision of an appeal tribunal would be subject to review only as provided in the provisions of the bill and not as provided under state administrative law provisions.

The employer or DWD could request a review of an appeal tribunal's decision by petitioning

the Labor and Industry Review Commission (LIRC) for review of the decision within 21 days after the decision was mailed to the employer's last-known address. LIRC would be required to conduct the review in the manner provided under the state UI law for settlement of benefit claims. An order to stop work that was in effect would remain in effect during the pendency of a review. A decision of LIRC would be final, and the provisions of the state UI law related to LIRC review of appeal tribunal decisions and judicial review would apply to the decision, unless judicial review of the decision was requested under the judicial review provisions included in the bill (described below). A decision of LIRC would be subject to judicial review only as provided under the provisions of the bill and not as provided in state administrative law. The employer or DWD would be authorized to commence an action for judicial review of a decision of LIRC within 30 days after the decision was mailed to the employer's last-known address. The scope of judicial review, and the manner of that review insofar as was applicable, would be the same as that provided under the state UI law for judicial review.

An order to stop work that was in effect would remain in effect during the pendency of a judicial review. In addition to any forfeiture for which the employer was liable, and any other penalty for which the employer was liable for a violation of a worker classification requirement, any employer that violated a final order to stop work of the Department, or final decision of an appeal tribunal, LIRC, or a court affirming such an order, would be subject to a forfeiture of \$1,000 for each day of violation. An employer could seek review of a forfeiture imposed in the same manner as an order to stop work would be reviewed under the provisions of the bill.

### **Other Enforcement Action Not Precluded**

An investigation, order, or decision under the bill would not preclude or otherwise impair or affect any other action that was required or permitted to enforce a requirement under the state laws for regulation of industry, safety, and buildings, WC, minimum wage, UI, wage payments and claims, employment regulations, and employment relations: including any investigation, order, or decision; any civil or criminal action or administrative proceeding; or any obligation for any payment, reimbursement, assessment, surcharge, forfeiture, or other remedy or penalty under any of those laws.

### **Recovery of Unpaid Forfeitures**

If an employer failed to pay a forfeiture imposed for violation of the worker classification provisions, DWD would have a perfected lien upon the employer's right, title, and interest in all of its real and personal property located in Wisconsin in the amount finally determined to be owed, plus costs. Except when creation of a lien was barred or stayed by bankruptcy or other insolvency law, the lien would be effective when the stop work order or decision affirming the stop work order became final, and would continue until the amount owed, plus costs and interest to the date of payment, was paid. The employer would be required to pay interest on the amount owed at the rate of 1% per month or fraction of a month from the date on which the amount became due. If a lien was initially barred or stayed by bankruptcy or other insolvency law, the lien would become effective immediately upon expiration or removal of the bar or stay. The perfected lien would not

give the Department priority over any lien-holders, mortgagees, purchasers for value, judgment creditors, or pledges whose interests had been recorded before the lien of the Department was recorded.

If an employer failed to pay to DWD any amount found to be due the Department in proceedings, and if no proceeding for review was pending, and the time for taking an appeal or review had expired, DWD or any authorized representative of the Department would be authorized to issue a warrant directed to the clerk of circuit court for any county of the state. The clerk of circuit court would be required to enter in the judgment and lien docket the name of the employer mentioned in the warrant and the amount of the forfeiture, interest, costs, and other fees for which the warrant was issued and the date when the warrant was entered. A warrant so entered would be considered in all respects to be a final judgment constituting a perfected lien upon the employer's right, title, and interest in all real and personal property located in the county where the warrant was entered. The lien would be effective when DWD issued the warrant, and would continue until the amount owed, including interest, costs, and other fees to the date of payment, were paid.

After a warrant was entered in the judgment and lien docket, DWD, or any authorized representative of the Department, could file an execution with the clerk of circuit court for filing by the clerk of circuit court with the sheriff of any county where real or personal property of the employer was found, commanding the sheriff to levy upon and sell sufficient real and personal property of the employer to pay the amount stated in the warrant in the same manner as upon an execution against property issued upon the judgment of a court of record, and to return the warrant of DWD, and pay to the Department the money collected by virtue of the execution, within 60 days after receipt of the warrant.

