Department of Workforce Development

Proposed Rules Relating to Unemployment Insurance and Temporary Help Employers

Chapter DWD 133/CR06-032

Public Hearing Summary

A public hearing was held in Madison on May 1, 2006.

The following individuals commented in support or registered support for the proposed rules:

1. Ray Odya, Director of Human Resources & Legal Affairs
   Seek Careers/Staffing
   Grafton
   (Also representing Wisconsin Association of Staffing Services)

2. David Cornwell, President
   Cornwell Staffing Services
   Milwaukee

3. Troy Hartman
   FirstSite Staffing
   Hudson
   (with one suggested modification)

4. Melissa Manley, Human Resource Supervisor
   QPS Companies
   Brookfield

5. Bobbi Curtis, Human Resource Manager
   QPS Companies
   Brookfield

6. David Silverberg, Management
   QualiTemps, Inc.
   Madison

7. MaryLynn Shirshac, Safety and Compliance Supervisor
   QualiTemps, Inc
   Madison

The following individual requested modifications to the proposed rules:

William Sample

Attorney at Law
Madison

Comment Summary and Department Response

Ray Odya, Seek Careers

- I support the proposed rule. Employees should not be able to refuse work that they initially said they would and could do and still be eligible to collect unemployment benefits.
- The employee agrees when applying to accept a stated range of assignments, pay rates, shifts, and locations. It is on that basis that the temporary help company accepted their application. There is also mutual understanding that employment is intermittent and there will often be a brief time of unemployment between assignments.
- The evolution of this proposed rule goes back to meetings with DWD staff in 1993. The issues has been discussed at length with the UI Advisory Council. The Advisory Council has stood steadfast on this issue even when threatened with a suspension of federal FUTA dollars totaling nearly $1 billion. Both employee and management representatives have endorsed the idea of a joint contract of hire to which both parties are bound and which encompasses the intermittent nature of the assignments in our industry. The department has issued administrative directives, but these directives have not been followed by all administrative law judges.

Department response: The comment displays general support for the approach taken by the Department in the proposed rule.

Troy Hartman, FirstSite Staffing

- I am in support of the majority of this proposal.
- I think DWD should explain the rules to the claimant when they first sign up for unemployment insurance. I have lost many great employees because they felt cheated or misled when they were disqualified for benefits for turning down a temp job. The proposed rules are fair and reasonable as long as everyone is aware of the rules. I do not feel that is should be the responsibility of the employment agency to communicate to each and every stipulation to every employee on our time and at our expense.

Department response: The comment does not meet the substance of the proposed rule, yet asserts support for it.

William Sample, Attorney at Law

Mr. Sample's comments and attachments are 26 pages long. A copy is attached.

Requested modifications:

1. Put in "good cause" exceptions for the otherwise-disqualifying situations listed in s. DWD 133.02 (3) (a).
2. Add a provision to the rule expressly recognizing that the so-called labor standards provisions, 26 U.S.C. 3304(a)(5)(B) and s. 108.04(9)(b), Stats., are applicable to subsequent assignments (and not just first ones) from temporary help employers to their employees.

Rationale for requesting modification to allow good cause exceptions:

