



# Newsletter

The Voice of Independent Business in State Government

## SMALL BUSINESS “OK” IN BUDGET BILL?

The state legislature’s Joint Committee on Finance has started taking votes and, thus far, small business has escaped relatively unscathed. Although individual components of Senate Bill 75 are unpopular with some business owners, blanket tax hikes or new regulations that could harm everyone had yet to emerge as your WIB Newsletter was prepared.

Pressure to add more spending to Governor Doyle’s precariously balanced budget will be a factor at every executive session held by the Finance Committee until they finally report out the budget bill. Early attempts to add more spending were blocked when co-chairs Senator Mark Miller (D-Monona) and Rep. Mark Pocan (D-Madison) not only resisted an effort to add money for important Milwaukee drivers’ education programs, they subsequently chopped nearly \$4 million the governor had put in his budget for the program. That type of fiscal restraint is not always seen during the budget process. Business owners should be encouraged that the co-chairs were standing firm as the executive action process got underway.

Updates on the state budget process are regularly available at WIB’s website, [WWW.WIB.ORG](http://WWW.WIB.ORG).

Hundreds of Wisconsin citizens appeared at six public hearings around the state. Counties, technical colleges and anti-smoking groups made what appeared to be the most effective cases. Counties are worried about social services funding during a recession and technical colleges are being pressed to provide more job training for laid-off workers. Governor Doyle’s budget proposes a statewide ban on smoking in public places and large numbers attended hearings to support that proposal. Tavern League members and others opposed to the ban had significantly fewer supporters testifying.

Governor Doyle’s budget would spend \$62.7 billion over two years but actually reduces General Purpose Revenue (GPR) spending by \$51.3 million. GPR is revenue produced mostly by sales, income and tobacco taxes. \$1.08 billion in new GPR is projected, with \$736 million coming from a new top rate in the state income tax applying to couples earning more than \$300,000 (\$225,000 for single filers) and a reduction in the capital gains exclusion from 60% to 40%.

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## UI FUND CRISIS WORSENS

Wisconsin’s Unemployment Insurance Fund crisis has worsened and is likely to get even worse over the remainder of 2009. Current projections suggest the state UI fund will owe \$700 million to the federal government for unfunded benefit payments by December 31st. That money will have to be paid back through higher taxes on Wisconsin employers.

Federal stimulus legislation made UI loans to states interest free through 2010, a huge savings for state employers. It seems unlikely, however, that the debt could be paid within that time frame, meaning the balance due is likely to begin going up significantly in 2011.

Wisconsin’s UI fund has lost nearly half-a-billion dollars in the past year, going from a February 28, 2008 balance of more than \$472 million to nearly \$20 million negative one year later. The heavy benefits draw caused by the recession has only exacerbated the problem. Since 1996, as WIB has repeatedly pointed out, the fund has paid out more in benefits every year than it has received in tax revenue. Between 1996-2000 interest on what was once a \$1.8 billion balance kept the fund stable. Since 2000, however, interest earned has not been enough as benefit payouts each year exceeded tax revenue and interest earned.

While the UI fund was heading inevitably toward disaster, the Unemployment Insurance Advisory Council (UIAC) did nothing to stem the cash exodus. Benefits went up. Taxes stayed artificially low. And the fund balance sank. Rome was burning and Nero called for his fiddle.

The UIAC is comprised of five management and five union leaders. They meet to debate changes in UI law and recommend what is called an “agreed upon” bill to the legislature. Lawmakers usually, although not always, pass the bill without amendment. With disaster lurking, WIB is urging the legislature to take a far more hands-on approach to making UI law. The legislature dumped the UI council in 1983 and made legislative leaders from both parties the de facto “council.” They developed legislation that led to the resolution of the worst UI crisis in state history. The 2009 crisis looks even worse.

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### OPPOSITION?

There was surprisingly little opposition to the tax increases at the public hearings. A handful of tax protestors waived placards outside some hearing locations but it appeared to have little effect on the Finance Committee. Just as there was little opposition to the tax increases, there was little demand for massive additional state spending.

Expansion of the sales tax base was not mentioned at the hearings. That ranks as a major surprise because four months ago talk of taxing business services was rampant at the Capitol. WIB members deserve taxpayers' thanks for actively insisting to lawmakers that business service taxation would be a large new tax on small businesses that must use those services.

