

Members

Rep. David Niezgodski, Chairperson
Rep. Russ Stilwell
Rep. Daniel Leonard
Sen. Brandt Hershman
Sen. Greg Walker
Sen. Karen Tallian
E. Craig Severns
Steve Schreckengast
John Griffin
Nancy Guyott
Joshua D. Richardson



UNEMPLOYMENT INSURANCE OVERSIGHT COMMITTEE

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MEETING MINUTES¹

Meeting Date: October 26, 2009
Meeting Time: 11:00 A.M.
Meeting Place: State House, 200 W. Washington St., Room 404
Meeting City: Indianapolis, Indiana
Meeting Number: 3

Members Present: Rep. David Niezgodski, Chairperson; Rep. Russ Stilwell; Rep. Daniel Leonard; Sen. Brandt Hershman; Sen. Greg Walker; Sen. Karen Tallian; E. Craig Severns; Steve Schreckengast; John Griffin; Nancy Guyott; Joshua D. Richardson.

Members Absent: None.

Representative David Niezgodski, Chairperson, called the meeting of the Unemployment Insurance Oversight Committee (Committee) to order at 11:05 a.m. with the Pledge of Allegiance.

Information Concerning the Costs to Each State to Enact the Unemployment Insurance Modernization Provisions (UIMA) of the American Recovery and Reinvestment Act (ARRA)

Joshua Richardson, Director of Government Affairs for the Department of Workforce

¹ Exhibits and other materials referenced in these minutes can be obtained electronically by requesting copies at licrequests@iga.in.gov Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for hard copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.in.gov/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

Development (DWD), discussed a spreadsheet (Exhibit 1) showing for each state: (1) the UIMA enacted; (2) the ARRA funding received as a result; (3) the annual cost of the UIMA enacted as estimated by the National Employment Law Project (NELP); (4) the projected number of years the ARRA funding covers the costs of the UIMA enacted; and (5) whether the state is borrowing from the federal Department of Labor (DOL).

In response to a question from Ms. Guyott, Mr. Richardson explained that the information as to the number of years that ARRA funding is projected to cover the UIMA costs and the estimated annual cost of the UIMA are from NELP, while the rest of the information is from the DOL's ARRA webpage.

In response to a question from Senator Hershman, Mr. Richardson responded that DWD used NELP's estimates to prepare Exhibit 1, because NELP's information was readily available and using DWD's cost estimates would have been more difficult. However, DWD stands by its own UIMA cost estimates. Those estimates differ from NELP's cost estimates as discussed during the Committee's last meeting.

Additional Information from DWD Concerning Youth Services

Mr. Richardson discussed the number of full-time and part-time staff providing youth services by region (Exhibit 2, page 1, middle slide).

In response to questions from Ms. Guyott, Mr. Richardson said that all of the staff shown on the slide, except for the DWD line, are the staff of service providers, not DWD employees. Guidance to providers concerning the use of full-time or part-time workers is given by the regional workforce boards and is region specific. Mr. Richardson also pointed out that a worker providing youth services part-time might be a full-time worker who also provides additional services in a WorkOne Center.

Representative Niezgodski asked about the counties comprising each region. He also requested that Mr. Richardson provide the unemployment rate for each region. Mr. Richardson distributed a map showing the counties in each region and the unemployment rate (not seasonally adjusted) for each county as of September 2009 (Exhibit 3). The unemployment figures shown on Exhibit 3 represent total unemployment, not just youth unemployment.

In response to questions from Representative Stilwell, Mr. Richardson explained that the staff shown on Exhibit 2 are funded by regular federal Workforce Investment Act (WIA) dollars. Compensation for the 1,900 youth in the Young Hoosiers Conservation Corps (YHCC) program was funded by stimulus dollars that passed through the State Workforce Innovation Council (SWIC) and went directly to the state parks. The state parks determined where the youth in the YHCC program worked. Mr. Richardson agreed to provide information about how many Lake County youth participated in the YHCC program.

Ms. Guyott asked how youth were selected for the YHCC program. She requested demographic information for the program participants and details as to how the participants were targeted as at-risk.

Information Concerning the Array System of Unemployment Tax Rate Assignment

Mr. Richardson next presented information based on Nebraska law about the array system of unemployment tax rate assignment (Exhibit 4). He discussed how an array system determines an employer's unemployment tax rate compared to Indiana's current system.

