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SUPREME COURT OF WISCONSIN

Appeal No. 2022AP00013

Amazon Logistics, Inc.,
Plaintiff-Respondent-Petitioner,

v.

Labor and Industry Review Commission
Defendant-Appellant.
and

Department of Workforce Development,
Defendant-Co-Appellant.

Appeal from the Circuit Court for Waukesha County,
Case No. 2022CV1456
The Honorable Michael O. Bohren, presiding.

**NONPARTY BRIEF OF LEGAL ACTION OF WISCONSIN,
INC.**

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INTRODUCTION AND STATEMENT OF INTEREST OF THE AMICI

Legal Action of Wisconsin (LAW) is Wisconsin's largest civil legal aid firm, with a focus on serving individuals experiencing poverty since 1968.¹ Many of LAW's clients are unemployed, irregularly employed, or employed in jobs that pay less than a living wage. Because of this, our clients are profoundly affected by changes in unemployment laws, particularly changes affecting eligibility.

During the height of the COVID-19 pandemic, LAW represented hundreds of unemployment claimants who were initially denied unemployment benefits and continues to represent claimants who allegedly received benefits for which they were not eligible. With this experience, LAW has seen firsthand the impact that joblessness has had on our clients.

It is imperative that the statutes and regulations regarding unemployment benefits be properly implemented because programs like regular unemployment insurance (UI) and temporary programs like Pandemic Unemployment Assistance (PUA) benefits² lift workers out of poverty at times when they need assistance the most. The U.S. Census Bureau has

¹ John F. Ebbott, *Forty Years of Equal Justice with Legal Action of Wisconsin* (2009) at <https://www.legalaction.org/data/cms/FORTY%20YEARS%20OF%20LAW%20HISTORY.pdf> (last visited 11/30/2023).

² Created by the CARES (Coronavirus Aid, Relief and Economic Security (CARES)) Act as a response to the pandemic.

concluded that benefits provided by the CARES Act reduced poverty regardless of race, ethnic background, or age.³

In this brief, LAW offers an overview of the development and social benefits of unemployment insurance programs, particularly in Wisconsin, and an analysis of why some businesses try to avoid paying for such programs. Interpretation of UI law to provide the broadest possible eligibility for benefits is good for the overall economy, even if it does impose some costs on employers. Because UI provides a safety net for people, like LAW clients, who rely on such benefits during tough economic times, it allows them to continue to purchase necessities and thus supports the businesses from which they make those purchases.

Wisconsin's unemployment statutes embody a set of public policy choices made during the most devastating economic crisis this country has ever faced and are designed to prevent such a crisis from occurring again. Those public policies favor broad inclusion of both employers and workers in the unemployment program to distribute the burdens and benefits of the program as widely as possible. To permit Amazon Logistics and other so-called "gig" employers to evade participation would undermine these public policies and the social benefits of unemployment insurance.

³ Frances Chen and Em Shrider, *Expanded Unemployment Insurance Benefits During Pandemic Lowered Poverty Rates Across All Racial Groups* (9/14/2021) at <https://www.census.gov/library/stories/2021/09/did-unemployment-insurance-lower-official-poverty-rates-in-2020.html> (last visited 9/27/2023).

ARGUMENT

I. Why do we have unemployment insurance programs? Answer: Hoovervilles.



“Hoovervilles” were shantytowns erected in urban areas after unemployed workers lost their homes during the Great Depression.⁴ By 1932, one in four workers were unemployed.⁵

In response to the economic decline and human deprivation caused by the Great Depression, reflected starkly in the desperation of the Hoovervilles, Wisconsin created an unemployment insurance program.⁶ It was the first state to do so.⁷

The idea for Wisconsin’s unemployment insurance program originated with UW-Madison’s Professor of Economics John Commons, who had earlier crafted Wisconsin’s first-in-the-nation workers’ compensation legislation.⁸ Two of his students, Elizabeth Brandeis and Paul Raushenbush, authored Wisconsin’s unemployment insurance act.⁹ The act was signed into law on January 28, 1932.¹⁰

⁴ Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/Hooverville> (last visited 11/27/2023).

The photographs are courtesy of the Milwaukee County Historical Society and are undated, but the Historical Society dates them as circa 1930’s.

⁵ Library of Congress, *Americans Respond to the Great Depression*, <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/americans-react-to-great-depression/> (last visited 11/28/2023).

⁶ Daniel Price, *Unemployment Insurance, Then and Now, 1935-85*, Social Security Bulletin, October 1985, Vol. 48, No. 10. <https://www.ssa.gov/policy/docs/ssb/v48n10/v48n10p22.pdf> (last visited 11/28/2023).

⁷ *Id.*

⁸ Larry DeWitt, *Never a Finished Thing: A Brief Biography of Arthur Joseph Altmeyer – The Man FDR Called “Mr. Social Security,”* Social Security History, 1997. <https://www.ssa.gov/history/bioaja.html> (last visited 11/28/2023).

