

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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Changes to Wisconsin Unemployment Benefits

The Boardman Clark Labor & Employment Team previously [reported](#) on some pending changes to Wisconsin unemployment benefits. Developments in recent days have now clarified the scope and implementation of some of these changes.

This article will cover the following changes affecting Wisconsin unemployment benefits:

- Increased duration and amount of benefits due to the federal CARES Act;
- Elimination of the one-week waiting period for benefit eligibility;
- Changes to how unemployment benefits related to COVID-19 will be attributed to employers; and
- Changes to the state workshare program.

INCREASE IN BENEFIT AMOUNT

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) increased the amount of weekly unemployment benefits by \$600 for each benefit claimant. These additional benefits are funded entirely by the federal government. This \$600 increase in benefits is not prorated. Therefore, so long as a claimant is eligible for the state minimum benefit of \$54 dollars per week, the claimant will receive an additional \$600 per week for a total weekly benefit of \$654. Similarly, if a claimant is eligible for the maximum state benefit of \$370 per week, the claimant will receive an additional \$600 per week for a total weekly benefit of \$970.

Because individuals are able to receive \$600 on top of their normal weekly state unemployment benefits, this dramatic increase in weekly benefits might have some unintended consequences. For example, an employee making the minimum wage of \$7.25 an hour and working 40 hours a week would receive only \$290 a week in wages. If that employee were terminated or laid off by his/her employer, the employee would receive his/her regular state weekly unemployment benefits plus \$600, which would be more than double what the employee would earn through employment.

Employers should remember, however, that employees who voluntarily quit their employment are generally not eligible for unemployment benefits, and thus would not be eligible for the extra \$600. Similarly, employees who are terminated due to misconduct or substantial fault are not eligible for unemployment benefits. Employers can continue to enforce their job performance and conduct rules and can still challenge employees' eligibility for unemployment benefits on the basis of voluntary termination, substantial fault, or misconduct.

Under these unique circumstances where terminations of employees may be "cushioned" by the enhanced unemployment benefits, employers may give more than usual consideration to implementing

terminations. There are several reasons employers should be cautious about terminations, however. First, many employers still have work that needs to be performed and terminating too many workers might cause a disruption to the employer's short-term and long-term operations. Second, employers who receive Paycheck Protection Program (PPP) loan funding and plan to seek forgiveness of that loan must maintain certain payroll levels. Employers whose workforce numbers fall below certain thresholds might lose their eligibility for loan forgiveness. Finally, any time an employer terminates an employee, even if the employer believes that it financially benefits the employee, the employer risks discrimination allegations and other claims related to the employee's termination.

The Wisconsin Department of Workforce Development (DWD) stated that the additional \$600 in weekly unemployment benefits will start being issued during the week of April 26, 2020. These benefits will be retroactive to April 4, 2020 and will continue through the week ending July 25, 2020. Claimants who have already been deemed eligible for unemployment benefits by DWD do not need to take additional action to receive the extra \$600 per week. New potential claimants must complete DWD's regular unemployment benefit application form.

EXPANSION OF ELIGIBILITY PERIOD

The CARES Act expanded the eligibility period for unemployment benefits from 26 weeks to 39 weeks. The additional 13 weeks of benefits are paid out at the level of the employee's regular state unemployment benefit and do not include the additional \$600 per week for any weeks after July 25, 2020. This expanded eligibility period will last until the week ending on December 26, 2020 or until the employee has used up all 39 weeks of eligibility, whichever is sooner.

RELAXED JOB SEARCH REQUIREMENTS

On March 18, 2020, Governor Evers issued Emergency Order #7. This order states that an unemployment benefits claimant shall be deemed "available for suitable work" during the state public health emergency if the claimant is perceived by an employer as exhibiting COVID-19 symptoms which prevent him/her from returning to work, or if the claimant is quarantined by a medical professional or under governmental order if one of the following applies:

1. The employer has instructed the claimant to return to work after the employee no longer exhibits symptoms, after a set amount of time to see if the disease is present, or after the quarantine is over.
2. The employer has not provided clear instruction for the claimant to return to work.
3. The claimant would be available for other work with another employer but for the perceived COVID-19 symptoms preventing a return to work or a qualifying quarantine directive.

Additionally, individuals receiving unemployment benefits are not required to perform work search actions during the period of the state public health emergency.

