U.S. Department of Labor

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

JUL - 9 2013

Mr. Dale R. Folwell
Assistant Secretary
Division of Employment Security
NC Department of Commerce
P.O. Box 25903
Raleigh, NC 27611

Dear Assistant Secretary Folwell:

We have reviewed Session Law 2-2013 (enacted North Carolina House Bill (HB) 4) for conformity with Federal unemployment compensation (UC) law. The enactment extensively revised the state UC law. We have identified several conformity issues and other provisions that raise potential conformity issues. In addition, while they do not raise conformity issues, we have other concerns with the enactment. Specifically, we have identified conformity issues or questions on the following matters: eligibility of employees of educational institutions; total reduction of benefit rights; approved training; and uniform method of determining employer experience. We have identified potential conformity issues relating to the definition of the unemployment fund and the withdrawal standard; equal treatment of services; and the retirement pay deduction. Finally, while not conformity issues, we have concerns with the reduction in the maximum weekly benefit amount (WBA); repeal of UC modernization provisions; and reduced UC duration. A detailed discussion of each item follows.

Section 3304(c) of the Federal Unemployment Tax Act (FUTA) requires the Secretary of Labor (Secretary) to annually certify to the Secretary of the Treasury each state whose law conforms to FUTA. This certification enables employers in the state to receive credit against the FUTA tax. Section 302(a) of the Social Security Act (SSA) requires the Secretary to certify, as a condition for payment of UC administrative grants, whether the state law conforms to the requirements of Section 303(a), SSA. The Secretary may withhold these certifications when, after providing the state notice and an opportunity for a hearing, he or she finds that state law no longer conforms to Federal UC law.

Section 96-19(b) of your UC law authorizes the agency administering the state UC law to suspend enforcement of any provision of such law when notified by the Department of Labor that the provisions are not in conformity with Federal law, until such time as your legislature may consider the conflict. We request that you use this authority to suspend the state provisions we identified as raising conformity issues so that we may hold the issues in abeyance until your legislature has an opportunity to address our concerns. Please respond, within thirty days of the receipt of this letter, to inform us of the actions that you will take to ensure that your law is in conformity with Federal UC law.

CONFORMITY ISSUES

Four provisions of Session Law 2-2013 create conformity issues with Federal law. Conformity issues exist when a particular provision or provisions of the state UC law do not conform to specific requirements of FUTA or the SSA. Conformity with the provisions of FUTA is necessary for certification of the state law in order for employers in the state to receive credit against the FUTA tax. Conformity with the requirements of the SSA is necessary in order for the state to be certified for the receipt of grants to administer the UC program. A conformity issue generally requires the state to amend its UC law to conform to the Federal requirement. The state might also invoke state law authority to suspend the provisions we have identified as raising conformity issues until such time as they can be amended by the legislature in order to bring your law into conformity with Federal UC law. A description of the specific provisions of Federal law to which the state law is required to conform, and a discussion of the conformity issues, follows.

I. Eligibility of Employees of Educational Institutions.

As amended by Session Law 2-2013, the state UC law is not in conformity with the "between and within terms denial" provisions of Section 3304(a)(6)(A), FUTA, requiring that UC is not payable between and within academic years and terms based on certain services while in the employ of an educational service agency.

The enactment repealed Section 96-13, which included detailed provisions of your UC law in subparagraphs (a) through (e) related to the eligibility of employees of educational institutions between and within academic years and terms and replaced it with the following provision in Section 96-14.1(e):

> Federal Restrictions. – Benefits are not payable for services performed by the following individuals, to the extent prohibited by section 3304 of the Code:
> (1) Instructional, research, or principal administrative employees of educational institutions.

This provision appears intended to implement Section 3304(a)(6)(A), FUTA, which establishes an exception to the equal treatment requirement for services described in Section 3309, FUTA, for the payment of UC between and within academic years or terms. Significantly, however, the state amendment is limited to services performed in the employ of "educational institutions," whereas the FUTA requirement is not so limited.

