

Legislative Analysis



UNEMPLOYMENT INSURANCE: EXPAND PRIVACY; WAIVE 'NEGATIVE BALANCE EMPLOYER' INTEREST

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4239 as enrolled
Public Act 1 of 2009
Sponsor: Rep. Bob Constan
House Committee: Labor
Senate Committee: Commerce and Tourism

Revised Second Analysis (3-19-09)

BRIEF SUMMARY: The bill (1) would revise the circumstances under which otherwise confidential unemployment insurance information can be disclosed (ensuring the continued receipt of federal administrative funds for the Unemployment Insurance Agency), and (2) would waive the interest charged to negative balance employers, as a result of the federal stimulus package--known as the American Recovery and Reinvestment Act of 2009.

FISCAL IMPACT: The disclosure conformity provisions of the bill would have no significant cost implications to the state or local units of government; they would, however, have significant revenue implications for the Department of Energy, Labor, and Economic Growth. The suspension of the solvency tax would save Michigan employers an estimated \$35 million. For more detail, see *FISCAL INFORMATION* below.

THE APPARENT PROBLEM:

The unemployment insurance (UI) program is a state-federal partnership administered by the Unemployment Insurance Agency, a Detroit-based office located within the Michigan Department of Energy, Labor, and Economic Growth. The unemployment insurance program, itself, was created in the 1930s, and is now part of the U.S. Social Security Act, as well as the Federal Unemployment Tax Act. In Michigan, the program is organized under the Michigan Employment Security Act.

Generally, employers pay an effective federal tax rate of 0.8 percent on a portion of their payroll (a 6.2 percent tax on the first \$7,000 of each employee's pay, offset by a 5.4 percent credit if a state's UI program is in conformity with the federal rules and regulations that govern the program). In addition, employers pay between .06 to 10.3 percent on the first \$9,000 of each employee's pay, the exact amount depending upon the size of the employer's company, and the kind of industry (whether agriculture, forestry and fishing; mining; construction; manufacturing; wholesale and retail trade; finance, insurance and real estate; services; or government). See *BACKGROUND INFORMATION*.

The money is collected nationwide and put into the federal Unemployment Insurance Trust Fund where each state has its own account based on its employers' contributions,

known as employer experience accounts. The state's trust fund account is the source of UI benefits for unemployed workers, as states withdraw money from the fund in order to pay those who have lost their jobs during an economic downturn.

When states have very high unemployment rates for many consecutive months, some of their employers become "negative balance employers"--that is, the employers' unemployed workers are drawing more money from the trust fund in the form of unemployment benefits than the amount that has been paid in as state unemployment taxes, on their behalf, when they were working.

The federal Social Security Act allows states to get loans from the federal UI Trust Fund when their state unemployment trust fund accounts run out of money. When states borrow, they must repay their advances with interest. For example, because Michigan has had to request advances from the U.S. Department of Labor during its long economic downturn, the state's total outstanding loan balance is an estimated \$1.34 billion.

The federal stimulus plan--known as the American Recovery and Reinvestment Act--provides that through December 2010, any interest payable on advances will be waived completely (not simply deferred), and interest on additional advances made will not accrue. As a result, Michigan's unemployment insurance account is no longer responsible for an estimated \$41 million in interest that would have otherwise been payable in calendar year 2009.

Legislation has been introduced to bring Michigan's unemployment statute into conformity with federal law in two ways: to protect worker privacy (a now more than two-year old rule with which Michigan does not yet conform); and to waive the payment of interest that would otherwise be due on advances that Michigan's negative balance employers have been loaned by the U.S. Unemployment Trust Fund.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Employment Security Act's provisions concerning the circumstances under which otherwise confidential unemployment insurance information can be disclosed. In general, the amendments are consistent with federal regulations (20 CFR 603) and Department of Labor directives, and would ensure the continued receipt of federal administrative funds for the Unemployment Insurance Agency. The bill would also waive the interest due on advances from the U.S. Unemployment Insurance Trust Fund.

Generally the act provides that information obtained from employers and individuals is confidential and not subject to disclosure or public inspection, except in certain limited circumstances. House Bill 4239 would clarify that information could not be disclosed, except as otherwise provided, in a manner that reveals particular identifying information about an individual or past or present employer, including when such information could be combined with other publicly available information.^[1] Additionally, the bill would

specify that disclosure of otherwise confidential information is permitted in the following circumstances:

- To agents of "interested parties"[2] if the agent provides the Unemployment Insurance Agency with a written authorization or representation from the represented party.[3]
- To attorneys retained by interested parties, and who file an appearance for purposes related to a claim for unemployment benefits.[4]
- To elected public officials in the performance of constituent services, if the official provides evidence that the constituent authorized the disclosure.[5]
- To other third parties (not acting as agents), if the third party presents a release from an interested party. The release would have to be signed by the interested party; specify the information to be released; list the individuals who may receive the released information; and state the specific purpose for which the information is sought. The purpose of the release would be limited to providing a service or benefit to the individual subject to the release or in administering or evaluating a public program related to the release. [6]