⁹ Edwin E. Witte, *Development of Unemployment Compensation*, 55 Yale L. J. 21, at 25 (1945).

¹⁰ DWD History Timeline. <https://dwd.wisconsin.gov/dwd/history/> (last visited 11/28/2023).

Some of Commons's students went on to become key players in the development of the New Deal, especially Wisconsin Industrial Commissioner Arthur Altmeyer (1926-1933). In 1934, Altmeyer became the Assistant Secretary for Labor at the request of FDR's Secretary of Labor, Frances Perkins.¹¹ He held top administrative positions related to federal Social Security from 1937-1953.¹²

Altmeyer and Edwin Witte (also a former student of Commons) were part of the team that developed the 1935 Social Security Act, which included provisions related to unemployment insurance.¹³ President Roosevelt called Altmeyer "Mr. Social Security."¹⁴

Wisconsin thus left an indelible stamp on the inception and development of unemployment insurance across the country.

II. Unemployment insurance is a system designed, in part, to address economic crisis.

The public policy declaration contained in Wisconsin's unemployment statute begins:

Unemployment in Wisconsin is recognized as an urgent public problem, gravely affecting the health, morals and welfare of the people of this state. The burdens resulting from irregular employment and reduced annual earnings fall directly on the unemployed worker and his or her family. *The decreased and irregular purchasing power of wage earners in turn vitally affects the livelihood of farmers, merchants and manufacturers, results in a decreased demand for their products, and thus tends partially to paralyze the economic life of the entire state.*

¹¹DeWitt, *supra* note 8.

¹² *Id.*

¹³ See, 42 U.S.C. §§ 1321-1324; also see Witte, *supra* note 9, at 30 and DeWitt, *supra* note 8.

¹⁴ DWD History Timeline, *supra* note 10.

In good times and in bad times unemployment is a heavy social cost, directly affecting many thousands of wage earners...¹⁵

At first, there was some doubt regarding whether providing unemployment benefits effectively helped to shore up the economy during times of recession or depression.¹⁶ However, by 1945, Professor Eveline Burns would write:

Economists, social scientists, business and labor groups, and many politicians appear today to agree that unemployment insurance should be viewed as an obviously convenient instrument for grappling with a substantial part of the problem of loss of income due to unemployment, and one which, by maintaining a minimum of purchasing power, might act as a national safeguard against a downward economic spiral.¹⁷

In 1955, the US Department of Labor stated that unemployment insurance “helps to maintain purchasing power and to stabilize the economy.”¹⁸ By the late 1960’s, some still considered unemployment benefits as primarily assistance for the unemployed worker, but nevertheless acknowledged that stabilization of the economy was an important secondary purpose.¹⁹ One authority noted that “increased benefits are dispensed at just the right time, in just the right place, and among those who tend to need them most.”²⁰ More recent research shows that “where unemployment benefits are more generous, the local economy tends to react significantly less

¹⁵ Wis. Stat. § 108.01(1) (emphasis added).

¹⁶ Eveline M. Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L. J. 1 at 12 (1945).

¹⁷ *Id.*.

¹⁸ Saul Bernstein, *Unemployment Insurance In the United States*, (W.E. Upjohn Institute 1993) at 47.

¹⁹ *Id.* at 47-48.

²⁰ *Id.* at 59.

sharply to negative shocks.”²¹ During the COVID-19 crisis, one bank described unemployment benefits as “a lifeline to an economy in freefall as the pandemic struck” and another emphasized that UI “helped to stabilize aggregate demand.”²² Future studies will likely show that the massive amount of money distributed through the CARES Act assisted in the rapid recovery from the brief recession caused by the pandemic.

III. Unemployment insurance claimants are presumed eligible for benefits.

Recognizing both the human costs of individual unemployment and the social benefits of providing unemployed workers with an income, Wisconsin Statutes established a strong presumption that an applicant for unemployment benefits is eligible for those benefits.²³ As noted long ago, “Under these provisions it was evidently intended that an unemployed worker, who is otherwise eligible for benefits, shall be deemed eligible unless the employer in rejecting his claim asserts some valid reason because of which the employee must be considered disqualified.”²⁴

²¹ Nick Gwyn, *Historic Unemployment Programs Provided Vital Support to Workers and the Economy During Pandemic, Offer Roadmap for Future Reform*, Center on Budget and Policy Priorities, (3/24/2022) <https://www.cbpp.org/research/economy/historic-unemployment-programs-provided-vital-support-to-workers-and-the-economy> (last visited 11/28/2023) citing Marco Di Maggio and Amir Kermani, “The Importance of Unemployment Insurance as an Economic Stabilizer,” Harvard Business School Working Paper 17-009 March 2016.

