



North Carolina Unemployment Insurance Reform

The Push for Reform

- Economic downturn
- High unemployment
- More UI claims
- Employers pay less UI taxes
- Balance in UI fund insufficient to pay claims
- NC borrows from Federal Treasury to pay benefits

The Push for Reform

- NC owed Federal Treasury approximately \$2.5 billion
- Employers faced continued prospect of annual increases in FUTA taxes until debt paid off
 - Not expected to occur until 2019 under old system

House Bill 4

- **Goal:** pay off debt to federal government in near term by increasing revenue and decreasing spending
- **How?**

House Bill 4

- Higher UI taxes on employers
- Reduced payments to claimants over shorter periods
- Fewer opportunities for employees quitting jobs to get benefits
- Fewer situations in which employers may avoid charges in discharge cases
- Drastic restrictions on use of “attached claims”

Increased UI Tax Rates

- 0.06% increase in state unemployment tax rate
 - Minimum: 0.00% to 0.06% of taxable wages
 - Maximum: 5.7% to 5.76% of taxable wages
 - Effective January 1, 2014
- New surtax on employers
 - Equal to 20% of required contribution / unemployment tax
 - Results in effective tax rates of 0.07% to 6.91% of taxable wages
 - Not charge in calendar years in which the UI Trust Fund balance is \$1 billion or more

Reduction in Weekly Benefit Amount

- Reduction in maximum weekly benefit amount (WBA) from \$535 to \$350
 - WBA calculation changed from a formula based on claimant's high quarter wages in base period divided by 26, to an amount calculated by dividing total wages earned in last 2 base period quarters by 52, not to exceed \$350

Reduction in Duration of Benefits

- Reduction in duration of benefits from 13 to 26 weeks to 12 to 20 weeks
 - Maximum duration varies depending on NC's seasonal adjusted unemployment rate
 - If rate is less than or equal to 5.5%, maximum duration of benefits will be 12 weeks
 - Maximum duration increases by 1 week for every 0.5% increase in the rate, up to 20 weeks when the rate is greater than 9%

Waiting Week for Each Claim

- Previously, claimants were subject to only one waiting week per benefit year, regardless of number of claims
- Claimants now must serve a one week waiting period for each claim filed on or after June 30, 2013

New Definition of “Suitable Work”

- Claimant is disqualified from benefits if s/he chooses not to accept suitable work

New Definition of “Suitable Work”

- Previously, to determine whether claimant has been offered suitable work, DES considered:
 - Degree of risk to health, safety and morals
 - Physical fitness and prior training and experience
 - Prospects for securing work in customary occupation
 - Prior earnings
 - Distance of the offered work from residence

New Definition of “Suitable Work”

- Now:
 - DES considers the factors above only during first 10 weeks of benefit period
 - After 10 weeks, any work offered to claimant which pays 120% of the weekly benefit amount will be deemed suitable work
 - If claimant declines, s/he is disqualified from benefits

Elimination of “Good Cause” Reasons for Quitting

- Claimant who quits must show s/he left work for “good cause attributable to the employer” to receive benefits

Elimination of “Good Cause” Reasons for Quitting

- New law eliminates all but two reasons that previously constituted good cause, including:
 - Health condition/disability of claimant or family member
 - Work relocation of spouse (except military spouses)
 - Inability to work particular shifts because of undue family hardship

Elimination of “Good Cause” Reasons for Quitting

- Only two specific reasons for which an employee may quit work and still qualify for benefits remain
 - Relocation of a military spouse
 - Domestic violence, if claimant believes continued employment would jeopardize his/her or family’s safety

Elimination of “Good Cause” Reasons for Quitting

- New law raises threshold for using reduction in work hours as good cause for leaving work from more than a 20% reduction to more than a 50% reduction

Elimination of “Good Cause” Reasons for Quitting

- New law retains prior threshold for using reduction in pay as good cause at a 15% reduction
 - Employers may rebut these good cause claims by showing reductions in hours or pay were temporary or caused by claimant’s malfeasance, misfeasance or non-feasance

Elimination of “Good Cause” Reasons for Quitting

- New law increases the maximum period the employer may suspend an employee without triggering eligibility for benefits from 10 days to 30 days