Section 3304(a)(6)(A)(iv), FUTA, provides that a state UC law must deny UC between and within terms, with respect to services in an instructional, research, or principal administrative capacity "to any individual who performed such services in an educational institution while *in the employ of an educational service agency* [ESA], and for this purpose the term 'educational service agency' means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions." (Emphasis added.)

Since the enactment does not apply the between and within terms denial provision for service in an instructional, research, or principal administrative capacity when performed for an educational service agency, it raises a conformity issue with Section 3304(a)(6)(A)(iv), FUTA.

II. Total Reduction of Benefit Rights.

As amended, the state law is not in conformity with the provision of FUTA that provides that a state UC law may not impose a total reduction of benefit rights unless an individual is discharged for misconduct connected with work, commits fraud in connection with a claim, or is receipt of disqualifying income. The amended law now provides a total disqualification for voluntarily leaving employment, and for being discharged for the failure to supply a license, regardless of whether the actions of the individual constitute misconduct connected with work. Additionally, as amended the law provides that an individual is disqualified for any remaining benefit weeks if there is a failure to apply for or accept suitable work; or a failure to return to self-employment; or a failure to accept a recall from an employer. If any such failure occurs during the first week benefits are claimed, then this also constitutes a total reduction of benefit rights. Thus, these provisions are not in conformity with Federal UC law.

The enactment amended several provisions of your employment security law governing disqualifications of individuals for benefits. Section 96-14.1(c), as amended, provides:

> (c) Qualification Determination. – An individual's qualification for benefits is determined based on the reason for separation from employment from the individual's bona fide employer. The individual's bona fide employer is the most recent employer for whom the individual began employment for an indefinite duration or duration of more than 30 consecutive calendar days, regardless of whether work was performed on all of those days. An individual who is disqualified has no right to benefits. [Emphasis added.]

Section 96-14.5(a), as amended, provides for a total disqualification if an individual voluntarily quits employment without good cause attributable to the employer.

> Determination. – The Division must determine the reason for an individual's separation from work. An individual does not have a right to benefits and is disqualified from receiving benefits if the Division determines that the individual left work for a reason other than good cause attributable to the employer. When an individual leaves work, the burden of showing good cause attributable to the employer rests on the individual and the burden may not be shifted to the employer.

Federal law limits the circumstances under which an individual may be totally disqualified for benefits. Section 3304(a)(10), 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.

Since voluntarily leaving employment does not constitute a discharge for misconduct connected with work, fraud in connection with a claim for benefits, or the receipt of disqualifying income, a total disqualification for this reason raises a conformity issue with Section 3304(a)(10), FUTA.

The enactment also imposes a total disqualification for individuals who become separated from employment because of the loss of a license. It specifically provides the following in the state law:

> § 96-14.7. Other reasons to be disqualified from receiving benefits.
> (a) Failure to Supply Necessary License. – An individual is disqualified for benefits if the Division determines that the individual is unemployed for failure to possess a license, certificate, permit, bond, or surety that is necessary for the performance of the individual's employment if it was the individual's responsibility to supply the necessary documents and the individual's inability to do so was within the individual's control. The period of disqualification begins with the first day of the first week the individual files a claim for benefits after the individual's failure occurs.

This disqualification is not included within the section of your UC law providing a definition of misconduct and examples of conduct that meets that definition. The placement of this provision in another part of your UC law entitled "Other reasons to be disqualified from receiving benefits" implies that no misconduct needs to be shown in order for the total disqualification to be imposed. For employment separations, a total reduction of benefit rights may be imposed only if the individual is discharged for misconduct connected with work. In instances where the discharge is for failure to obtain a license or certification, the agency must determine whether the failure constituted misconduct connected with the work, or whether the individual had good cause for failing to obtain the necessary certification. While an employer is free to discharge the individual for failing to obtain the necessary license or certification, absent a finding that the individual was discharged for misconduct connected with the work, FUTA does not permit the total denial of benefit rights.

For example, if the individual personally failed to take the necessary actions to obtain the license or certification, such as failing to take a required test or submit required proper documentation to the licensing board, then the failure could, consistent with Section 3304(a)(10), FUTA, be construed as misconduct. However, if the failure to obtain the license was due to factors unrelated to misconduct, such as failure by the employer to submit necessary paperwork, cancellation by the state of scheduled testing, or the inability of the individual to pass the test in spite of their best effort to do so, there would be no misconduct on the basis of which the state could totally deny UC consistent with Section 3304(a)(10), FUTA.

