

LEGAL ACTION OF WISCONSIN

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TO: Assembly Committee on Workforce Development
FROM: Abby Bar-Lev Wiley, Legislative Director, Legal Action of Wisconsin
RE: Impact of AB 938/SB 932 on Legal Action's Clients
DATE: February 8, 2022

Thank you for the opportunity to provide comments on AB 938/SB 932. Legal Action of Wisconsin (LAW) is the largest non-profit law firm providing high-quality, free civil legal aid to low-income people in 39 of Wisconsin's southern counties. Our broad reach and expertise mean that we see what poverty looks like over a wide swath of the state, from urban and rural areas, from farmworkers to construction workers. One of our priority areas focuses on helping clients secure and maintain the government benefits necessary to meet their most basic needs including food, shelter, health, and income. Legal Action has serious concerns about how AB 938/SB 932 would impact our low-income clients.

Requiring more audits will not uncover fraud but will hurt low income individuals

The process of applying for unemployment benefits and understanding the unemployment insurance requirements is often confusing and difficult to navigate. Already existing barriers in the unemployment system became even more apparent during the pandemic as newly unemployed Wisconsin workers struggled to access the unemployment system and understand the filing requirements—but could not receive or guidance in doing so. Unemployed workers want to complete their unemployment insurance applications correctly and need timely help in completing applications or timely feedback when an application is missing certain information.

Wisconsin's current unemployment requirements are already especially burdensome to Legal Action of Wisconsin's migrant and seasonal farmworker clients. Wisconsin's agricultural economy depends on the seasonal flow of migrant farmworkers into the state. Legal Action's migrant and seasonal farmworker clients are not usually computer literate, often lack easy access to technology, and face language barrier issues in accessing benefits and communicating with DWD. The process of applying for unemployment insurance benefits, particularly the work-search requirements, are often confusing and difficult to navigate. In the past, many migrant and seasonal farmworkers received overpayment penalties because of improperly completed work searches. Farmworkers were not trying to commit fraud, but because they were trying to navigate a complex system with little support, they were often confused about the requirements. In nearly all of these overpayment cases, clients asked us "why didn't someone tell me I was doing anything wrong until now?"

Additional filing assistance or timely feedback during the weekly claim filing process could have prevented these overpayments from occurring. It is assistance, not audits, that would prevent application errors caused by misunderstandings regarding unemployment insurance requirements

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or errors in completing the application.¹ Similarly, a story circulated in the news² about a woman who received a one-time \$300 check from a dance class she had taught in the past. At the time she received the check, she was receiving unemployment insurance. Months later, after she found a new job, she received a notice from DWD accusing her of fraud and demanding that she pay back \$4,851, which constituted all of her unemployment benefits with a 40% fine for fraud. The investigation did not catch someone who was fraudulently trying to take advantage of the system. She had simply made a mistake. Legal Action understands from our experience that increasing audits of unemployment claims or work search actions will not necessarily find people who are trying to commit fraud.

Increasing audits also does not help people find family-sustaining employment. Rather, it opens the door for more low-income workers and families to be punished for simply being confused. Many of our farmworker clients are still recovering—mentally, emotionally, and financially—from the increase in work search audits in 2016 that left them in precarious economic situations. An audit of at least 50% of unemployment work-search actions would be a tremendous administrative burden that DWD is unlikely to be able to conduct without new or additional funding streams. More resources devoted to audits means fewer resources devoted to staff that could educate claimants and prevent overpayments from occurring. More resources devoted to audits also would mean fewer resources available to help claimants connect with meaningful job training and employment opportunities.

Identity proofing

AB 938/SB 932 would require DWD to implement new, technology-driven identity-proofing measures for unemployment insurance applicants. Legal Action has serious concerns about how this might impact our clients. Facial recognition technology is increasingly being proposed by states for unemployment insurance identity verification, but the technology is flawed and could significantly negatively impact our clients, particularly Black clients or clients of color. A federal agency researching facial identification technology during the Trump Administration found that the technology is less accurate when identifying people of color, particularly people who are Black, Asian, or Native American.³ Moreover, the technology is unregulated, with no laws governing its use or providing oversight. If this type of technology is used to verify identity for unemployment insurance, it is almost certain that there will be some eligible applicants will be wrongfully denied benefits due to errors with the identity verification system.