But expansion of the sales tax base is by no means out of the woods as a budget-balancing-tool in coming weeks. There can be no relaxing until the budget has been passed. The demand for services, especially with the state unemployment rate shooting upwards, is greater than it has been in many years. Pressure to put more money into county social services and technical colleges, among other important causes, is great. WIB will continue to work to make certain that spending increases are absolutely essential and that tax increases are not targeted at small businesses. ■

### STATE LOSING PRIVATE BUSINESSES

Wisconsin has lost businesses and jobs in recent years according to a new report from the Wisconsin Taxpayers Alliance. The number of private Wisconsin businesses dropped 0.4% in 2006 and 0.8% in 2007. 2008 data are not yet available, WTA said.

Michigan was our only neighbor to record a decline in private businesses in 2007. That state, with its manufacturing economy hammered for several years, lost nearly 1% of its private businesses in 2007. Illinois, Iowa and Minnesota all reported business growth, according to WTA.

Business startups rose more than 2% nationally in both 2006 and 2007.

### JOBS LOST

With fewer businesses, Wisconsin is also losing jobs. WTA reports preliminary figures for December 2008 showed 2.7% fewer jobs in the private sector than in December 2007. Overall the state job count was down 2.2%. National percentages saw a drop of 2.7% private sector jobs and 2.1% overall December-to-December.

Although the most recent declines are comparable, the WTA report says Wisconsin began losing jobs about 18 months ahead of the national jobs downturn. That could suggest the state entered the recession earlier than much of the nation.

On a happier note, WTA Measuring Success: Benchmarks for a Competitive Wisconsin 2008 says the state's high school graduation rates are climbing and "are significantly above the national average," the percentage of the population without health insurance dropped to 8.2% and state exports continued to increase.

The entire report can be obtained through WTA's website, [www.wistax.org](http://www.wistax.org). ■

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### WHAT'S AHEAD?

Wisconsin's UI benefits are not high, compared to other states. In the upper Midwest region officials say Wisconsin is below average. Nationally we are below the median. Labor probably views the crisis as a management problem and will be very reluctant to accept benefit cuts under the circumstances.

Higher tax rates are inevitable and, for the first time, there is some discussion about increasing rates mid-year. Even if current law remains on the books there will be a rate hike in 2010 and the UI taxable payroll will be increased in 2011. That will lead to another tax increase. Those increases won't be enough. They won't be enough to restore the UI fund to solvency or to pay back the federal government. The feds will demand a special assessment to get their money back and that assessment may be spread across the board without regard to experience rating. The state's most stable small employers will likely be asked to pay the special assessment at the same tax rate given General Motors. That's what happened in the 1980s, leading to the highest UI taxes in history.

The consequences of the UI tax table can be explained in simple terms: positive balance employers subsidize negative balance employers. In other words, positive balance employers pay MORE in taxes than their workers pull in UI benefits. Negative balance employers pay LESS in taxes than the UI benefits paid their employees. Thus, positive balance employers subsidize negative balance employers.

WIB has historically believed that the maximum UI tax rate, now 9.8%, should be raised. It doesn't come close to covering the benefits drawn by companies that are "maximum rated" and it allows an on-going drain on the UI fund that becomes even worse during a recession. WIB also believes that small stable employers, the backbone of Wisconsin's economy, should not be forced to carry the bulk of this burden. Stable employers – those with positive balances in their UI accounts – are not to blame for the current crisis. They shouldn't be asked to financially solve the problem.

The battle will come down, inevitably, to big unstable businesses versus small stable employers. WIB has fought this battle for many years and we will continue to fight it throughout the coming years. These are challenging times for small business in Wisconsin. WIB is here to fight on your behalf and at your side.

Do you have comments about the UI system? E-mail WIB executive director Wayne Corey at [wcorey@wibiz.org](mailto:wcorey@wibiz.org). Call Wayne on the WIB toll-free member HOTLINE at 800-362-9644. ■

### FLORISTS, LOCKSMITH'S; WHO'S NEXT?

Local florists in Wisconsin have been victimized by national "toll-free number" operators whose telephone book advertising makes them look local. Now reputable local locksmiths have found locksmith services advertised using bogus local street addresses.

Has your business or industry been harmed by misleading or dishonest advertising? WIB is looking closely at this issue and we need your help. Call the WIB toll-free member HOTLINE at 800-362-9644 or e-mail information to [wcorey@WIBIZ.org](mailto:wcorey@WIBIZ.org).