- The proposed rule places great emphasis upon a temporary employee's contractual agreement to certain conditions of employment. This raises the issue of procedural unconscionability. Procedural unconscionability bears upon factors related to the meeting of the minds of the parties to the contract: age, education, intelligence, business acumen and experience, relative bargaining power of the parties, and whether the terms were explained to the weaker party.
  - Temporary help employer has more business acumen and experience and superior bargaining power than prospective employee.
  - This superior position is strengthened by the access that the industry has had to both DWD and the UI Advisory Council (UIAC).
    - August 6, 1998 letter from president of Cornwell Staffing to Greg Frigo, then Director of Bureau of Legal Affairs for UI. Letter discusses meeting with UI staff and preparing agenda.
    - UIAC records show significant, ongoing access.
  - Temporary help employees had no such access.
- Greater bargaining power, along with other advantages employers have over employees, necessitate that a rule provide some protection for employees and the proposed rule does not.
- Because the proposed rule does not provide protection for employees, the contractual provisions it envisions could be substantively unconscionable as well, that is unreasonable as applied to a temporary help employee.
- Proposed rule should have a "good cause" provision for refusal of an assignment for each of the scenarios that proposed s. DWD 133.02 (3) (a) defines as a quit of employment.
  - DWD's analysis of adjacent states indicates that Minnesota, Iowa, and Illinois each have good cause provisions.
  - Example from a LIRC case: EE can work first or second shift when she begins employment because ex-partner has physical custody of their children. She does some second shift work and then works only first shift assignments for approximately one year and, in the interim, obtains custody of her children. She can no longer work second shift because she needs to be home with them in the evenings. The proposed rule would treat a

refusal of second shift work as a quit while UI laws and rules currently in place generally do not require that a UI claimant be available for second or third shift work as a condition of eligibility. The disqualification in the proposed rule is grossly unfair to the employee, and it would be avoided by a good cause provision.

- If an employee had private transportation at the time of the original contract of employment and then loses that transportation due to accident or breakdown, the employee remains bound by the original agreement unless the employer agrees to modification of that provision. In this context, the proposed rule essentially places in the hands of the employer determination of the employee's eligibility for unemployment insurance.

<u>Rationale for requesting modification so rule expressly recognizes that the labor standards provisions are applicable to subsequent assignments and not just the first one:</u>

- 26 U.S.C. 3304(a)(5)(B) requires states to adopt a law that provides that UI may not be denied for refusal of new work if the wages, hours, or other conditions of the work offered are "substantially less favorable to the individual than those prevailing for similar work in the locality." Wisconsin has adopted this provision at s. 108.04 (9) (b), Stats.
- Federal Dept. of Labor (DOL) and the State agree that the labor standards provision applies to new offers of work from a temporary help employer but disagree on whether it applies to subsequent offers.
- State position is laid out in *Cornwell Personnel Associates v. LIRC*, 175 Wis. 2d 537 (Ct. App. 1993) (hereinafter *Cornwell*). The court held that subsequent assignments from a temporary help employer were not new work within the meaning of s. 108.04 (9) (b), Stats. This means a temporary help employee does not have cause to refuse a subsequent assignment even if the work offered does not meet prevailing labor standards.
- DOL has disputed the State's position.
  - 7/17/94 DOL letter to DWD UI Division in response to notification of *Cornwell* decision.
    - Purpose of labor standards law is to prevent depression of conditions of employment below those prevailing in the locality. Purpose not accomplished if new assignments by temporary help firm were not subject to the labor standards law.
    - An assignment from a temporary help agency would be new work if it changed job duties, number of hours worked per day, or wages.
  - 8/17/98 Formal DOL Program Letter 41-98 to States on Application of the Prevailing Conditions of Work Requirement
    - Released in part due to increase in temporary workers.
    - "A refusal of temporary work in the form of a new assignment from a temporary help firm is also subject to the prevailing conditions requirement."
    - "No contract granting the employer the right to change working conditions may act as a bar to determining that 'new work' exists."

- 7/19/2000 Change to DOL Program Letter 41-98
    - Changes in a job situation would have to be material for the subsequent assignment to be considered new work.
    - Examples of material changes include a change from $10 per hour to $8 per hour or an assignment as a secretary to an assignment as an accounting clerk. It is immaterial whether there is a break between assignments.
- 3/15/01 DOL letter to DWD UI Division
    - Both regional and national offices of DOL have discussed issue of application of prevailing conditions of work requirement repeatedly with DWD and DOL's position remains the same.
    - Failure to move on issue could result in conformity proceedings for failure to comply with requirements of 26 U.S.C. 3304(a)(5)(B).
- 5/31/01 DOL letter to DWD UI Division
    - When employer materially changes the condition of work, an offer of "new work" exists. "New work" is not, as the *Cornwell* court stated, limited to indefinite lay-offs. Federal law does not permit temporary help agencies to be treated any differently in this regard than other employers.
    - Failure by Wisconsin to enact legislation conforming with the federal position on what constitutes new work in the temporary employment context "will lead to conformity proceedings."