“Substantial Fault” Repealed

- Previously, employer accounts were not charged where the claimant was terminated for “misconduct” or “substantial fault”
 - For substantial fault, claimants were disqualified for 4 to 13 weeks and then received benefits, but their employers’ accounts were not charged

“Substantial Fault” Repealed

- For claims filed on or after June 30, 2013, substantial fault is eliminated
 - Employers must establish misconduct in discharge cases to prevent charges to their accounts

“Substantial Fault” Repealed

- Practical Effects:
 - More claimants will receive benefits for discharges based on minor to intermediate infractions of work rules not rising to misconduct
 - Claimants and employers no longer may create a “win-win” situation by stipulating to facts to achieve a substantial fault finding

Higher Burden to Prove Misconduct in “Discharge” Claims

- The burden is on employer to show:
 - Conduct evincing a willful or wanton disregard of the employer’s interest as is found in deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee or has explained orally or in writing to an employee, or

Higher Burden to Prove Misconduct in “Discharge” Claims

- The burden is on employer to show (cont'd):
 - Conduct evincing carelessness or negligence of such degree or recurrence as to manifest an intentional and substantial disregard of the employer’s interest or of the employee’s duties and obligations to the employer

Proving Misconduct

Relatively new statutory examples of misconduct

- Violation of written alcohol or illegal drug policy
- Reporting to work significantly impaired by alcohol/illegal drugs
- Consumption of alcohol/ illegal drugs on employer's premises
- Arrest or conviction for offenses involving violence, sex crimes or illegal drugs
- Physical violence related to work
- Unlawful harassment/ creating a hostile work environment

Proving Misconduct

Relatively new statutory examples of misconduct (cont'd)

- Theft
- Forging / falsifying documents or data, including previously submitted employment applications
- Violation of written absenteeism policy
- Refusal to perform reasonable assigned work tasks
- Failure to adequately perform employment duties as evidenced by no fewer than 3 written reprimands in the 12 months preceding discharge

Remember . . .

- An employer's account is not charged for benefits granted to claimant terminated within first 100 days for *bona fide* inability to do job for which s/he is hired
 - Consider establishing/revitalizing 90-day introductory periods
 - Implement process to assess and act upon performance issues within first 100 days

Restrictions on Attached Claims

- “Attached claims” are claims filed by employers for employees who remain attached to payroll but:
 - Work less than “three customary scheduled full-time days” in a week
 - Work less than 60% of “customary scheduled full-time hours” in a week, or
 - Temporarily have no work available

Restrictions on Attached Claims

- No work search requirements during attachment
- According to DES, 40% - 50% of claims activity was attributable to attached claims
- Changes apply to attached claims filed on or after June 30, 2013

Restrictions on Attached Claims

- New prerequisites for filing attached claims:
 - Must have at least \$0 account balance, or bring account to \$0
 - Must prepay to DES full cost of benefits payable during attachment before claim is processed
 - Employers will be reimbursed for unused prepaid amounts
 - 14 calendar days to prepay after attached claim request is made

Restrictions on Attached Claims

- New Limits
 - Only one attached claim per employee permitted per benefit year, regardless of length of claim period
 - Attached claim period may not exceed six weeks
 - One week waiting period applies to each attached claim

Restrictions on Attached Claims

- Practical Effects:
 - Fewer employers will be able to utilize attached claims
 - Laid-off employees may need to file regular claims themselves and receive benefits; work search requirements will apply
 - Potential for higher turnover
 - Potential for increased reliance on temporary workforce

Action Items

- Review handbooks, policies and codes of ethics/conduct
 - Ensure existence of written policies covering each statutory example of misconduct and other acts considered to be misconduct

Action Items

- Review handbooks (cont'd)
 - Assess sufficiency of policies
 - Do they address in detail specific acts that run afoul of policy?
 - Do they include clear consequences for non-compliance?
 - Consider point/occurrence systems for absenteeism policies

Action Items

- Review handbooks (cont'd)
 - Revisit corrective action policies
 - Consider dropping “verbal,” “coaching,” “counseling” language
 - Consider using “written reprimand” instead

Action Items

- Review handbooks (cont'd)
 - Ensure employees acknowledge in writing their receipt and understanding of, and agreement to abide by, policies