## HUNDREDS AT BUDGET HEARINGS

What do they talk about? What do they hope to accomplish? Several thousand Wisconsin residents showed up at six state budget public hearings held by the legislature's powerful Joint Committee on Finance. Hundreds of those residents testified at the hearings in Sparta, Appleton, Eau Claire, West Allis, Racine and Cambridge. Some were well organized in groups. Others brought a lonely but sincere individual message. Almost all think Wisconsin will be a better place to live if the final budget bill has their idea included.

Managers and employees of Kwik Trip stores may have had the greatest impact. They carried the water for major oil companies by opposing the oil company profits tax proposal and endorsing an increase in the state gasoline tax. That idea seems to be getting traction in the budget debate.

The "usual suspects" showed up. Mayors, county board members, school superintendents and other public officials testified. Most did not, in a somewhat unusual development, ask for a lot more money. They get it. There isn't a lot more money to be had. Employment is slumping and, thus, so are tax collections.

District attorneys and public defenders provided a united front from the criminal justice system when they claimed they were understaffed and underpaid. There was strong support for treatment programs and parole for prison inmates convicted of non-violent crimes.

Independent Living Centers for people with severe disabilities made the case for more and better paid employees. School districts worried about revenue caps and eliminating the Qualified Economic Offer (QEO). Unionized operating engineers were at every hearing promoting Governor Doyle's prevailing wage for public projects proposal. Pharmacists made, as usual, a persuasive case for higher Medicaid reimbursement.

Technical colleges talked about student loans in a bad economy. There was steady support, and some opposition, to the proposal on domestic partner benefits.

The hearings give citizens an opportunity to have input in the budget process. Citizens really do make a difference. Not everybody will get what they want but their ideas always cause the committee to rethink attitudes before committee members begin taking votes. ■

## NORTHERN WI EXPORT CONFERENCE

Businesses interested in learning more about exporting products will have an opportunity at Northcentral Technical College May 14 in Wausau. Sessions on developing an international sales strategy, the mechanics of exporting, market opportunities and getting paid for exports are scheduled. Experts on Europe, Canada, Mexico, China and Brazil will also be available for one-on-one appointments. The program costs \$75. For a brochure call 715-803-1861 or toll-free 1-888-682-7144 x1861.

The day-long conference is sponsored by NCTC Workforce Learning Solutions, UW-Madison Center for International Business Education & Research and the Wisconsin Department of Commerce. ■

## EMINENT DOMAIN APPEAL CURBS CUT

An alert WIB member helped get a really bad provision out of the state budget bill. A state budget bill is a massive document. The Legislative Fiscal Bureau analysis runs more than 700 pages. Some "minor" items come close to being passed unnoticed in any budget bill. It could have happened again this year.

WIB member Lana Frank of Iron Ridge had alerted WIB to a provision that would significantly limit the amount of attorney fees that could be awarded on a successful appeal of an eminent domain case. Ms. Frank has had extensive experience involving right-of-way eminent domain issues on her farm. She was concerned that farmers and businesses with appeals involving relatively small sums would find it impossible to get a lawyer to take the appeal. Gary Antoniewicz of the Boardman Law Firm, corporate counsel to WIB, agreed. He said cases under \$100,000 could go without an appeal because law firms wouldn't be able to afford them.

Farmers often have eminent domain issues with utility companies. Businesses have similar issues with the State of Wisconsin and local governments on highway and road construction projects. Restricting the amount lawyers could be awarded would restrict the ability of farmers and businesses to appeal an unfair decision.

WIB's Frank testified before the Joint Committee on Finance at its Cambridge budget hearing. The following week the eminent domain item was removed from the bill by the committee co-chairs. It may still be introduced as separate legislation but it won't sneak through in the state budget bill. ■

## HEALTH REFORM ROLLOUT STALLED

Governor Doyle has delayed introducing his BadgerChoice health insurance reform proposal. The state's precarious financial situation has made it impossible to develop expensive new programs at this time. BadgerChoice would provide an opportunity for small employers and workers to purchase health insurance through a huge purchasing pool and by comparing carriers and products side-by-side.