An array system first ranks employers by experience rate from best to worst and divides the ranking into groups, with each group equaling five percent of all taxable wages. Next, the revenue needed for the next year is determined, and based on that information, an average multiplier is determined and assigned to the middle employer group. Finally, the multiplier is determined for the remaining employer groups with the worst experience employers having higher multipliers and the best experience employers having lower multipliers. Mr. Richardson provided an example of what an array tax rate system might look like for Indiana and compared those array tax rates to the 2010 statutory schedule tax rates (Exhibit 4, page 2).

In response to a question from Senator Walker as to whether the amount of the multiplier is discretionary, Mr. Richardson responded that Nebraska law sets the multiplier rate.

DWD Review of the Processes and Procedures for Unemployment Insurance (UI) Tax Collections and Tax Audits

(A) UI Tax Collections

Mr. Richardson reviewed: (1) the organizational structure of the collection enforcement unit; (2) how employers pay UI taxes; and (3) the various collection methods DWD uses (Exhibit 2, pages 2-3). Each December DWD notifies employers of the tax rates to be used for the following year. Each employer self-reports employee wages and taxes due. Taxes are due 30 days after the end of each calendar quarter. If an employer does not pay the taxes when due, and DWD collection efforts after two months are not successful, DWD turns the collections process over to Premier Credit of North American, LLC, DWD's collections agent.

Representative Stilwell asked how employer accounts are shut down. Mr. Richardson said that DWD expects employers to self-report when they cease doing business. However, if an employer does not advise DWD of its status, DWD estimates the employer's taxes based on an estimated payroll and sends the employer a notice of taxes due. After five years without a response from the employer, DWD stops sending notices.

(B) UI Tax Audits

Mr. Richardson provided information about: (1) the organizational structure of the field audit office; (2) what field auditors do each year; (3) the composition of audits performed, and (4) 2008 results (Exhibit 2, pages 3-5).

Each year the work load per field auditor involves the following:

- 240-250 wage investigations
- 100 compliance audits, including at least two large employer audits
- More than 540 delinquency resolutions

The total number of Indiana employers is:

- 129,401 taxable employers; and
- 2,152 reimbursable employers.

Selection methods for the audits performed include:

- 65% are randomly selected
- 31% are industry targeted (list from DOL)

- 2% are blocked claim related
- 1% are anonymous tips
- 1% are federal certification

In 2008:

- 2,740 audits were performed
- 30,487 hours were spent auditing
- \$25 million in under-reported taxable wages were found

In response to a question from Representative Stilwell, Mr. Richardson stated that a field auditor has 30 days to resolve any concerns an employer has with an audit. After that time, the auditor issues an audit report.

Ms. Guyott asked for additional information about the targeted industries. Retail sales, construction, and wholesale industries are some of the targets on the DOL list. Indiana may add other industries to the targeted list. Mr. Richardson agreed to provide the DOL list of targeted industries.

Senator Hershman asked what percentage of audits find problems. Mr. Richardson said that \$1.3 billion in wages were audited with \$25 million in under-reported taxable wages and \$68 million total unreported wages found. Senator Hershman then expressed frustration with the audit process, because DOL resists audits of claimants.

In response to a question from Representative Stilwell as to whether DWD has enough auditors, Mr. Richardson said that Indiana has been recognized for its UI audit efforts, and the number of auditors is a policy decision for the General Assembly.

Ms. Guyott asked whether Indiana has done any outreach to states having a higher return than Indiana. (Indiana annually audits one percent of total wages and has a return of 6.7%). Mr. Richardson indicated that DWD has done this type of outreach.

Mr. Griffin asked what percentage of under-reported wages is due to the misclassification of workers. Mr. Richardson agreed to provide a list of the reasons for under-reporting. Representative Niezgodski asked that the list be provided by the end of the meeting.

In response to questions from Ms. Guyott, Mr. Richardson said that the cost of collection is about three percent. The collection agency receives a 15% fee charged to the delinquent employers. About 92% of UI taxes are timely paid.

Representative Niezgodski asked about the qualifications of the auditors. Mr. Richardson explained that the auditors have basic business or accounting backgrounds; all are sent to DOL training after they are hired. The auditors are not certified. They get "on the job" training by going out with experienced auditors.

Mr. Richardson distributed additional information concerning field audits: (1) Percent change in total wages by state for the calendar year ending December 31, 2008 (Exhibit 5); and (2) Audit performance showing the results by state for the 2% penetration requirement, the large employer requirement, and the number of workers misclassified as independent contractors (Exhibit 6).