Action Items

- Carefully document performance issues
 - Include facts to show “deliberateness” and lack of good cause to justify conduct/failure to perform, if appropriate
 - Confirm in documentation that employee had notice of policy
 - Document employee’s response

Action Items

- Provide written documentation to employees for all counseling sessions, performance improvement plans, reprimands and warnings, regardless of whether characterized as “written” or “verbal” in discipline policies
 - Provide copy of applicable policy with documentation

Action Items – Focus on Effective Documentation

- Prepare soon after event
- State facts – not conclusions/ opinions

Action Items – Focus on Effective Documentation

Include:

- Date prepared
- Name/signature of preparer
- Date/time/place of event
- What happened and who was involved
- How it impacted business
- Applicable policies (and attach)
- References to past relevant documentation (and attach)
- Corrective action taken and consequences of additional issues
- Date/time/place of discussion with employee
- Employee's response
- Employee's signature and date

After a Claim is Filed . . . Provide Adequate Response to NCUI 500 AB

- Employers now have 14 days to respond
- New DES standard for employer responses:
 - Employer must provide “sufficient facts to enable DES to make a correct determination under the law without having to contact the employer to obtain any additional information”

After a Claim is Filed . . . Provide Adequate Response to NCUI 500 AB

- If benefits are erroneously paid to a claimant at the initial stage, and the employer later appeals and proves misconduct, benefit charges to employer's account may not be reversed if the employer has pattern of failing to respond timely or adequately to DES requests

Responding to NCUI 500 AB

- When providing reason for termination:
 - Be truthful and consistent – provide the same reason you gave employee, and the same reason you would give in court

Responding to NCUI 500 AB

- When providing reason for termination (cont'd):
 - Be concise, but include key facts, especially in performance-based cases
 - “Ms. Doe was terminated for failure to adequately perform job duties despite 5 written reprimands over the past 8 months. See attached documentation.”

Responding to NCUI 500 AB

- When providing reason for termination (cont'd):
 - Highlight potential for non-charging, if applicable

Responding to NCUI 500 AB

- DES expects to receive:
 - Resignation letter
 - Applicable policies
 - Signed acknowledgement forms
 - Written documentation regarding policy violations
 - Previous warnings, reprimands, PIPs, coachings/counselings
 - Detailed information regarding circumstances leading to separation

Handling Appeals Hearings

- Consider whether potential benefit (avoiding charges) outweighs costs and potential risks:
 - Time, resources, energy
 - Opportunity for free and early discovery for claimant and opposing counsel through cross-examination of company witnesses and subpoenas for documents

Handling Appeals Hearings

- Consider engaging counsel
- Proceed cautiously in cases involving:
 - Problematic facts for company
 - Claimant with history of complaints about discrimination, harassment, retaliation, pay issues, etc.
 - Claimant who has filed, or threatened to file, charge/complaint with EEOC, DOL, court, etc.

Handling Appeals Hearings

- Remember – hearing is the only opportunity to create a record and present testimony
- Consider requesting in-person hearing
- Use witnesses with first-hand knowledge of essential facts/issues
 - Hearsay not sufficient

Handling Appeals Hearings

- Submit key documents, and serve on claimant or counsel prior to hearing
- Follow special rules for hearings on controlled-substances related discharges

Resources

- www.ncesc.com
- HB4questions@nccommerce.com
- House Bill 4 – available at <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=hb4&submitButton=Go>
- House Bill 743 (technical corrections) – available at <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2013&BillID=H743&submitButton=Go>
- NCDES Memo on changes to unemployment insurance law – available at <http://www.ncesc1.com/HB4/Memo-on-HB4-Changes-to-UI.pdf>
- NCDES Q&A – available at <http://www.ncesc1.com/individual/2013LawChangeQA.asp>
- NCDES Memo to NC Employers – available at <http://www.ncesc1.com/HB4/Memo-on-HB4-Changes-to-UI.pdf>
- NCDES Memo regarding preparing adequate and timely responses to Forms NCUI 500AB – available at http://www.ncesc1.com/HB4/EMPLOYER_memo9.11.13_M.pdf
- NCDES Employer Training videos – available at <http://www.youtube.com/user/DESofNC/videos>



Thank You.

J. Travis Hockaday and Megan P. Black

**North Carolina Unemployment
Insurance Reform**