Since this provision in the enactment does not require a finding that the failure to obtain the license or certification was the result of any misconduct connected with work by the individual, it raises a conformity issue with Section 3304(a)(10), FUTA.

The enactment also provides, in amended Section 96-14.11(b) of the state law, that an individual will be disqualified for remaining weeks of the benefit period if an individual fails to apply for

suitable work when directed by the employment office, fails to accept suitable work when offered, or fails to return to customary self-employment when directed by the Division. Additionally, under amended Section 96-14.11(c), an individual will be totally disqualified for failure to return to work after a layoff.

> (c) Recall After Layoff. – An individual is disqualified for any remaining benefits if it is determined by the Division that the individual is, at the time that a claim is filed, unemployed because the individual without good cause attributable to the employer and after receiving notice from the employer, refused to return to work for an employer under one or more of the following circumstances:
> (1) The individual was recalled within four weeks after a layoff. As used in this subdivision, the term "layoff" means a temporary separation from work due to no work available for the individual at the time of separation from work and the individual is retained on the employer's payroll and is a continuing employee subject to recall by the employer.
> (2) The individual was recalled in a week in which the work search requirements were satisfied under G.S. 96-14.7(g) due to job attachment.

If the individual fails to apply for suitable work when directed by the employment office, fails to accept suitable work when offered, or fails to return to customary self-employment when directed by the Division during the first week of the benefit year, the disqualification would be a total reduction of benefit rights for a cause other than discharge for misconduct connected with work, fraud in connection with a claim for compensation, or receipt of disqualifying income. It therefore raises a conformity issue with Section 3304(a)(10), FUTA.

Additionally, amended Section 96-14.11(c) (the provision entitled "Recall After Layoff") provides that an individual is disqualified from receiving benefits for the remaining weeks of the claim's duration if, "at the time a claim is filed," an individual is unemployed because the individual without good cause attributable to the employer refused to return to work for the employer after receiving notice of recall. Since this provision is applicable at the time the claim is filed and applies a total disqualification for all remaining weeks in the benefit period, it constitutes a total reduction of benefit rights and raises a conformity issue with Section 3304(a)(10), FUTA.

III. Approved Training.

As amended, the law is out of conformity with the provision of FUTA requiring that state UC law must provide that individuals in approved training programs may not be denied due to the application of state law provisions related to an active work search, refusal to apply for or accept suitable work, or being available for work during weeks such individuals are attending training with the approval of the state agency. Session Law 2-2013 repealed a provision of the state UC law that implemented this requirement. As such, it raises a conformity issue.

Session Law 2-2013 amended the suitable work provisions of your state UC law and deleted the provision in Section 96-13(3) requiring that "an otherwise eligible individual who is attending a vocational school or training program which has been approved by the Division for such individual shall not be denied benefits because he refuses to apply for or accept suitable work

during such period of training." The enactment replaced that provision with Section 96-14.9 as follows:

> (h) Job Training. – An individual has satisfied the work search requirements for any given week if the Division determines for that week that one or more of the following applies:
>
> (1) Trade Jobs for Success. – The individual is participating in the Trade Jobs for Success initiative under G.S. 143B-438.16.
>
> (2) Reemployment services. – The individual is participating in the reemployment services as directed by the Division and is actively seeking work in a manner consistent with the planned reemployment services. The Division must refer an individual to reemployment services if the Division finds that the individual would likely exhaust regular benefits and need reemployment services to make a successful transition to new employment.
>
> (3) Vocational school or training program. – The individual is attending a vocational school or training program approved by the Division.

We also note that amended Section 96-14(9)(j) provides that an individual participating in training under the Trade Act of 1974 may not "be denied benefits by reason of leaving work to enter such training, provided the work left is not suitable employment, or because of the application to any such week in training of provisions in this law or of any applicable federal unemployment compensation law, relating to availability for work, active search for work, or refusal to accept work."