²² *Id.*, citing the Federal Reserve Bank of Dallas and JP Morgan Chase.

²³ Wis. Stat. §§ 108.01(1) and 108.02(11).

²⁴ *Boynton Cab Co. v. Giese*, 237 Wis. 237, 296 N.W. 630, 633 (1941). Also see *Kansas City Star Co., Flambeau Paper Co. Div. v. Dep't of Indus., Lab. & Hum. Rels.*, 60 Wis. 2d 591, 602, 211 N.W.2d 488, 493 (1973).

More recently, this Court has reaffirmed these principles, noting that Wis. Stat. Ch. 108 is to be “liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status.”²⁵

If “gig economy” workers like the drivers who work for Amazon Logistics are not considered employees, as that term is defined in the unemployment statutes,²⁶ the effect will be to deny those workers, who are dependent upon Amazon Logistics for their earnings, the safety net that they need. It will also harm our overall economic recovery during times of recession or depression, by depriving workers of benefits that help stabilize spending.

IV. Employers are presumed to be participants in the program.

When Wisconsin created the first unemployment insurance program in the nation, other states expressed reluctance to pass similar legislation out of fear that any state that adopted an unemployment compensation plan “handicapped its employers in interstate markets by burdening them with costs their competitors in other states were not required to meet.”²⁷ Although these objections were overcome by federal legislation incentivizing adoption of UI in all states, similar concerns about

²⁵ *Operton v. LIRC, et al.*, 2017 WI 46, ¶31-32, 375 Wis.2d 1, 894 N.W.2d 426, quoting *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 62, 330 N.W.2d 169 (1983).

²⁶ See, Wis. Stat. § 108.02(11).

²⁷ Witte, *supra* note 9, at 28.

intrastate unfairness arose where some employers worried their competitors might be exempt from the program.

To avoid any employer-to-employer competitive disadvantage within the state, the public policy declaration in Wisconsin's statute also states:

Each employing unit in Wisconsin should pay at least a part of this social cost, connected with its own irregular operations, by financing benefits for its own unemployed workers. Each employer's contribution rate should vary in accordance with its own unemployment costs, as shown by experience under this chapter. Whether or not a given employing unit can provide steadier work and wages for its own employees, it can reasonably be required to build up a limited reserve for unemployment, out of which benefits shall be paid to its eligible unemployed workers, as a matter of right, based on their respective wages and lengths of service.²⁸

By basing taxes on each employer's actual unemployment claims, the law encouraged employers to engage in business practices that reduced the likelihood of layoffs, thus advancing the policy of reducing unemployment and its social costs.

The principle that "each employing unit" must participate in the program is consistent with the principle that no single employing unit should gain the advantage of escaping unemployment taxes to the disadvantage of its competitors. And yet employers, like Amazon Logistics, continue to try.

²⁸ Wis. Stat. § 108.01(1) (emphasis added).

V. Rampant “misclassification” of employees as independent contractors undermines the purposes of unemployment insurance and other worker protections.

The term “misclassification” in the context of employment refers to identifying workers as independent contractors rather than as employees. The term is misleading in that it implies that the “misclassification” of workers as independent contractors is somehow accidental or unintended: a mistake.

But misclassification is no mistake. Employers who engage in misclassification save millions of dollars; when looking at the “gig economy” nationwide, the funds diverted from employee compensation are undoubtedly in the billions.

In Wisconsin, DWD created a Task Force on Payroll Fraud and Worker Misclassification, which issued a report in 2022.²⁹ The report found that in 2021 DWD identified \$780,000 in unpaid UI taxes and interest due because of misclassification of employees as contractors.³⁰

“Misclassification” results in payroll fraud in more areas than simply unemployment. The District of Columbia’s Attorney General reported on illegal misclassification in its construction industry. Like the Wisconsin report, the D.C. report characterizes misclassification as payroll fraud due to the illegal diversion of

²⁹ 2022 Task Force on Payroll Fraud and Misclassification Report <https://dwd.wisconsin.gov/misclass-taskforce/pdf/2022-misclassification-task-force-report.pdf> (last visited 11/28/2023). The report also noted that the task force was hampered in its work by the demands of responding to the COVID pandemic, suggesting that it would have found substantially more misclassification had it not been so hampered.