Even in light of that order, employers should be aware of the following:

- An employee who is sick and unable to work is not eligible for unemployment benefits.
- An employee who imposes a "self-quarantine," without the advice or order of a medical professional or the government, is not eligible for unemployment benefits.
- An employee who has refused an offer of work from a former employer (such as a "recall" from layoff or furlough) will likely no longer be eligible for unemployment benefits, provided that this information is brought to the attention of the DWD.

SELF-EMPLOYED CLAIMANTS

The CARES Act provides unemployment benefits to self-employed individuals, certain independent contractors, individuals with limited recent work history, and other workers who are not normally eligible for unemployment benefits. DWD will begin taking applications from these individuals during the week of April 21st. These benefits are retroactive to the week ending February 8, 2020 or to the first week an individual is out of work due to COVID-19, whichever is later. The last payable week for these benefits is the week ending December 26, 2020. DWD is working to provide additional information on these benefits on its [website](#).

ELIMINATION OF THE ONE-WEEK WAITING PERIOD

On April 15, 2020, Governor Evers signed 2019 Wisconsin Act 185 into law. Among other provisions, this law eliminates the one-week waiting period that claimants must usually wait in each benefit year before they can receive unemployment benefits. This provision is retroactive to benefit years that began after March 12, 2020. This provision will no longer apply for benefit years that began on or after February 7, 2021.

Under the CARES Act, the federal government will reimburse states for the full cost of unemployment benefits during this initial week, so this first week of unemployment benefits will not be attributed to the employer—regardless of the reason an employee qualifies for unemployment benefits.

ATTRIBUTING BENEFITS TO EMPLOYERS

2019 Wisconsin Act 185 also changed DWD's procedure for attributing benefits to employers. For benefit weeks occurring after March 12, 2020 and before December 31, 2020, unemployment claims will generally not be attributed to an employer's unemployment account if DWD determines that these claims are related to the state public health emergency.

DWD has not yet provided guidance regarding how it will determine if a claim is related to the state public health emergency. At a minimum, employers must timely state to DWD that a claim is related to the state public health emergency in order for these claims not to be attributed to the employer's unemployment account. The result of this change is that private employers will not see an increase in their unemployment tax rates as a result of increased unemployment claims that DWD determines are related to the state public health emergency. Reimbursable employers (who reimburse DWD dollar for dollar for unemployment benefits), including most public employers, will not have to reimburse DWD for such benefits.

For private employers, instead of attributing these benefits to specific employers and adjusting employers' unemployment tax rates based on claims history, these benefits will be attributed to the state's reserve fund. For reimbursable employers, DWD will not charge these employers for such benefits, but will instead charge these benefits to other state funds.

The new state law requires DWD to take steps to seek the maximum amount of funding from the federal government so that all private Wisconsin employers can remain at the lowest overall unemployment tax rate established by federal law through the end of 2021. A private employer's individual tax rate will still be subject to increases based on claims history.

However, even with increased federal funding, it is possible that Wisconsin's reserve fund will run low. If that occurs, there is a possibility that all private Wisconsin employers might see their unemployment tax rates increase in order to replenish the state reserve fund. Potentially, the Wisconsin legislature could take additional action to add money to the reserve fund to prevent this from occurring, but that will require future legislative action.

CHANGES TO THE WORKSHARE PROGRAM

2019 Wisconsin Act 185 also made significant changes to the state's workshare program. The state workshare program is designed to help both employers and employees by allowing employers to reduce

hours for employees and still enable those employees to receive certain amounts of unemployment benefits to offset the loss of income from the reduced hours. The recent changes to the law have eliminated some of the previous restrictions on participation in a workshare program. Employers seeking to take the advantage of the workshare program must submit a workshare plan to DWD for approval. Another advantage of a workshare program is that it potentially enables employees to remain eligible for employer-provided health insurance.

Employers contemplating large-scale layoffs or hour reductions should watch for more information from DWD on changes to the workshare program and consult with legal counsel regarding whether this program is a viable option. Along with other considerations, employers receiving PPP loan funding and seeking loan forgiveness have to consider whether any reduction in hours under a workshare program might jeopardize their eligibility for loan forgiveness. Employers should also keep in mind that employees who remain scheduled to work, even at reduced hours, would generally be eligible for paid leave for qualified events under the Families First Coronavirus Response Act (FFCRA).

CONCLUSION

The state unemployment system is a crucial resource for both employers and employees during this unprecedented pandemic. Employers should be aware of the potential effects these recent changes to the state unemployment system will have on their businesses, particularly employers considering reductions in hours, layoffs, or terminations and employers who have already taken such actions.

The Boardman Clark Labor & Employment Team is here to assist employers as they navigate challenging employment decisions implicating the unemployment system.

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