- DOL pronouncements are "interpretive rules" under the Administrative Procedure Act and under *Barnhart v. Walton*, 535 U.S. 212, 221 (2002) are entitled to judicial deference.
- It is one thing for DWD to ignore this law because they believe they are bound by the *Cornwell* decision. It is another to affirmatively enact an administrative rule in violation of that law.

Department response:

The "good cause" exceptions suggested by the comment are contrary to existing law and policy applicable to employees generally. The comment cites hypothetical cases of employees whose restrictions (childcare-related or transportation restrictions) arise during the course of employment and prior to employer's offer. Such circumstances are personal to the employee and not "good cause attributable to the employer" and thus do not constitute and exception to a voluntary separation from employment. The Department does not believe there is reason to create a special exception for temporary employment of the sort the comment seeks.

The Department disagrees with the notion that employers have any greater "access" than employees to either the Department of to the Unemployment Insurance Advisory Council (UIAC). Access to the UIAC is afforded to the public through regular public meetings. The UIAC consists of equal numbers of employee and employer representatives. Consideration and development of the rule

have occurred in an open and fair manner over a very lengthy period of time, during which the opportunity for input to the process was equally available to employees and their representatives. The fact that access to the Department is or was made by the public through direct communications to the Department does not mean that access favors any particular interest. The Department does not believe that employees have been disadvantaged by the process.

The comment correctly asserts that "new work" triggers the application of labor standards. However, the Wisconsin Court of Appeals in *Cornwell Personnel Associates v. LIRC*, 175 Wis. 2d 537 (1993) held that a temporary employer's offer of a second of subsequent assignment is not "new work" where the assignment is within the terms of the employee's contract.

The commenter contends *Cornwell* can be safely ignored by the Department and notes the record of objection to *Cornwell* by the U.S. Department of Labor. The comment suggests that the Department ought not to follow *Cornwell* and that continuing to follow *Cornwell* will subject the State of Wisconsin to legal proceedings by DOL to force conformity with DOL's position regarding its definition of "new work" in the temporary employment context.

Notwithstanding DOL's contrary interpretation of the term "new work," the Department considers itself bound by the decision in *Cornwell*. DOL has not formally interpreted "new work" but has instead merely issued informal opinions and Unemployment Insurance Program Letters (UIPLs), which do not necessarily contain legally correct interpretations and ordinarily do not have the force of formally promulgated rules. It appears that there is no judicial authority on the issue other than the *Cornwell* decision.

In response to a letter from Wisconsin Governor Scott McCallum on July 27, 2001, in support of the *Cornwell* decision, DOL promised to review the matter. In addition, the Department notified DOL of its intention to promulgate the proposed rule on temporary help employers. In response, DOL acknowledged in January 2005 that its "review" of the *Cornwell* matter remained undone. DOL has not otherwise acted in the matter. Thus the threat of "conformity proceedings" has not been realized. More importantly, the Department believes it is not only proper that it follow *Cornwell*, but, in the absence of legislation overruling *Cornwell*, it is required to follow it. It is far from clear that the State has not conformed to federal law. Indeed, under the circumstances, one view is that *Cornwell* insulates the State from nonconformity.

Furthermore, the proposed rule neither alters nor affirms the specific analysis of what constitutes "new work." Rather, the proposed rule establishes with greater precision and clarity the conditions under which employment either continues or ends following the end of an initial assignment. The rule addresses the actions required of the employer and employee, respectively. The Department believes that the proposed rule properly accounts for the unique circumstances involved in temporary

employment. The rule balances the competing interests of temporary employers and employees in the manner in which it determines the issue of termination of the temporary employment relationship.