The clerk of circuit court would be required to accept, file, and enter each warrant, satisfaction, release, or withdrawal in the judgment, and lien docket without prepayment of any fee. However, the clerk of circuit court would be required submit a statement of the proper fee semiannually to DWD covering the period from January 1 to June 30, and July 1 to December 31, unless a different billing period was agreed to between the clerk of circuit court and the Department. The fees would then have to be paid by DWD, but the court fees provided for entering the warrants would be required to be added to the amount of the warrant and collected from the employer when satisfaction or release was presented for entry.

When the penalties set forth in a warrant together with interest and other fees to the date of payment, and all costs due DWD were paid to the Department, the Department would be required to issue a satisfaction of the warrant and file that satisfaction with the clerk of circuit court. The clerk of circuit court would be required to immediately enter a satisfaction of the judgment on the judgment and lien docket. The Department would have to send a copy of the satisfaction to the employer.

If DWD found that the interests of the state would not be jeopardized, the Department, upon such conditions as it could exact, would be authorized to issue a release of any warrant with respect to any real or personal property upon which the warrant was a lien or cloud upon title. The clerk of

the circuit court would be required to enter the release upon presentation of the release to the clerk. Payment of the fee for filing the release and the release would be conclusive proof that the lien or cloud upon the title of the property covered by the release was extinguished. If DWD issued an erroneous warrant, the Department would be required to issue a notice of withdrawal of the warrant to the clerk of circuit court for the county in which the warrant was filed. The clerk would be required to void the warrant and any liens attached by the warrant.

### **Levy for Delinquent Forfeitures**

If any employer who was liable for any forfeiture neglected or refused to pay that forfeiture after DWD made demand for payment, the Department would be authorized collect that forfeiture and expenses of the levy, by levy upon any property belonging to the employer. The statutory levy provisions of the state UI law would generally apply except as follows: (a) "debt" would mean a delinquent forfeiture under the provisions of the bill, or any liability of a third party for failure to surrender to DWD property or rights to property subject to levy after proceedings to determine that liability; and (b) UI provisions related to an exemption from levy for wages in the case of forfeitures would apply.

### **Definitions and Effective Date**

The definition of "employee" for the purposes of compliance with specific worker classification provisions would be cross referenced to the definition of employee under the state employment law relevant to the requirement. The state laws that would be cross referenced include UI, WC, employment regulations (labor standards laws), and minimum wage. Similarly the definition of "employer" would be cross-referenced to the same relevant laws. "Employers" subject to the new provisions would only include those engaged in the activities covered by the Act 28 requirements (construction of roads, bridges, highways, sewers, water mains, utilities, public buildings, factories, housing, or similar construction projects). "Business day" would mean any day on which the offices of DWD were open.

The provisions of the bill would take effect on January 1, 2011.

### **FISCAL EFFECT**

DWD estimates that it would require four investigators to implement the provisions of SB 672. The investigators would visit worksites and offices of employers of construction workers that DWD had reason to believe were misclassifying employees as independent contractors. The Department would issue stop work orders where employers were found to be out of compliance with worker classification requirements. The Department estimates that the investigation workload would also require 0.5 support position, 0.33 attorney position to represent DWD in appeal hearings, 0.33 administrative law judge position to hear and decide appeals, and 0.25 legal secretary position. Total annual costs for the 5.42 positions would be \$449,100, of which \$323,000 would be for salary and fringe benefits and \$126,100 would be for other costs, including rent, travel, supplies, computers, telephones and agency overhead.

SB 672 does not provide DWD with additional funding or positions to administer the worker classification law. DWD indicates that funding would be provided by the federal UI administrative grant for all or some of program costs. If necessary, additional funding would be sought. Possible sources would include a supplemental budget request to the U.S. Department of Labor for federal program integrity funding, possible federal funding for worker classification compliance, and state funding sources.

SB 672 would impose a \$250 per day forfeiture on an employer that did not stop work after a DWD stop work order was issued, until the employer complied with worker classification law provisions. In addition, an employer that violated a final order to stop work, or a final decision of an appeals tribunal, LIRC, or a court would be subject to a fine of \$1,000 for each day of violation. Revenue generated from the forfeitures and fines would be placed in the common school fund of the general fund. DWD indicates that the additional revenue generated from these forfeitures and fines is indeterminable. The amount of additional UI contributions and benefit payments that would result from proper classification of employees would be dependent on the employer's business and employment practices, and responses by workers and employers.

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