Section 3304(a)(8), FUTA, requires state law to provide that "compensation shall not be denied to an individual for any week because he is in training with the approval of the State agency (or because of the application, to any such week in training, of State law provisions relating to availability for work, active search for work, or refusal to accept work)."

Amended Section 96-14.9 is not sufficient to conform to the requirement of Federal UC law that individuals attending approved training must not be disqualified under state law provisions relating to availability for work, active search for work or refusal to accept work because it only applies to individuals participating in training under the Trade Act of 1974.

Since the enactment exempts individuals in approved training only from the work search requirement, and does not exempt such individuals from the availability for work or refusal to accept work requirements (except if participating in training under the Trade Act of 1974), it raises a conformity issue with Section 3304(a)(8), FUTA.

IV. Uniform Method of Determining Employer Experience.

Session Law 2-2013 is not in conformity with the provision of FUTA that requires state experience rating systems employ a "uniform method" of determining an employer's experience with respect to unemployment risk when calculating employers reduced tax rates. In order to equitably assign a reduced tax rate, state law is required to use the same method of assigning experience among the employers in the state. Because the state UC law, as amended, employs a

different system of charging benefits for seasonal claims than is employed for all other claims, the experience of all employers in the state is not measured using a uniform method.

The enactment provides that benefits will be charged to an employer's account in relation to proportionate base period wages as follows:

> § 96-11.2. Allocation of charges to base period employers.
>
> Benefits paid to an individual are charged to an employer's account when the individual's benefit year has expired. Benefits paid to an individual must be allocated to the account of each base period employer in the proportion that the base period wages paid to the individual in a calendar quarter by each base period employer bears to the total wages paid to the individual in that quarter by all base period employers. The amount allocated to an employer that pays contributions is multiplied by one hundred twenty percent (120%) and charged to that employer's account. The amount allocated to an employer that elects to reimburse the Unemployment Insurance Fund in lieu of paying contributions is the amount of benefits charged to that employer's account.

However, the enactment amended the provisions of state law related to seasonal employment to eliminate the reference to proportional charging of benefits provided in former Section 96-9(c)(2)(a), and changed the charging provision so that benefits paid to an individual will be classified as seasonal or non-seasonal. Seasonal wages are deemed to constitute all of the individual's base period wages for any unemployment that occurs within the seasonal period, and the account of the seasonal employer(s) would be subject to all of the benefit charges for unemployment occurring with the seasonal period. For any unemployment that occurs outside the seasonal period, the non-seasonal wages are deemed to constitute all of the individual's base period wages, and any benefit charges will be assigned to the account of the employer(s) that reported these non-seasonal wages.

Since the state law now employs a different method of charging employers when seasonal work is part of the base period than the method of charging employment for other claims that do not contain seasonal employment in the base period, it does not conform to the requirement of Federal UC law that state experience rating systems must employ a uniform method of charging.

Section 3303(a)(1), FUTA, requires, as a condition for employers in a state to receive the additional credit against the Federal tax, that state law provide that:

> No reduced rate of contributions to a pooled fund is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) experience with respect to unemployment or other factors bearing a direct relation to unemployment risk.

Departmental guidance, discussed below, has consistently interpreted this FUTA provision to require that, where "experience" is measured (as in North Carolina) by benefit charges, all employer accounts must be charged in the same way to ensure each employer's experience is properly measured in relation to other employers. It is inconsistent with this requirement to

charge benefits in one manner for an employer in one industry, or type of industry, and in another way for employers in another industry, or type of industry, because it would distort the relative measure of certain employers' experience in relation to other employers. (For a detailed discussion of the "uniform method" requirement, see Unemployment Insurance Program Letter (UIPL) No. 29-83, Change 1.) Since the enactment provides that benefits will be charged differently based on whether any wage credits were earned in seasonal work from the way all other claims are charged, it raises a uniform method issue. In UIPL No. 24-77, which announced the Secretary of Labor's conformity decision involving an amendment to a state law that provided that employers in one industry would be charged differently than other employers in that state, the Secretary reaffirmed the uniform method requirement with respect to charging benefits as follows:

> The general principle underlying the Department's interpretations of section 3303(a)(1) has been that a State must charge all employers by the same rule over the same period of time.