Public Comment

(A) Johnny Reason

Johnny Reason, a laid-off Borg-Warner employee from Muncie, testified about his concerns with the changes enacted in HEA 1379 (P.L.175-2009), specifically the following problems:

- Using DWD's self log-in page to report work search efforts. The page is confusing as it seems to apply only to Internet users. He has had problems using self log-in, because he reports by mail.
- Complying with the new requirement that a position that a claimant applies for must be an "open" position. He cannot find that requirement in HEA 1379.
- Confusion as to what constitutes an "application" for an open position. His WorkOne Center requires that he submit a resume, not an application for a specific employer. He has learned that either an application or resume meets the job search requirement.
- Submitting a resume to employer online through the Indiana Career Connect web site. He can submit a resume this way only when the employer accepts Word software. If the employer is using another software to accept applications/resumes, he cannot use Indiana Career Connect.
- Confusion as to what constitutes "full-time" work. Positions on Indiana Career Connect specify that they are for 15-18 hours per week, but these jobs do not meet the job search requirement because of the number of hours.

Mr. Richardson discussed what DWD considers "full-time": the number of hours customarily considered full-time in the industry or job category. Senator Hershman expressed concern that the term "full-time" is considered vague and requested that DWD use its rule-making authority to clarify the definition. He also suggested that DWD add a "comments" section for its website users.

The Committee discussed the differences between policy-making and rule-making by DWD and the Unemployment Insurance Review Board (Review Board) and the authority for DWD or the Review Board to adopt a policy rather than rules. Mr. Richardson stated that DWD has rule-makings underway and uses policies when guidance is needed more quickly than is provided by the rule-making process. He also said that DWD's formal rule-making process is the same as that used by other state agencies and departments.

Representative Niezgodski commented on DWD's use of policy-making to clarify what is an "open" position, but not "part-time" versus "full-time" work. Mr. Richardson said that he would need additional information about Mr. Reason's and his wife's situation, but Mr. Reason's wife might be considered "job-attached", and therefore, exempt from the job search requirement.

Representative Stilwell asked whether working several part-time jobs would meet DWD's requirement of "full-time" work. He asked DWD to adjust to the current economic realities and allow claimants to qualify for unemployment benefits with part-time work.

Ms. Guyott asked DWD to consider its "open" position requirement met when an employer accepts a claimant's job application or resume. She also asked DWD to "synch" DWD's web page with DWD's actual policies.

(B) Shaw Friedman

Shaw Friedman, an attorney with Friedman and Associates, Inc., who has extensive employment law experience and has participated in numerous DWD hearings, submitted

written testimony (Exhibits 7 and 8) and testified about his concerns with two practices DWD has authorized and encouraged:

- Non-attorneys (claims adjusters and law students) assigned as administrative law judges (ALJs) to hear evidence in disputed unemployment appeals.
- The use of telephone hearings, and DWD's failure to advise parties that they have a right to an in-person hearing.

In response to questions from Mr. Schreckengast and Representative Stilwell, Mr. Friedman said that in the last six months DWD has emphasized the use of telephone hearings more. If an ALJ doesn't show up for a telephone hearing, then the hearing is rescheduled. Mr. Friedman emphasized the difficulties involved in conducting a telephone hearing, particularly if the hearing is contested. He also stated that his concerns included the time limitations being imposed on ALJ hearings. For example, he has experienced having the hearing time limited to 45 minutes, instead of allowing whatever time is necessary for the hearing.

In response to a question from Senator Tallian, Mr. Richardson agreed to provide information on the difference in pay rates between an attorney ALJ and a law student ALJ.

Senator Hershman asked whether any data exists suggesting that non-attorney ALJs are overruled on appeal more often than attorney ALJs. Mr. Friedman responded that he believes non-attorneys make more process errors, and he is hard pressed to find any other state agency using non-attorney ALJs.

Representative Stilwell asked for information on the population appealing ALJ decisions. He thinks that many unemployed people don't have the resources to appeal an adverse ALJ decision.

Representative Niezgodski read from the minutes of a Review Board meeting in which Mary Johnson, Deputy Commissioner of Unemployment, is reported as reaffirming that all ALJs are attorneys. Representative Niezgodski commented that DWD provides great testimony during the Committee's meetings, but he is concerned that DWD is saying other things in other forums. This is why the Committee is gathering information on this topic.

Mr. Richardson had the following response:

- DWD is not hiding the use of non-attorney ALJs.
- DWD's use of non-attorney ALJs started in 2009.
- Thirty states use non-attorney ALJs at lower decision levels.
- DWD consulted with USDOL before using non-attorney ALJs.
- The Review Board's statute (IC 22-4-17-5) specifies only one attorney position on the Review Board.
- ALJs are not bound by the formal rules of evidence.