The act permits disclosure of otherwise confidential information to a college, university, or state agency conducting research of a "public service nature." The bill specifies that the release of otherwise confidential information could be made to a college, university, or state agency acting as a contractor or agent of a public official and conducting research in furtherance of the public official's duties. The bill would require the UIA to enter into a written agreement with a public official ensuring that the agent or contractor maintains the confidentiality of the information provided. If the agreement is violated, it would be terminated and the public official would be subject to the penalties of 90 days imprisonment and/or a fine of \$1,000. [7]

The bill also provides that a recipient of otherwise confidential information would have to utilize such information as contained in the written disclosure agreement with the UIA, and could not subsequently disclose such information to another individual or entity without the prior approval of the UIA.

In addition, the bill specifies that if interest due during a calendar year on federal advances is forgiven or postponed under federal law and is no longer due during a calendar year, then no solvency tax would be assessed against an employer. Any tax already collected before the forgiveness of the interest would be credited to the employer's experience account. Recently, the American Recovery and Reinvestment Act of 2009 (the federal stimulus package) waived interest paid by negative balance employers during 2009 and 2010.

[1] 20 CFR 603.4(b) provides that state unemployment insurance laws "must include provision for maintaining the confidentiality of any [unemployment insurance] information which reveals the name or any identifying particular about any individual or any past or present employer or employing unit, or which could foresee-ably be combined with other publicly available information to reveal any such particulars, and must include provision for barring the disclosure of any such information, except as provided in this part."

[2] Rule 201 (R 421.201) generally defines "interested party" to mean anyone whose statutory rights or obligations might be affected by the outcome or disposition of the determination, re-determination, or decision. The rule includes specific provisions as to when a claimant, an employer, and the UIA are considered to be interested parties.

[3] 20 CFR 603.5(d) permits disclosure of otherwise confidential information to agents acting for or in place of an individual or employer with a written release (or other form of consent) of the individual or employer being represented.

[4] 20 CFR 603.5(d) permits disclosures of otherwise confidential information to attorneys retained for purposes related to a state's unemployment insurance law, if the attorney asserts that he or she is representing the individual or employer.

[5] 20 CFR 603.5(d) permits disclosure of otherwise confidential information to an elected official performing constituent services, if the official presents reasonable evidence (such as a letter from the individual or employer requesting assistance or a written record of a telephone request from the individual or employer) that the individual or employer has authorized such disclosure.

[6] 20 CFR 603.5(d)

[7] 20 CFR 603.5(e) permits disclosure of otherwise confidential information to a public official for use in the performance of official duties, which includes research related to the law administered by the public official. The regulations, 20 CFR 603.5(f), also note that disclosure of otherwise confidential information to an agent or contractor of a public official in the performance of official duties is also permitted. Discussion of these provisions, in the context of permitting disclosure for research at colleges and universities, is included in the DOL's Notice of Final Rule (71 FR 56830, September 27, 2006), which states "[t]he proposed rule described 'performance of official duties' as administration or enforcement of law or, in the case of the legislative branch oversight of [the UI] law. It also stated that although research by a public official was permitted under this exception, this exception did not include research by an individual at a public or private university. However, it also stated that, where appropriate, a researcher could obtain access to confidential [UI] information under the exceptions provided for in proposed paragraph (f) (agent or contractor of a public official) or proposed paragraph (d)(2) (third party). Under paragraph (f) of the proposed rule, the public official would maintain responsibility for insuring that the confidential [UI] information is safeguarded by its agent (for example, the researcher). The Department continues to believe that there is less risk of unauthorized use or disclosure of confidential UI information if responsibility for safeguarding confidentiality remains within the executive or legislative branches of government."

[8] 20 CFR 603.5(d)

BACKGROUND INFORMATION:

For further information about the Michigan Unemployment Insurance Agency, visit <http://www.michigan.gov/uia>

FISCAL INFORMATION:

The bill essentially enacts two changes to the state UI law: (1) amending the disclosure provisions to bring state law in conformity with federal requirements and (2) suspending the imposition of the solvency tax on negative balance employers due to the waiver of interest payments on Title XII advances under the recently enacted American Recovery and Reinvestment Act, PL 111-5.

Disclosure Conformity

This provision would have no significant cost implications to the state or local units of government. The bill amends the unemployment insurance disclosure provisions of the Michigan Employment Security Act in a manner consistent with federal regulations (20 CFR 603) and U.S. Department of Labor directives. The regulations contain a number of exceptions to the confidentiality requirements "only if authorized by State law and if such disclosure does not interfere with the efficient administration of the State [unemployment insurance] law" [20 CFR 603.5(d)].