Under Section 96-11.2, as amended by Session Law 2-2013, benefits paid on a claim not involving seasonal wages are charged to each base period employer based on the proportion of wages paid by that base period employer. Since the enactment employs a different charging method for a claim based on seasonal wages than all other claims, it raises a uniform method issue.

POTENTIAL CONFORMITY ISSUES

In addition to the conformity issues identified above, we have identified three potential conformity concerns with the state law as amended. A detailed explanation of these potential conformity issues follows.

I. Unemployment Fund and the Withdrawal Standard.

It is unclear whether the amended state law conforms to the "withdrawal standard" in FUTA and the SSA, which requires state law to permit the withdrawal of money in the unemployment fund only to pay UC. Session Law 2-2013 removed a provision from the state UC law that money in the unemployment fund would be used "solely for the payment of compensation." The state must either restore this limitation on the use of money in the unemployment fund to its UC law, or provide written assurance that some other legal authority or binding statutory interpretation exists that requires the state UC agency to limit the use of money in the unemployment fund consistent with this limitation.

Session Law 2-2013 deleted the language in Section 96-6(a) that the state unemployment fund is "established as a special fund, separate and apart from all public moneys or funds of this State..." It also deleted the language in Section 96-6(c) that limits the expenditure of money in the benefit account solely for the payment of UC. Specifically, the enactment deleted language that required that:

> Money shall be requisitioned from this State's account in the unemployment trust fund solely for the payment of benefits (including extended benefits) and in accordance with regulations prescribed by the Secretary.

Section 3304(a)(4), FUTA, requires state law to provide that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration…." Section 3306(h), FUTA, defines "compensation" as "cash benefits payable to individuals with respect to their unemployment." These two provisions of Federal law require that all money withdrawn from a state's unemployment fund be used solely for the payment of compensation to individuals with respect to their unemployment. These provisions are referred to as the "withdrawal standard."

Section 3306(f), FUTA, defines "unemployment fund" to mean—

> "a special fund, established under a State law and administered by a State agency, for the payment of compensation. Any sums standing to the account of the State agency in the Unemployment Trust Fund established by section 904 of the Social Security Act…shall be deemed to be a part of the unemployment fund of the State, and no sums paid out of the Unemployment Trust Fund to such State agency shall cease to be a part of the unemployment fund of the State until expended by the such State agency."

The enactment requires that North Carolina administer the fund "exclusively for the purposes of this Chapter." In addition to the payment of UC, the Chapter includes the administrative provisions related to the UC program and certain employment services. The costs of administration of the UC program and employment services may not be paid out of the UC fund. These expenses may be paid from the state administrative grant, which is not part of the state UC fund. Thus, providing that the fund shall be used exclusively for the purposes of this Chapter is not the same as the limitation required by the withdrawal standard.

Either North Carolina must amend its UC law to conform to the withdrawal standard by restoring the provision that limits withdrawal of money in the unemployment fund solely for the payment of UC, or the state UC agency must provide written assurance that some legal authority or interpretation exists such that the amended state law continues to limit withdrawals from the unemployment fund to those permitted by Federal law.

II. Equal Treatment of Services.

Session Law 2-2013 raises a potential conformity issue regarding the "equal treatment" requirement. FUTA requires that benefits paid on the basis of service for state and local governmental entities, certain non-profit organizations, and Federally-recognized Indian tribes be paid on the same terms, and subject to the same conditions, as compensation payable on the basis of other service covered by the state law.

Section 3309(a)(1), FUTA, requires that state law provide for coverage of services performed for state and local governmental entities, certain nonprofit organizations, and Federally-recognized

Indian tribe unless specifically exempt in Federal law (most of the exemptions are in Section 3309(b), FUTA). Section 3304(a)(6)(A), FUTA, establishes an equal treatment requirement; state UC law must provide that, with respect to services performed for these entities, UC be payable "in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law."