In response to a question from Representative Stilwell, Mr. Richardson said that the Review Board could reverse a policy decision of the DWD Commissioner, but not a rule. Representative Stilwell asked what functions the Review Board serves and whether the Review Board could be eliminated.

Ms. Guyott asked for information about the commonality of ALJ practice between DWD and the Indiana Department of Labor. She also asked for information as to whether the use of law student ALJs complies with federal law and regulations.

(C) Lori Smith

Lori Smith, an human resources professional for 25 years and employed by Pilgrim Manor, a nursing facility, testified about her concerns with the current administration of the unemployment insurance benefit system.

Her first concern is an employee who has been drawing unemployment benefits since June 2009. It has taken three and a half months to stop the payments. The employee is PRN status, which means the employee is called in as needed. Sometimes the employee did not come in when work was available for personal reasons or because working was inconvenient.

Ms. Smith's second concern is three individuals from whom she is waiting to receive repayment of benefit overpayments. DWD did not look at employer responses for those individuals for three months after the responses were submitted.

Ms. Smith's third concern is an individual who was a "no-call, no-show" for a position with her employer and still drew unemployment benefits. She has a telephone hearing on this case scheduled for tomorrow.

Senator Hershman asked whether the compliance center established by HEA 1379 would help with any of these cases.

Senator Tallian commented that it sounded like DWD was overloaded with work. She asked whether DWD received an additional \$10 million for unemployment system administration, and if so, why more of the money wasn't used to hire more employees. Mr. Richardson confirmed DWD's receipt of the additional amount for administration and that some of the money was used to hire additional employees.

Representative Stilwell asked whether DWD has ever conducted an internal audit of UI claims paid. Mr. Richardson did not think that DWD has conducted an audit like the one described by Representative Stilwell. The unemployment system requires employers to contest claims for benefits. If an employer loses the incentive to contest claims because there is no financial incentive to do so, that's a problem that is the result of statutory language.

Consideration of Committee Recommendations

Representative Niezgodski proposed that the Committee, as part of its Final Report, adopt a recommendation that rule-making authority for the unemployment insurance system be restored to the Review Board.

Senator Hershman commended Representative Niezgodski's work on this topic, but expressed concern about taking action on the proposed recommendation today, because:

- The proposal was not listed on the meeting agenda.
- There is not a clear understanding as to why the Review Board's authority was removed or whether the Review Board wants the authority back.
- The Committee may be rushing into a policy decision without full information.

Senator Tallian agreed that the Committee has made a good effort in its first year. She thinks it's clear that DWD is adopting unemployment policies without engaging in a rule-making. She asked DWD to bring its questions and concerns about implementing HEA

1379 to the General Assembly, so that the Indiana Code can be amended.

Representative Stilwell suggested that the Committee recommend that any rule-making concerning the unemployment insurance system must have public notice and public comment.

Senator Walker said that it seems that the debate involves whether there should be oversight of DWD's discretion. He suggested that certain policies go through a rule-making, with the Committee specifying which policies should be rules.

Representative Niezgodski suggested that DWD provide all policy decisions to the Committee within three days after DWD adopts the policy.

Senator Hershman suggested that a formal recommendation is not necessary for the Committee to keep looking at this topic, and he needs more information before he will support a formal recommendation.

Senator Walker proposed a recommendation that would offer a "road map" for the Committee's oversight of DWD's decision-making. Senator Tallian proposed two amendments to Senator Walker's proposal:

- Ask the Legislative Services Agency (LSA) to clarify who has rule-making authority in DWD; and
- Ask DWD to list the areas of vagueness in the unemployment insurance statute and the policies that DWD has adopted as a result.

Representative Leonard asked whether this was already included in the Committee's statutory authority, so that the proposal was redundant.

Representative Niezgodski asked the Committee to do something in a bipartisan manner to help those who are having problems with the unemployment insurance system.

Senator Walker withdrew his proposal and directed LSA to request from DWD the information described by Senator Tallian. Senator Hershman suggested that DWD provide the following to the Committee:

- Clarification of DWD's rule-making authority.
- A list of the rules DWD has adopted since HEA 1379 was enacted.

Senator Tallian asked that DWD provide any data supporting the assumptions on which its UIMA analysis was based.

Mr. Griffin requested that DWD provide to LSA information about the number of workers misclassified and the dollars lost as the result of the misclassification of workers.

Consideration of the Committee's Final Report

The Committee voted 9-0 to approve the draft Final Report (Exhibit 9) with the addition of information from today's meeting.

Adjournment

The meeting was adjourned at 3:30 p.m.