¹ Srebel Erica, Wisconsin Law Journal Article, *Migrant workers tripped up by new work search rules, slapped with fraud* (Nov 22, 2017), <https://wislawjournal.com/2017/11/22/migrant-workers-tripped-up-by-new-work-search-rules-slapped-with-fraud/>

² Amanda St. Hilaire, *Fraud or mistake? Claimants Say Unemployment System Punishes Confusion*, Fox6 News (Dec. 2, 2020), <https://www.fox6now.com/news/fraud-or-mistake-claimants-say-unemployment-system-punishes-confusion>.

³ Chad Boutin, News Release, U.S. Dept of Commerce, Natl Inst. of Standards & Technology, *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software* (Dec. 19, 2019), <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>.

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New administrative burdens would leave applicants in a lurch

This bill proposes additional burdens on unemployment insurance administration than DWD is likely to be able to handle. As a result, rather than improving the unemployment system to make it more efficient and more accessible for low-income people like our clients, AB 938/SB 932 would likely create new and significant delays administering benefits. Many of Legal Action's clients waited months to receive benefits due to DWD administrative delays and errors, particularly clients who face language access barriers. These bills do not propose any new or additional funding streams for DWD to manage the increased workload proposed in the bills, it merely allows the transfer of other-agency employees to DWD while making DWD pay the temporary employees' salaries.

Transferring employees from other agencies to DWD does not resolve the administrative burden felt by the DWD Unemployment Insurance (UI) Division. During the pandemic, DWD transferred employees from other DWD divisions to the UI Division to help manage the workload. Yet even with the transfers, clients' unemployment insurance benefits are still facing delays. For example, we know of at least one client who applied for benefits in March 2020, has been determined to be eligible for those benefits, but has still not received a single dime in unemployment insurance benefits. Additionally, when someone is employed for one job and then transferred to a different job, this often means that no one is completing the duties of the job they were originally hired to do. For example, Legal Action has farmworker clients who filed wage theft claims with DWD's Equal Rights Division over a year ago that are still unresolved because there is a shortage of ERD staff to investigate claims. Asking employees from other agencies across the Executive Branch to temporarily transfer to DWD does not solve underlying issues and leads to problems in other areas of government. Without additional funding to pay for the transferees' salaries, DWD's budget would also be stretched even thinner, and our clients would be the ones impacted.

Changes to the definition of misconduct are unnecessary

With the exception of the removal of intent and permanency from the provision relating to deprivation of the employer of its property, the other proposed changes to the definition of misconduct in AB 938/SB 932 are already acts that would be considered misconduct, as misconduct is defined as:

one or more actions or conduct evincing such *willful or wanton disregard of an employer's interests* as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employer's interests, or of an employee's duties and obligations to his or her employer.

Wis. Stat. s. 108.04(5) (emphasis added).

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The “willful or wanton disregard of an employer’s interests” language encompasses everything contained in the proposed amendments to the statute.

The language regarding intent and permanency related to the deprivation of the employer of his property tracks similar language in Wisconsin’s criminal code relating to what constitutes as theft. It appears that this provision precludes borrowing without the employer’s prior consent but does not require that there be any harm to the employer; an employee could be charged with misconduct if they borrow a stapler for the weekend. This would run directly contrary to Wis. Stat. s. 108.04(5) and the principles originally outlined in *Boynton Cab v. Neubeck*, 237 Wis 249, 259, 260, 296 NW 636 (1941), in which the language requiring “willful and wanton disregards of the employer’s interest” was first expressed. Wisconsin can be proud that its Supreme Court’s definition of misconduct, as the term is used in unemployment law, has been quoted by every jurisdiction in the United States.

The effect of these changes on our clients would be to delay or prevent benefits. The inevitable increase in appeals of benefits denials would add further burdens the unemployment appeal system. However, many clients do not understand their initial denials of benefits, or what an appeal is, or how to do it, and those clients would actually be prevented from receiving benefits for which they are eligible.

Overall, we are deeply concerned that the changes proposed in AB 938/SB 932 would have long-lasting negative impacts on our clients while increasing administrative burdens that slow the process and create additional and unnecessary delays to receiving benefits. Thank you for your consideration.

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