U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210

JUN 2 3 2011

Ms. Lynn R. Holmes
Chairman
NC Employment Security Commission
P.O. Box 25903
Raleigh, North Carolina 27611

Dear Chairman Holmes:

We have reviewed North Carolina Senate Bill (SB) 532, which has passed the legislature and has been sent to the Governor for signature, for conformity with Federal unemployment compensation (UC) law. My staff provided technical assistance to members of your staff about several issues in this bill that were not addressed before it passed the legislature. As a result, we have been requested to send a letter explaining the issues with Federal UC law that are raised by this bill.

In brief, there are four issues raised by the SB 532 as currently drafted. First, it contains a provision that would allow employers thirty days to respond to a claim notice. Second, the bill includes a provision that would permit the total reduction of benefit rights if an individual is arrested for or convicted of certain criminal behavior. Third, the bill would permit an individual to be total disqualified for unsatisfactory performance. Finally, the bill would permit parties to waive the right to an appeal hearing by entering stipulations resolving the issues of an appeal. A detailed discussion of each of these issues follows.

Payment of UC with the greatest promptness that is administratively feasible. The bill would amend the UC law to provide that an employer shall be allowed thirty days from the mailing or delivery of the notice of claim filed to protest the claim and have it referred to an adjudicator.

Section 303(a)(1), of the Social Security Act (SSA), requires, as a condition for a state to receive administrative grants for its UC program, that the law of the state provide for "[s]uch methods of administration ... as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."

The Supreme Court's decision in *California Department of Human Resource Development v. Java*, 402 U.S. 121 (1971), interpreted this requirement to pay UC "when due" to mean "at the earliest stage of unemployment that such payments [are] administratively feasible after giving both the worker and the employer an opportunity to be heard." The Court further stated that "[w]e conclude that the word 'due' in 303(a)(1), when construed in the light of the purposes of the Act, means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment."

As a result of *Java,* the Department of Labor issued interpretations of the "when due" provision with respect to certain administrative procedures for the UC program. These include regulations establishing promptness criteria for first payments found in 20 CFR Part 640, the Benefit Payment Promptness Standard.

As specified in the regulation, for most intrastate claims, the Secretary determined that a state will be considered to be paying UC when due if the state pays 87% or more of these claims within 14 days of the end of the first compensable week (or 21 days for non-waiting week states), and 93% of such claims within 35 days. For the less common interstate claim, the percentages required are lower.

Allowing employers thirty days from the delivery or mailing of the notice of claim filed to protest a claim would make it nearly impossible for the agency to make timely determinations under the Secretary's standard. Therefore, the UC agency would not be meeting its requirement to make payment of UC with the greatest promptness that is administratively feasible. Thus, an issue is raised.

Misconduct connected with work and total reduction of benefit rights. The bill would broaden the definition of "misconduct connected with work" in the disqualification section of the UC law to include the commission of certain criminal offenses. Specifically, if an individual is "terminated or suspended from employment after arrest or conviction for an offense involving violence, sex crimes, or illegal drugs," the individual will be disqualified for the duration of the unemployment.

Federal law limits the circumstances under which an individual may be totally disqualified for benefits. Section 3304(a)(10) of the Federal Unemployment Tax Act (FUTA) provides that –

> compensation shall not be denied to any individual by reason of cancellation of wage credits or total reduction of benefit rights for any cause other than discharge for misconduct *connected with his work*, fraud in connection with a claim for compensation, or receipt of disqualifying income… [Emphasis added.]

The list of criminal offenses in the bill includes situations when an individual may engage in certain criminal behavior that does not occur at work, is not directly related to an individual's work performance, or which does not involve some special duty on the part of the individual to uphold the law. Thus, while the employer is free to discharge an individual due to arrest for or conviction of these offenses, the agency must determine whether they constitute misconduct connected with the work. To the extent that an individual could be totally disqualified for UC absent such a finding, this provision raises an issue.

Failure to perform and misconduct. The bill would impose a total disqualification for benefits if an individual is discharged for "the failure to adequately perform any other employment duties as evidenced by no fewer than three written reprimands received in the 12 months immediately

preceding the employee's termination." Receipt of three written reprimands, in and of itself, does not constitute misconduct connected with work and can not be the basis for imposing a total disqualification of benefit rights. As noted above, Federal law limits the circumstances under which an individual may be totally disqualified from benefits. Thus the UC agency must determine, on a case by case basis, whether the actions of the individual in failing to meet the performance expectations of the employer were the result of intentional behavior or gross negligence, and sufficiently egregious as to warrant the conclusion that the discharge was for misconduct connected with work to impose a total denial of benefits rights.

Stipulation of the issues and the methods of administration requirement. The bill would permit parties to an appeal to waive the right to an evidentiary hearing by entering into "a stipulation resolving the issues pending before the appeals referee, hearing officer, or other employee assigned to make the decision ..." The bill further provides that such stipulation need not be recorded.

As noted above, states must have "methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due . . ." The Secretary interprets "payment when due" to require the state agency to obtain promptly and prior to a determination of an individual's right to benefits, such facts pertaining as will be sufficient reasonably to insure the payment of benefits when due. As noted in the Secretary's Standard for Claims Determinations, Sections 6010-6015 of the Employment Security Manual "[T]he responsibility of the agency to take the initiative in the discovery of information may not be passed on to the claimant or the employer" or other sources. (This standard is codified at 20 CFR 614 Appendix B.)

Unemployment Insurance Program Letter 26-90, provided the Department of Labor's position that appeal hearing procedures must be simple, speedy and inexpensive. As noted in the UIPL, Section 303(a)(3), SSA, has been interpreted "to require that appeals hearings are to be simple and that a claimant should be able to understand the appeals procedures without the need of securing legal representation to protect his or her rights." (See page 5 of A Guide to Unemployment Insurance Benefit Appeals.)

These provisions require the UC agency to conduct an investigation and make findings of facts before making a determination on a claim, including issuing an appeal decision. Allowing the claimant and employer to "stipulate to the issues" involved in an appeal is not a method of administration to insure full payment of UC when due because the agency's responsibility to apply the UC law to specific findings of fact is disregarded by a process that allows the parties to stipulate to the issues of an appeal.

While a stipulation of the facts may be acceptable, this would depend on all the circumstances involved. As noted above, appeal procedures must be simple, speedy, and inexpensive. A stipulation of the issues may have far reaching consequences both on the eligibility of the individual for UC and possible benefit charges on the current or future claim. We note that most

claimants are not represented by counsel and it is the responsibility of the hearing officer to ensure that the claimant's rights are protected. Unrepresented claimants could be unduly influenced to agree to stipulations or a settlement that is not supported by the facts of the situation when they are without benefit of counsel.

We note that any stipulation of the facts must be approved by the appeals hearing officer who must insure that the stipulation is accurate, that there is no undue influence involved, and that the parties fully understand how the hearing officer will use the stipulated fact(s) in making the decision on the appeal. Given the significance of a stipulation of fact, we strongly recommend that any procedure by which a hearing officer accepts a stipulation of fact should be recorded.

Please contact Randy Fadler, your Regional Office UI Legislative Specialist, at (404) 302-5360 or Fadler.randy@dol.gov should you have questions regarding this letter.

Sincerely,

Gay M. Gilbert
Administrator
Office of Unemployment Insurance

cc: Helen Parker
Regional Administrator
Atlanta