The delay came as some factions in the insurance industry started a campaign opposing BadgerChoice. Material seen by WIB suggests the opposition either lacks information about the legislative and state budget process or was intentionally providing misleading information to clients. Because WIB has had numerous inquiries about the BadgerChoice facts, you can find a detailed explanation at our website, [WWW.WIBIZ.ORG](http://WWW.WIBIZ.ORG). ■

## CONTRACTS BILL READIED

Legislation to regulate business service contracts with hidden automatic renewal clauses is being introduced by Senator Robert Wirth (D-Pleasant Prairie), the chairman of the Senate Small Business Committee. WIB has promoted the legislation for several years and it appears to have the best opportunity for passage in the 2009 legislature.

Details of the bill can be found at the WIB website, [WWW.WIBIZ.ORG](http://WWW.WIBIZ.ORG). ■



Robert E. Gregg  
Boardman Law Firm

**Robert E. Gregg is a partner with the Boardman Law Firm of Madison. He has been associated with WIB for 25+ years. Boardman attorney Jennifer Mirus also contributed to this report. Find more employment law updates at the WIB web site, [WWW.WIBIZ.ORG](http://WWW.WIBIZ.ORG). Click on LEGAL LINE. Contact Bob at [rgregg@boardmanlawfirm.com](mailto:rgregg@boardmanlawfirm.com).**

**Layoffs**--Layoffs are an increasing reality for many businesses. Reduction in force is often essential for effective operation or survival. Most employers are aware of the need to comply with WARN Acts, ERISA, COBRA and the Older Workers Benefit Protection Act, but layoffs have many other legal after effects: The statute of limitations on wage and hour claims is up to three years. Employees who were silent while employed often raise these issues with the State of Wisconsin or Department of Labor *after* a layoff. Complaints regarding overtime pay, and especially misclassification or improper pay practices with exempt salaried employees have significantly increased. The DOL process allows anonymous complaints, which can trigger an audit of across-the-board pay practices. The DOL can order back pay for an entire class of employees (including former employees), not just the complainant. Employers should double-check for proper pay practices and correct use of exempt status. The aftermath of incorrect practices can cost more than the layoff saved.

**COBRA Supplementation: American Recovery and Reinvestment Act of 2009.** Effective March 1, 2009, terminated eligible employees will receive a 65% discount of COBRA insurance continuation. All those terminated since September 2008 are eligible. The employer pays the 65% then recovers it from the IRS by an offset against tax withholdings. Notice forms are being developed by the government, but the 65% employer payments—or reimbursements—start now. For a more detailed

article on this issue, contact Bob Gregg ([rgregg@boardmanlawfirm.com](mailto:rgregg@boardmanlawfirm.com)) or Jeff Storch ([jstorch@boardmanlawfirm.com](mailto:jstorch@boardmanlawfirm.com)).

**Electronic devices may make it difficult to be “off the clock.”** Technology allows employees to do work from home and allows managers to contact employees at any time. Some supervisors seem to expect employees to be readily available for questions or to respond 24/7. Company-provided cell phones, Blackberries, laptops, pagers, etc., make it easy to communicate during “non-work” hours and create an impression that the employee is on-call at any time. A recently filed Fair Labor Standards case will address this issue. *Rulli v. CB Richard Ellis, Inc.*, (E.D. Wisconsin, filed March 15, 2009). Maintenance workers who were issued phones or pagers were expected to have them on at all times—day and night. Any call was expected to be returned within 15 minutes, usually to answer questions or provide advice. At times, the workers were expected to go and do work. The suit raises the issue of how much time every 24 hours the workers should actually receive pay for this constant on-call duty. It asks for hourly pay and overtime pay for all the company’s maintenance workers, nationwide, for this off-hour/on-call work.

This case is a good warning that supervisors should be cautioned, and periodically reminded, that the convenience of contacting employees at any hour can have FLSA consequences. Employers should also review their policies and procedures for on-call responsibilities to assure they are clear, in compliance with the FLSA, and that worked time is properly recorded. Lack of care in this area can cost a lot in wage and hour liability.

**Layoff was pretext for disability discrimination.** An employee’s cancer and many months of treatment qualified as a disability. During periods of treatment, she suffered short-term memory loss. However, she compensated by copious note taking, and she maintained an excellent performance rating the entire time. She was laid off, then filed and won an ADA case verdict for \$200,000. The evidence included the fact that when “rating” people for layoff, the supervisor changed her retention score from “high” to “low” based on the disability-caused memory problems, in spite of the consistent excellent performance. *Eshelman v. Agere Systems, Inc.* (3rd Cir., 2009) ■

If you have questions about these issues or any workplace problem, call the WIB toll-free member HOTLINE at 800-362-9644

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