³⁰ *Id.* at 4.

tax funds to support employment-related programs, as well as denying pay and other benefits from employees who are entitled to them. These include:

- Mandatory payroll taxes that fund social welfare programs such as Social Security, Medicare and unemployment insurance.
- Workers' compensation insurance premiums
- Minimum wages and overtime pay³¹

The report confirms that misclassified workers also do not receive the benefits of unemployment compensation or workers' compensation programs.³² Importantly, an employer that engages in misclassification not only escapes responsibility for paying its share of the workers' Social Security and Medicare taxes, it shifts the burden to the worker to pay the employee *and* the employer shares of those taxes.³³

The D.C. report noted that the last nationwide study by the IRS found that 15 percent of employers engaged in misclassification, affecting 3.4 million workers and robbing the federal fisc of \$1.6 billion annually (in 1984 dollars).³⁴

Ultimately, the report concluded that the cost reduction for an employer who illegally misclassified construction employees in the D.C. area would result in savings of 16.7-48.1 percent.³⁵

³¹ OAG Issue Brief and Economic Report, "Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry." <https://oag.dc.gov/sites/default/files/2019-09/OAG-Illegal-Worker-Misclassification-Report.pdf> at 2-3 (last visited 11/28/2023).

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.* at 2.

³⁵ *Id.* at 5.

Wisconsin’s Task Force report did not sweep quite so broadly, but nonetheless concluded that between “2012 to 2021 over \$14.5 million in additional [workers’ compensation] insurance premiums were generated from employers brought into compliance.”³⁶

So-called “gig economy” employers are not faring well in their efforts to avoid paying employee benefits. According to the National Employment Law Project, damages assessed against non-compliant “gig” companies are in the millions:

Attorneys general in California and Massachusetts have been leading enforcement actions against large app-based corporations that misclassify their workforce, including Handy, Uber, and Lyft. City and district attorneys also have brought enforcement actions against Instacart, and the District of Columbia recently announced a \$2.5 million settlement with DoorDash for tip-stealing. Seattle recently announced a \$3.4 million settlement with Uber for back wages and unpaid sick leave. ... New Jersey assessed \$650 million in premiums against Uber. An analysis in California found that Uber and Lyft owe the state \$413 million over five years for unpaid premiums. An analysis in Illinois found that transportation network companies would owe \$46.6 million in 2019 alone.³⁷

In addition to the cases involving Amazon Logistics in New York and Virginia cited in DWD’s brief, app-based gig economy

³⁶ 2022 Task Force on Payroll Fraud and Misclassification Report at 4. <https://dwd.wisconsin.gov/misclass-taskforce/pdf/2022-misclassification-task-force-report.pdf> (last visited 11/28/2023).

³⁷ National Employment Law Project Policy Brief, March 2022, *Proactive Policy Solutions for Contract Workers*, at 7. <https://www.nelp.org/wp-content/uploads/Policy-Brief-Policy-Solutions-Contracted-Workers.pdf> (last visited 11/28/2023). Go to the online article for links to the sources for the data contained in the quotation, above.

employers have failed to convince at least four other courts that the unemployment claimants were independent contractors.³⁸ If this Court were to find that Amazon Logistics drivers were *not* employees, it would abandon the principles and presumptions animating Wisconsin's pioneering unemployment insurance law and may well make Wisconsin an outlier. The Court should heed Wisconsin's history and statutory public policies and require Amazon Logistics to pay unemployment taxes. The people making deliveries for Amazon Logistics are employees entitled to unemployment insurance benefits that will allow them to weather hard times and contribute to the State's economic stability.

³⁸ See, DWD brief at 17, citing *Amazon Logistics, Inc. v. Virginia Emp. Comm'n*, 78 Va. App. 521, 533, 892 S.E.2d 331 (2023), *Matter of Khaychuk*, 211 A.D.3d 1250, 1252, 181 N.Y.S.3d 673 (2022); see also *Vega v. Postmates*, 35 N.Y.3d 131 (Ct. App. 2020), *Lowman v. Unemployment Comp Board of Review*, 661 Pa. 29 (2020), *Matter of Morales*, 215 A.D.3d 1188, 1189, 188 N.Y.S.3d 744, 745 (2023) (another Amazon Logistics case) and *Matter of Phillips*, 217 A.D.3d 1014, 1016, 190 N.Y.S.3d 488 (2023).

CONCLUSION

For the foregoing reasons, LAW respectfully requests that the Court rule in favor of the Labor and Industry Review Commission and the Department of Workforce Development and determine that Amazon Logistics drivers were and are employees, as that term is used in the unemployment insurance statutes.

Date: December 4, 2023

Electronically signed by Brenda Lewison

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(7) and (8) for a brief produced with a proportional serif font. The length of this brief is 2954 words and 20 pages.

Signed: December 4, 2023

Electronically signed by Brenda Lewison

s/ Brenda Lewison

CERTIFICATE OF SERVICE

I hereby certify that I have submitted an electronic copy of this brief to the Clerk of the Court of Appeals and on representatives for Plaintiff-Respondent-Petitioner Amazon Logistics, Inc., as well as Defendants-Appellants the Labor and Industry Review Commission and the Department of Workforce Development via the electronic filing system for the Court of Appeals.

Signed: December 4, 2023

Electronically signed by Brenda Lewison

s/ Brenda Lewison