The bill requires a written agreement between the Unemployment Insurance Agency within the Department of Energy, Labor, and Economic Growth, and the public official receiving otherwise confidential information. The department already has a number of disclosure agreements in place, so the costs incurred for developing a written agreement with public officials would be immaterial. Additionally, the bill would impose a penalty of 90 days' imprisonment and/or a fine of \$1,000 on public officials and contractors for improperly disclosing confidential information. This would result in an indeterminate, though likely insignificant, amount of revenue credited to the Contingent Fund, Penalty and Interest Account, which is expended, as provided in Section 10 [MCL 421.10(6)], to pay the administrative expenses of the Unemployment Insurance Agency and to pay interest payments on Title XII cash-flow advances (loans) made by the U.S. Department of Labor.

The department has indicated that it has not imposed any penalties for improperly disclosing confidential information; it is assumed that this will continue to be the case. Finally, the bill, in an added Section 11(6), prohibits recipients of confidential information from releasing such information without prior approval from the UIA or from using the information received in a manner inconsistent with the written disclosure agreement. The bill does not specify a penalty for such a violation, although Section 54 [MCL 421.54(a)] of the act imposes a penalty on "a person who willfully violates or intentionally fails to comply with any of the provisions of the act....for which a penalty is not otherwise provided." The applicable penalty under Section 54 appears to be a combination of imprisonment or community service lasting up to one year, although there is no associated fine imposed. Again, however, the department indicates that such violations are rare and, as such, the related costs are not expected to be significant.

The bill does, however, have significant revenue implications for the Department of Energy, Labor, and Economic Growth. In general, Title III of the federal Social Security Act requires that states, as a condition of receiving federal funding for the administration of state unemployment insurance programs, enact UI laws that conform to certain requirements. The U.S. Department of Labor has indicated to the UIA that provisions in the MESA permitting disclosure of UI information to colleges and universities to conduct research of a public service nature does not conform to federal requirements. Current state law allowing disclosure for research purposes is broader in scope than that permitted by federal regulations. As a result, the bill is necessary to ensure the continued receipt of federal funds for the administration of the state's unemployment insurance program. The Fiscal Year 2008-09 appropriation totals approximately \$136.5 million, which includes

funding for UIA administrative costs, information technology, and the MES Board of Review. Additionally, a state law's conformity with federal requirements is also a necessary condition to enable Michigan employers to receive a credit against federal unemployment taxes that effectively reduces the FUTA rate from 6.2 percent to 0.8 percent on taxable wages. Where state UI laws remain out of conformity, the federal Department of Labor has the authority to impose a number of enforcement mechanisms on states to exact compliance with federal requirements. These enforcement mechanisms include withholding UI administrative funds and rolling back the FUTA credit available to Michigan employers.

Suspension of the Solvency Tax

The bill also temporarily suspends the imposition of the state solvency tax on the negative balance of employers during the period in which interest payments on Title XII advances are payable. Section 1201 (Title XII) of the federal Social Security Act permits states to receive advances (loans) to pay unemployment benefits when state unemployment trust fund does not have sufficient resources to pay such benefits. In general, though not always, these advances are interest-bearing. In the past few years, the state has had to request, on several occasions, Title XII advances from the DOL. As of February 23, 2009, the total outstanding loan balance, according to the Department of Labor, was \$1.6 billion. See the DOL website:

[<http://www.ows.doleta.gov/unemploy/budget.asp#tfloans>].

The American Recovery and Reinvestment Act provides that through December 2010, any interest payable on Title XII advances is waived (completely, not simply deferred), and advances on additional advances made would not accrue. The result is that the state UIA is no longer responsible for an estimated \$41 million in interest that would have otherwise been payable in calendar year 2009.

Earlier estimates from the Unemployment Insurance Agency indicated that the solvency tax would generate approximately \$35 million on a full year basis. [The tax equates to \$67.50 per employee per year.] Under Section 19a of the Michigan Employment Security Act, revenue from the solvency tax is credited to the Contingent Fund, and can only be expended for the payment of interest on Title XII advances. By suspending the solvency tax, the bill would forego approximately \$35 million in Contingent Fund revenue.

ARGUMENTS:

For:

This legislation allows state officials to adopt changes to the Michigan Unemployment Insurance statute in order to ensure conformity with the federal Unemployment Insurance law. The state statute fails to conform in two ways: First, the state statute is out of conformity because it fails to protect workers' privacy. Indeed, Michigan risks a financial penalty, since the state failed to meet a two-year deadline on September 27, 2008, set by the U.S. Department of Labor.

Second, the state statute does not take into account changes made to the unemployment insurance system recently enacted by the U.S. Congress in the federal stimulus package. Specifically, the American Recovery and Reinvestment Act of 2009, signed by President Obama in February 2009, provides that through December 2010, any interest payable on advances made to state Unemployment Insurance Accounts be completely waived (not simply deferred). Further, interest will not accrue on additional advances that may be necessary during the next two years of the prolonged economic downturn. As a result, Michigan is no longer responsible for an estimated \$35 million in interest that would have otherwise been payable in calendar year 2009.

Against:

No arguments against the bill were advanced by the members of the House Labor Committee or those offering testimony.

Legislative Analyst: J. Hunault
Fiscal Analyst: Mark Wolf

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.