Session Law 2-2013 removed the equal treatment of services requirement from your state UC law by repealing Section 96-13. While Federal UC law does not require this provision to be stated explicitly in state UC law, it raises a conformity issue if the state were to pay UC differently on the basis of service for any of these entities. Most state laws have, as your law did before it was removed, a provision to explicitly codify this requirement. North Carolina must amend its UC law to conform to the equal treatment of services requirement by restoring the provision requiring such equal treatment of services, or the state UC agency must provide written assurance that some legal authority or interpretation exists such that the amended state law cannot be interpreted to permit disparate treatment based on services for entities to which Section 3309, FUTA, applies.

III. <u>Retirement Pay Deduction</u>.

FUTA requires that retirement pay be deducted from UC if it is paid under a plan maintained by (or contributed to) by a base period or chargeable employer. However, FUTA also permits, but does not require, a state to take into account an individual's contribution toward the retirement pay toward reducing the deduction. As amended, North Carolina law requires retirement pay to be deducted merely by referencing the provision in FUTA requiring the deduction for retirement pay. As such, the state law does not implement the option to limit the deduction based on the individual's contribution to the retirement pay. This does not raise a conformity issue, but it is inconsistent with what state UC agency staff have informed us has been a state practice of exempting social security retirement payments from UC deductions.

Session Law 2-2013 amended a provision of the state UC law related to how the receipt of retirement benefits affects UC eligibility by replacing it with Section 96-14.2 to read, in part:

> (c) Retirement Reduction. – The amount of benefits payable to an individual must be reduced as provided in section 3304(a)(15) of the Code.

Section 3304(a)(15)(a)(ii), FUTA, provides that "State law *may* provide for limitations on the amount of any such a reduction to take into account contributions made by the individual for the pension, retirement or retired pay, annuity, or other similar periodic payment." [Emphasis added.]

North Carolina staff informed us that for several years, the state has not deducted social security retirement payments from UC. We note the state UC law prior to the enactment appears to have been silent both with respect to limiting the deduction from UC for retirement pay for any type of retirement plan, or specifically to retirement payments under the Social Security Act. We have been unable to identify any statutory authority in the North Carolina UC law exempting retirement payments under the Social Security Act from the deduction requirements of the UC law. Absent such authority, social security retirement payments must be deducted. In order to

continue exempting payments from deduction, the state must either amend its UC law to provide that retirement pay under the Social Security Act will not be deductible from UC, or provide a legal basis for continuing the practice of not making such payments deductible from UC.

OTHER CONCERNS

There are three provisions of Session Law 2-1013 that do not raise conformity concerns but may have a negative impact on North Carolina workers and/or the administration of the state UC law. A detailed description follows.

I. Reduction in Maximum WBA.

As we previously notified your state, the reduction in the maximum WBA renders the state's claimants ineligible for emergency unemployment compensation (EUC).

The enactment amended the UC law to change the methodology by which the WBA for an individual who is totally unemployed is determined. In addition, it provides that the WBA "may not exceed three hundred fifty dollars ($350.00)."

Before enactment, the maximum WBA was determined as "sixty-six and two-thirds percent (66 2/3%) of the average weekly insured wage rounded, if the amount is not a whole dollar, to the next lower whole dollar." The maximum WBA in North Carolina using this formula previously was $535, which is $185 higher than under the new law.

In a March 19, 2013, letter, Acting Secretary Of Labor Seth Harris informed Governor McCrory that, due to these state amendments, Federal law requires the termination of the U.S. Department of Labor's agreement with the State of North Carolina to provide EUC. This action became effective on July 1, 2013, the date Session Law 2-2013 became effective. If the agreement was not required to be terminated, EUC would have been payable in North Carolina through the week ending December 28, 2013.

II. Repeal of UC Modernization Provisions.

Session Law 2-1013 repealed certain UC modernization provisions governing the eligibility of individuals who are part-time workers and that expanded eligibility for individuals who separate from employment for compelling family reasons. The Department approved North Carolina's application for an incentive payment for UC modernization as part of the American Recovery and Reinvestment Act of 2009 (ARRA) based upon North Carolina using an alternative base period formula and the adoption of these expanded eligibility provisions. Of the $205,063,552 total incentive payment made to North Carolina, $136,709,080 was based upon North Carolina adopting these two provisions.

In providing the incentive payments, Congress clearly intended to support states that had already adopted certain eligibility provisions and to expand eligibility to additional unemployed workers by encouraging other states to adopt these provisions. By specifying that the provisions must be in effect as permanent law, Congress also made clear its intention that the benefit expansions not be transitory. However, Congress did not prohibit repeal of the provisions on which

modernization payments were based after receipt of incentive payments. Thus, while it is not a conformity issue to repeal the provisions, and the Department will not ask North Carolina to return any portion of the incentive payment, we believe that North Carolina should have given sufficient consideration to the benefit of providing additional economic security that these expanded benefits offered North Carolina workers before repealing the provisions. We also note that the state has reserved the money it received for enacting the UC Modernization provisions for use in administering the UC program, but has not expended any of the money as of yet.

III. Reduced UC Duration.

The reduction in the maximum duration of "regular" UC will cause a reduction in extended benefit (EB) payments when such benefits are payable in the state. The state agency must be cognizant of this and be prepared to adjust EB calculations accordingly.

Session Law 2-2013 amended Section 96-14.3 of your law to reduce benefit duration from a maximum of 26 weeks to a lesser number of weeks, but not to exceed 20 weeks, depending on the state's seasonally adjusted unemployment rate. The reduced duration does not raise a conformity issue, but it does affect the amount of EB available under state law.

There is no requirement in FUTA or Title III of the SSA that a state UC law provide for the payment of a specified number of weeks of UC to be certified as eligible for FUTA tax credits or the UC administrative grant under Title III, SSA. While reducing the duration of benefits from 26 weeks does not raise a conformity issue, it results in reduced payments of EB if the amendment to state law is effective during weeks of unemployment when this program is operational.

Section 3304(a)(11), FUTA, requires, as a condition of employers receiving credit against the Federal unemployment tax, that extended compensation shall be payable as provided by the Federal-State Extended Unemployment Compensation Act of 1970 (EUCA). Section 202(b)(1), EUCA, provides that an EB account shall consist of an amount that is the lesser of:

> (A) 50 per centum of the total amount of regular compensation (including dependents' allowances) payable to him during such benefit year under such law,
>
> (B) thirteen times his average weekly benefit amount, or
> (C) thirty-nine times his average weekly benefit amount, reduced by the regular compensation paid (or deemed paid) to him during such benefit year under such law.

This amount may be higher when the state is in an EB high unemployment period (HUP) under Section 202(b)(3)(A), EUCA. Thus, when a state is in an EB period that is not a HUP, an individual who qualifies for 26 weeks of regular UC would be entitled to 13 weeks of EB. If a state amends its law to reduce the duration of benefits, it results in a reduced payment of EB. For example, if a state reduces the duration of regular UC to 20 weeks, the amount of EB would be reduced from 13 weeks to 10 weeks since this would be 50 percent of the amount of regular UC payable to him or her during the benefit year. When a state is in a HUP because the TUR exceeds 8 percent, individuals may be paid 80 percent of the amount of regular UC paid in a

benefit year. Thus, if a state reduces maximum duration of regular UC to 20 weeks, the amount of EB payable would be reduced from 20 to 16 weeks.

CONCLUSION

In sum, we have identified numerous provisions in the enactment that are not in conformity with the Federal UC law. As noted above, a state law must conform to these provisions of Federal UC law in order for employers in a state to be eligible for credit against the FUTA tax and for the state to be eligible to receive an administrative grant to operate its UC program. Other provisions in the enactment raise potential conformity issues or contain provisions that may have a negative impact on North Carolina workers claiming UC even though they are not conformity issues.

To reiterate on the state's next step, we request that you invoke state law authority to suspend the state provisions we identified as raising conformity issues so that we may hold the issues in abeyance until your legislature has an opportunity to address our concerns. Please respond, within thirty days of the receipt of this letter, to inform us of the actions that you will take to ensure that your law is in conformity with Federal UC law.

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: Eugene Caso
Acting Regional Administrator
Atlanta

Sharon Allred Decker
North Carolina Secretary of Commerce